

January 2006

## The Making of a Constitution in Afghanistan

J. Alexander Thier  
*United States Institute of Peace*

Follow this and additional works at: [https://digitalcommons.nyls.edu/nyls\\_law\\_review](https://digitalcommons.nyls.edu/nyls_law_review)



Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), [International Law Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

J. A. Thier, *The Making of a Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 558 (2006-2007).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

J. ALEXANDER THIER

## The Making of a Constitution in Afghanistan

**ABOUT THE AUTHOR:** J. Alexander Thier is Senior Rule of Law Adviser at the United States Institute of Peace. He was previously Director of the Project on Failed States at the Center for Democracy, Development and the Rule of Law at Stanford University and a National Fellow at the Hoover Institution. Mr. Thier was legal adviser to Afghanistan's Constitutional and Judicial Reform Commissions from 2002–2004. He also worked in Afghanistan from 1993–1996 for the U.N. and several NGOs during the civil war.

This article is excerpted, in part, from a forthcoming book by the author on nation-building in Afghanistan. The author wishes to thank the Bonn University Center for Development Research and the Development Studies Institute of the London School of Economics for their support in developing this article, and Tolu Fadeyi, for her research assistance. The author also wishes to thank the Constitutional and Judicial Reform Commissions of Afghanistan, and in particular Chief Justice Azimi, Justice Bahauddin Baha, and Ms. Fatema Gailani for their extensive insights.

## I. INTRODUCTION

For twenty-one days in late 2003, a piece of Afghanistan was transformed. In a vast white tent, close to the rubble of Afghanistan's past wars, over five-hundred Afghan men and women from every province fought vigorously for their vision of Afghanistan's future. Afghanistan's constitutional convention began on December 14, 2003, and quickly fell into a rancorous and divisive debate about the power-sharing in post-Taliban Afghanistan. But unlike the armed struggles between terrorists, warlords, drug traffickers, and international military forces still raging in many parts of the country — the Afghans in the tent were fighting over words, ideas, and amendments. By January 4, 2004, after several walkouts, a majority of delegates ratified the new constitution.<sup>1</sup>

The passage of a provisionally democratic constitution is a triumph for war-ravaged Afghanistan. However, creating a new constitution for Afghanistan is a necessary, but not sufficient step in establishing the rule of law. Constitutions are little more than pieces of paper without a network of institutions and cultural values to support them. Post-Taliban Afghanistan lacks both of these things. On paper, the new constitution creates a good foundation for political progress, but opportunities to build legitimacy for the future state were missed during the constitution-making process. A combination of secrecy, haste, insecurity, and intimidation made the process inaccessible to the public and limited open, honest debate. Rather than using its position to foster an environment of democratic openness, much of the political influence on the process from the United States and the United Nations reinforced the tendency of Afghan power-brokers to maneuver out of the public eye.

In this article, I begin by examining Afghanistan's historical experience with the constitution-making process, focusing on Afghanistan's 1964 Constitution, which serves as the basis for today's constitution. Section II analyzes Afghanistan's constitution-making process from 2002–2004 and examines the key factors that informed the process of drafting the new constitution, including consulting public opinion, choosing representatives of the constitutional loya jirga ("CLJ"), and ratifying the new constitution at the CLJ. Section IV highlights some of the most important aspects of Afghanistan's new constitution, such as the separation and balance of powers of government, local and/or regional power-sharing, and the role of Islam. I conclude by comparing the 1964 and 2004 constitutions by highlighting the most salient factors in determining the success or failure of state-building in Afghanistan.

---

1. Carlotta Gall, *Afghan Council Gives Approval to Constitution*, N.Y. TIMES, Jan. 5, 2006, at A1.

## II. THE HISTORY

### A. *Overcoming Decades of Political Turmoil in Afghanistan*

If Afghanistan is to be once again prosperous and stable, it must overcome the deep divisions that have led to three decades of war and political turmoil.<sup>2</sup> There are numerous cleavages in Afghan society, including urban-rural, modern-traditional, the role of Islam and politics, and ethnicity. These cleavages have fueled and have been consequently further exacerbated by recent conflicts. In the course of thirty years, Afghanistan went from being a constitutional monarchy, to a republic, to a communist dictatorship under Soviet occupation, to a failed and fractured state engaged in devastating civil war, to the home of a fundamentalist and obscurantist theocracy which thrived, in part, upon the largess of the leadership of a global terrorist confederation and the world's largest opium crop. These cleavages continue to manifest themselves in the ongoing peace process.<sup>3</sup>

The attacks on the World Trade Center and the Pentagon on September 11, 2001 marked the start of a new political situation for Afghanistan. The U.S.-led military campaign in the country led to the collapse of the Taliban regime, the entry of Northern Alliance forces into Kabul, and the eventual signing of the Bonn Agreement in December 2001.<sup>4</sup> The political transition process that is still underway presents a great challenge and opportunity to the people of Afghanistan. Through dialogue, negotiations, reconciliation, and reconstruction, the Afghan people can make compromises that will allow the country to enjoy security, a stable political future, and increased prosperity. In order to succeed, all groups in Afghanistan must be willing to work out their differences through peaceful politics, and must build trust in each other by foreswearing the gun and embracing the pen. At its best, a constitutional process can be the central focus of this process of building peace.

### B. *The Experience with Constitutions in Afghanistan*

Afghanistan has had both too much and too little experience with constitutions in the past eighty years. On one hand, Afghanistan has had many constitutions, but on the other hand, the country has had little opportunity to actually implement some of the fundamental aspects of these constitutions. Since 1923,

---

2. See generally WILLIAM MALEY, *THE AFGHANISTAN WARS* (2002).

3. See generally LOUIS DUPREE, *AFGHANISTAN* (1980); LARRY P. GOODSON, *AFGHANISTAN'S ENDLESS WAR: STATE FAILURE, REGIONAL POLITICS, AND THE RISE OF THE TALIBAN* (2001); BARNETT R. RUBIN, *THE FRAGMENTATION OF AFGHANISTAN: STATE FORMATION AND COLLAPSE IN THE INTERNATIONAL SYSTEM* (2d ed. 2002).

4. Special Representative of the Secretary-General for Afghanistan, *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, transmitted to the Security Council by the Secretary-General*, U.N. DOC. S/2001/1154, 1155 (Dec. 5, 2001) [hereinafter *Bonn Agreement*], available at <http://www.un.org/News/dh/latest/afghan-agree.html>.

when Afghanistan's first constitution was promulgated by King Amanullah, Afghanistan has had eight different constitutions.<sup>5</sup> The first two constitutions, in 1923 and 1931, were established by the monarchy after periods of turmoil (after the final battle for independence from Great Britain and after the revolt of 1929 that deposed King Amanullah, respectively).<sup>6</sup> These constitutions were created without a great deal of public participation, and they kept almost all of the state power in the hands of the monarchy, with little room for popular participation. They did include political reforms — especially the 1923 constitution — but the lack of public participation in this reform process was a primary reason for the uprising in 1929.<sup>7</sup>

In 1963, after over thirty years of relative stability and slow but steady economic and political progress, King Zahir (who had been on the throne for thirty years) called for the drafting of a new constitution.<sup>8</sup> This constitution, which introduced a far greater degree of democratic participation, was drafted over an eighteen month period after wide-ranging consultations with all sectors of society.<sup>9</sup> The resulting constitution provided for a popularly elected parliament, elected city councils, provincial advisory councils, and an independent legislature. Once this constitution was ratified by a *loya jirga* in 1964, the era known as the “new democracy” period began.<sup>10</sup> Two parliamentary elections were held, and the country had just begun to experience democratic government.<sup>11</sup>

In 1973, this period came to an abrupt end when Sardar Daoud, former Prime Minister and cousin of the King, took power by coup.<sup>12</sup> The 1964 constitution was suspended, and Afghanistan was declared a republic. A new constitution was prepared, without wide consultation, and promulgated in 1977. By this time, however, the government was in turmoil and Daoud was overthrown in 1978 by communist coup.<sup>13</sup> The constitution was once again suspended, and a new constitution was put in place in 1980 by Babrak Karmal.<sup>14</sup> By this time, the country was already occupied by Soviet troops, and engaged in a brutal war. In an attempt to gain legitimacy after years of conflict, the government of Najibullah introduced another constitution in 1987. This document was quickly

---

5. See THE CONSTITUTIONS OF AFGHANISTAN: 1923–1996 (2004).

6. VARTAN GREGORIAN, THE EMERGENCE OF MODERN AFGHANISTAN 251, 300 (1969).

7. See *id.*; see also DUPREE, *supra* note 3.

8. See RICHARD S. NEWELL, THE POLITICS OF AFGHANISTAN (Richard L. Park ed., 1972).

9. See *id.*

10. 1964 AFG. CONST., available at <http://www.afghan-web.com/history/const/const1964.html>.

11. See NEWELL, *supra* note 8.

12. See DUPREE, *supra* note 3.

13. See *id.*

14. See CONSTITUTIONS OF AFGHANISTAN, *supra* note 5.

replaced in 1990 after the Soviet withdrawal, and in 1992 the new interim mujahideen government proposed a new constitution. However, fighting broke out between the elements of the new government in 1992 and civil war destroyed the capital and the government. The Taliban government did not create a new constitution.<sup>15</sup>

With so many constitutions, it is difficult to discuss Afghanistan's experience with any one constitution. A constitution itself is but a piece of paper — reflecting decisions made by the political leadership. If that leadership does not have the power or the desire to implement the basic law, then the constitution has little meaning. At the same time, when important changes are introduced, they require both some popular support and some time to take root. For instance, after the new Afghan legislature was elected in 1965, they had great trouble completing their work, and the legislative process became deadlocked.<sup>16</sup> The representatives, still without political parties, played politics more like Buzkashi<sup>17</sup> than chess; the representatives were unable to act cohesively with allies and were unwilling to make short-term sacrifices for long-term gain. The political representatives may have been able to work out these problems through practice and new elections, but they were not given the opportunity.

Similarly, basic rights for citizens of Afghanistan may have been strong on paper, but were weak in effect. Afghans have been promised many freedoms — freedom of speech, freedom of assembly, freedom from torture, freedom from discrimination — but when those freedoms were violated, the courts and police did not enforce them or punish the transgressors.<sup>18</sup> For most of Afghanistan's history, the country has been ruled by power, not by law. Although many of Afghanistan's governments did make an effort to improve life for the people, they did not do so by the rule of the constitution. The rule of the constitution means obeying and enforcing the law, equally, for everyone.

### C. *The 1964 Constitution*

The 1964 Constitution is the touchstone for the birth of democracy in Afghanistan. This constitution was intended to move Afghanistan into an era of

---

15. See MALEY, *supra* note 2; see also RUBIN, *supra* note 3.

16. See NEWELL, *supra* note 8; see also Marvin G. Weinbaum, *Afghanistan: Nonparty Parliamentary Democracy*, 7 J. DEV. AREAS 59, (1972).

17. An Afghan game played on horseback, using a headless calf or goat as the "ball." It is brutal, chaotic, and often played as every man for himself. See generally G. WHITNEY AZOY, BUZKASHI: GAME AND POWER IN AFGHANISTAN (2d ed. 2003).

18. See generally U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, With Particular Reference to Colonial and Other Dependent Countries and Territories: Final Report on the Situation of Human Rights in Afghanistan*, U.N. DOC. E/CN.4/1993/42 (Feb. 18, 1993), E/CN.4/1994/53 (Feb. 14, 1994), and E/CN.4/1995/64 (Jan. 20, 1995) (*submitted by* Felix Ermacora, Special Rapporteur).

greater citizen participation and more representative and accountable government. Because it serves as the basis for the current constitution, its five key principles are examined here.

### 1. *The Executive Power*

The 1964 Constitution provided for a constitutional monarchy,<sup>19</sup> whereby the king had ultimate executive authority, including the power to declare war and sign treaties.<sup>20</sup> The king also commanded the armed forces and had the power to convene the *loya jirga*, and dissolve parliament. Other executive powers included the ability to exercise absolute legislative veto and to appoint the prime minister, the cabinet, and the justices of the Supreme Court.<sup>21</sup> The prime minister administered the executive authority. In practice, the prime minister was responsible for the daily operation of the government, and made sure the king did not abuse his considerable constitutional powers. However, keeping this power in the hands of one un-elected official did not help to introduce a political culture in the country that respected peaceful, constitutional transition of power from one leader to another.

### 2. *The Legislature*

Under the 1964 Constitution, the parliament was given broad legislative and executive oversight powers to control the budget,<sup>22</sup> ratify treaties,<sup>23</sup> and approve or dissolve the executive.<sup>24</sup> The role of the *Shura*, or parliament of Afghanistan, was strengthened in the 1964 Constitution and became the preeminent law-making and representational body. The *Shura* was acknowledged in the constitution as manifesting the “will of the people.”<sup>25</sup> The 1964 Constitution envisioned a bicameral legislature with a directly elected lower house of 214 members, the *Wolesi Jirga* (House of the People), and a smaller upper house of 84 members, the *Meshrano Jirga* (House of Elders).<sup>26</sup> The lower house, whose members were directly elected from single-member districts, held the dominant legislative position. The upper house was comprised of one-third directly elected, one from each province, one-third elected by each provincial assembly, and one-third appointed by the king.<sup>27</sup> The two-house structure was a way of allowing

---

19. 1964 AFG. CONST. art. 1.

20. *Id.* arts. 6–9.

21. *Id.* art. 9, §§ 1–3, 6, 11, 13.

22. *Id.* art. 75.

23. *Id.* art. 64.

24. *Id.* art. 75.

25. *Id.* art. 41.

26. *Id.* art. 42.

27. *Id.* art. 45.

people to vote for geographic representation, while providing for representation of Afghanistan's diversity.

Although the *Shura* was forceful on paper, it suffered from inaction and deadlock between 1965 and 1973. Because political parties were not legal in Afghanistan, individual members of the *Shura* were elected independently in each district of the country.<sup>28</sup> The lack of political parties with a broad-based constituency meant that there was no hierarchy of leadership in the *Shura* and no one to organize delegates and to bring party members in line. This lack of organization, combined with the newness of authority in the hands of elected representatives, meant that the *Shura* struggled to accomplish anything. The fragility of this system was not enough to contend with the political pressures of the age (the Cold War and modernization) and it collapsed after a short experiment. Further, due to the extremely short trial period of this model, the modalities of power-sharing between the two houses of the legislature or between the executive and the legislature branches were never fully explored.

The 1964 Constitution was also unique in Afghanistan's history because, for the first time, it institutionalized the *loya jirga*.<sup>29</sup> The *loya jirga*, well known in Afghan history as an ad hoc body that brings together the nation for critical decisions in time of crisis or political transition, was given a place in the Afghan political process. In the 1964 Constitution, the *loya jirga* was comprised of both houses of the legislature and of the chairman of each provincial assembly.<sup>30</sup> It is something of a "super-parliament" — a manifestation of the will of Afghan society that is capable of standing in for a government dissolved by the king. The *Shura* could be dissolved by the order of the king, for unspecified reasons, but when the *Shura* had to be dissolved, the *loya jirga* formed to consider amendments to the constitution.<sup>31</sup>

However, due to the short reign of the 1964 constitutional regime, the use of the *loya jirga* in this fashion was not tested. Such a super-parliament may be an effective way to deal with political crises by breaking deadlock and promoting stability. However, the *loya jirga* in this time period was used as a political trump which introduced a degree of instability into the system. Careful consideration must be given to the powers (and limitations) of a CLJ, and the circumstances under which it is invoked.

### 3. *The Judiciary*

The creation of a unified and independent judiciary was one of the most significant changes embodied in the 1964 Constitution.<sup>32</sup> Under the 1964 Con-

---

28. See NEWELL, *supra* note 8, at 177–79; see also Weinbaum, *supra* note 16, at 70.

29. 1964 AFG. CONST. art. 84.

30. *Id.* art. 78.

31. *Id.*

32. *Id.* art. 97.

stitution, the judiciary was intended to be a fully independent and co-equal branch of government, with the Supreme Court as the highest judicial authority in the country.<sup>33</sup> The judiciary was charged with applying the laws and constitution of Afghanistan, and the court's writ of jurisdiction was broadly worded, explicitly including litigation brought against the state.<sup>34</sup> The state was required to enforce all judgments, and the supremacy of the constitution and the laws of Afghanistan was made clear.

The constitution also included safeguards against judicial overreaching, such as public trial provisions and a requirement that the legal rationale for a verdict must be disclosed.<sup>35</sup> All justices were appointed by the king on the recommendation of the chief justice.<sup>36</sup> These appointments could be reviewed every ten years by the king, otherwise the only possibility of removal was via impeachment.<sup>37</sup> In reality, Afghanistan's judiciary, in the short time it had, achieved neither independence nor coherence. The judiciary faced three primary obstacles in its development. First, there were far too few qualified judges and lawyers to ensure the fair and even-handed application of the law.<sup>38</sup> Second, local traditional practices for resolving disputes were entrenched and undermined formal judicial power. In many cases, this meant that judges either supported the local practices, even when at odds with the law under the constitution, or they became irrelevant. The third obstacle to independence was the preeminence of the king and the prime minister.

#### 4. *Provincial and Local Government*

The 1964 model of government in Afghanistan was that of a unitary state.<sup>39</sup> This meant that all sub-divisions of the state (provinces and districts) were administrative in nature, and that provincial and district offices were extensions of, and directly subordinate to, the government offices in Kabul. According to the 1964 Constitution and the 1965 Law of Basic Organization, there were five types of sub-national government entities:

- Provinces (*Wolayat*).
- Districts (*Uluswali*) — with each province containing between five to twenty districts.
- Sub-districts (*Alaqadri*).

---

33. *Id.*; *Id.* art. 107.

34. *Id.* art. 98.

35. *Id.* art. 100.

36. *Id.* art. 99.

37. *Id.* arts. 105(3), 106.

38. Marvin G. Weinbaum, *Legal Elites in Afghan Society*, 12 INT'L J. MIDDLE EAST STUDIES 39, 57 (1980).

39. 1964 AFG. CONST. art. 108.

- Provincial municipalities (*Sharwali Wolayat*) — these provincial municipalities were independent from provincial administration and administered in Kabul via the Ministry of Interior. There was one provincial municipality per province. Municipal Districts were known as *Gozars*.
- Rural municipalities (*Sharwali Uluşwali*) — rural municipalities were largely departments of the provincial municipality — with each district containing at most one rural municipality, but some had none.<sup>40</sup>

Under this model the provinces were not distinct political entities and had a very limited formal role in decisions concerning their structure, leadership, and staffing. The Governor (*Woluswal*) and senior staff, including senior provincial level ministry staff and district heads (*Uluşwal*), were appointed by the president. Mid-level staff was appointed by central government ministries and the governor approved only junior staff appointments.

The 1964 Constitution also called for the creation of elected Provincial Councils that would be responsible for assisting and advising the provincial government.<sup>41</sup> However, the law required to create the provincial councils was never passed, and the provincial councils were never elected.

### 5. *The Role of Islam*

Islam has always had a prominent place in the constitutions of Afghanistan. In the 1964 Constitution, Islam was deemed the state religion, and religious rites of the state were to be performed according to the Hanafi school.<sup>42</sup> The king was also required to be a Muslim.<sup>43</sup> The 1964 Constitution also required that all laws passed by the parliament must not be contradictory to the basic principles of Islam.<sup>44</sup> Only in those cases where there is no state law to cover a case before the judge, the basic principles of Hanafi jurisprudence, in accordance with the limitations of the constitution, were to be applied to secure justice.<sup>45</sup> Therefore, the constitution also required that all judges had to be competent in the laws and jurisprudence of the nation.<sup>46</sup>

This system required the laws of Afghanistan to be in accord with the principles of Islam, but allowed the elected representatives of the people to decide how to do that. As the parliament did its work and passed comprehensive legal codes,

---

40. *Id.* arts. 108–112.

41. *Id.* art. 109.

42. *Id.* art. 2. The Hanafi school is considered the oldest and most liberal of the four Sunni schools of law. See COLIN TURNER, *ISLAM: THE BASICS* 209 (2006).

43. 1964 AFG. CONST. art. 8.

44. *Id.* art. 64.

45. *Id.* art. 102.

46. *Id.* art. 105, § 3.

the need for judges to apply their own private Islamic legal interpretations became less necessary.

### III. THE PROCESS

#### A. *The 2001 Bonn Agreement and the Adoption of a New Constitution in 2004*

The “Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions,” otherwise known as the Bonn Agreement, was signed on December 5, 2001.<sup>47</sup> The Bonn Agreement is a framework for transformation and stabilization of the Afghan political system. The Afghan representatives agreed to several fundamental things at Bonn. First, it was decided that the Afghan system of government would temporarily be based on the Constitution of 1964, but without a king or a legislature. Second, the delegates chose an interim government which would function for six months. During this time, the interim government would organize an emergency *loya jirga* (grand assembly) to choose a transitional government. Third, once the transitional government was formed, it would be responsible for creating a commission to draft a new constitution and organizing a second *loya jirga* after eighteen months to approve a new constitution. Fourth, the transitional government would also be responsible for organizing elections after twenty-four months to elect a new government according to the requirements of the new constitution.

The process of creating a new constitution in Afghanistan consisted of four distinct aspects: drafting the new constitution, conducting a public consultation process, choosing the representatives of the CLJ, and ratifying the new constitution at the CLJ. These important aspects of the constitution-making process are discussed below.

#### B. *Drafting a New Constitution*<sup>48</sup>

President Karzai appointed a nine-member Constitutional Drafting Commission by decree in October 2002.<sup>49</sup> The Commission was headed by Vice President Shahrani, an ethnic Uzbek and religious scholar from Badakhshan province. Shahrani’s deputy was Professor Azimi, former rector of Kabul University and a Professor of the Sharia Faculty there.<sup>50</sup> Shahrani had been Azimi’s student, and

---

47. See *Bonn Agreement*, *supra* note 4.

48. Much of the information in this section is based on the direct experience of the author.

49. See *United States Ongoing Commitment to Success in Afghanistan: Hearing before the H. Comm. on International Relations*, 108th Cong. 108–809 (2003) (statement of Christina Rocca, Assistant Secretary for South Asian Foreign Affairs, U.S. Dept. of State) (discussing the establishment of a Constitutional Drafting Commission by President Karzai).

50. Interview with Abdul Salam Azimi, Chief Justice, Afghanistan Supreme Court (Dec. 2004) (transcript on file with author).

they shared a close bond.<sup>51</sup> The nine-member commission, however, struggled to develop as a cohesive unit since it lacked organization and a competent secretariat, and suffered greatly from considerable rancor among its membership. The United Nations Assistance Mission for Afghanistan (known as the “UNAMA”), which was responsible for aiding the Commission, failed to direct competent resources towards the Commission for months.<sup>52</sup> Six months after President Karzai’s decree, the Commission was in disarray, and virtually no progress had been made on producing a decent draft of the constitution, or canvassing the political aims of Afghanistan’s power-players or the Afghani population. The Commission had broken into two camps, each creating a different draft of the constitution. Meanwhile, a foreign advisor to President Karzai had created another separate draft. These three drafts became the subject of rumor and confusion, and the draft ultimately provided by the Constitutional Drafting Commission to President Karzai was not released to the public.

With the prospect of another national *loya jirga* looming, serious international pressure was placed on both the ATA and UNAMA to get things moving forward. On March 10, 2003 the secretariat of the Constitutional Drafting Commission released a document, “The Constitution-Making Process in Afghanistan,” which outlined the proposed activities and timeline of the Constitutional Drafting Commission. In early April, the drafting committee submitted a draft constitution to President Karzai, which was intended to serve, “as a set of recommendations . . . on constitutional arrangements” to the full Constitutional Drafting Commission.<sup>53</sup>

On April 26, 2003, the government appointed a second, larger Constitutional Drafting Commission. This new Commission consisted of thirty-five members, including six members of the original Commission. The thirty-five member Commission represented a broader political and ethnic spectrum than the first Commission.<sup>54</sup> The decree outlined a public consultation process and determined that the CLJ would be held in October of 2003. This Commission received much more support from the U.N. and other international sources, and it extensively reworked the draft constitution, following both a public consultation process as well as more input from international expertise. However, the Constitutional Drafting Commission and UNAMA remained very wary of interna-

---

51. *Id.*

52. INT’L CRISIS GROUP, ICG ASIA REP. NO. 56, AFGHANISTAN’S FLAWED CONSTITUTIONAL PROCESS, at i-ii (2003).

53. THE SECRETARIAT OF THE CONST. COMM’N OF AFG., THE CONSTITUTION-MAKING PROCESS IN AFGHANISTAN 2 (2003) [hereinafter CONSTITUTION-MAKING PROCESS], available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN016658.pdf>.

54. Presidential Decree on the Constitutional Commission (Apr. 26, 2003), available at <http://www.cic.nyu.edu/archive/pdf/TextofPresidentialDecreeonConstitutionalLoyaJirga1.pdf>.

tional inputs, fearing the appearance of international influence in a critical aspect of Afghanistan's political development.

That summer, it became apparent that the CLJ could not go forward until December due to delays in drafting and delegate selection. Despite promises to release the draft of the constitution for public review by the end of August of 2003, the draft was not made public. The Constitutional Drafting Commission finally delivered its draft to President Karzai in late September of 2003. Although it was expected that Karzai would simply release the draft to the public, several members of his cabinet and other influential figures were unhappy with the Commission's draft. Anxious to secure greater power for President Karzai and limit the possibility of alternative power centers, members of President Karzai's cabinet and the National Security Council re-drafted key aspects of the constitution. Despite growing public protest at delays and the secretiveness of the process,<sup>55</sup> President Karzai did not release the draft constitution until November 3, 2003, just five weeks before the *loya jirga* was formed.

### C. *The Public Consultation Process*

From the very beginning, there were competing views about whether the constitutional process should be opened to debate and wider participation within Afghan society. Some argued that the constitutional process must be broadened to incorporate diverse views and to allow for popular political participation. Such a process would be perceived as more legitimate if interested parties felt that they had their say, even if there were tight controls on the outcome of the debate. Others argued, however, that injecting confrontational issues into the political process could be destabilizing, or could undermine progress on sensitive issues. There was a perception that a few controversial issues could cause the forces of moderation to lose ground on a host of other matters. Therefore, the preference would be to keep debate on controversial issues out of the public sphere.<sup>56</sup>

Ultimately, a middle-of-the-road approach was taken. Although the Constitutional Drafting Commission refused to release a draft of the constitution for public debate, a public consultation process was conducted for two months starting in June. Members of the Constitutional Commission traveled to provincial capitals, holding meetings with pre-selected groups.<sup>57</sup> These meetings, as well as questionnaires that were circulated, generally limited public discussion to vague principles rather than eliciting concrete views on key questions. However, the

---

55. Masuda Sultan & Hannibal Travis, Op-Ed., *Bias Remains Under the New Law*, BOS. GLOBE, Nov. 13, 2003, at A19.

56. This view was held in particular by Jean Arnault. See Interview with Jean Arnault, Deputy SRSG, Deputy SRSG for Political Affairs in the U.N. Assistance Mission to Afghanistan (Sept. 2003).

57. Vanessa Gezari, *Mistrust Mars Drafting of Constitution; Afghans Mindful of Prior Failure*, CHI. TRIB., July 9, 2003, at 4; see also Elizabeth Sullivan, *Afghanistan's Constitution is a Local Creation*, PLAIN DEALER, Jan. 8, 2004, at B9.

public consultation process did manage to reach to a number of people. Independent civil society networks played a role by holding training sessions and consultations, while working groups contributed to the process from the outside.<sup>58</sup> In the end, thousands of comments were received and logged by the staff of the Constitutional Drafting Commission.

As the results of these consultations were being processed, the power-play between Afghan factions, as brokered by the United States and the United Nations, intensified. The Constitutional Drafting Commission and UNAMA had been reluctant to engage in a meaningful public debate from early-on in the process, as each felt it would compromise their agendas and interfere with their efforts to arrive at an elite compromise between existing power-holders. Although the Secretariat of the Constitutional Drafting Commission produced a report detailing the collection of nearly 100,000 written opinions and the results of 523 meetings, the report was never made public despite a decree requiring it.<sup>59</sup> Ultimately, as described above, the reluctantly gathered opinions of the public were swept under the carpet in last-minute backroom deal-making.

#### D. Delegate Selection

The July 15, 2003 presidential decree concerning the CLJ determined that there would be 500 delegates to the CLJ as follows: 344 elected at the district level, 64 women elected at the provincial level, 42 delegates elected from refugee, IDP, and other minority communities, and 50 people (25 men, 25 women) appointed by President Karzai.<sup>60</sup> Due to logistical constraints, the elected delegates were not chosen in general elections, but rather were chosen by the roughly 15,000 community representatives who had elected the delegates to the emergency *loya jirga* in 2002. There were reports of vote buying and intimidation in the election process,<sup>61</sup> but ultimately, 502 delegates appeared at the CLJ site in Kabul in December 2003, representing every province and a wide range of views.<sup>62</sup>

---

58. See SIPPİ AZERBAIJANI-MOGHADDAM, ACSF-SWISSPEACE CIVIC EDUC. FOR THE CONST. PROJECT, TECHNICAL LESSONS LEARNED FROM THE AFGHAN CIVIL SOCIETY FORUM (2003).

59. See CONSTITUTION-MAKING PROCESS, *supra* note 53, at 3. According to this source, a report issued by the Constitutional Commission on March 10, 2003, which was formalized by decree on May 10, 2003, the responsibilities of the Commission included “preparing a report analyzing the views of Afghans gathered during public consultations and making the report available to the public.” *Id.*

60. Decree of the President of the Islamic Transitional State of Afghanistan on the Convening of the Constitutional Loya Jirga art. 2, §2 (July 15, 2003), *available at* [http://www.unama-afg.org/docs/\\_nonUN%20Docs/\\_Loya-Jirga/CLJ/Unofficial%20English%20Translation%20of%20the%20decree%20about%20convening%20the%20Constitutional%20Loya%20Jirga.doc](http://www.unama-afg.org/docs/_nonUN%20Docs/_Loya-Jirga/CLJ/Unofficial%20English%20Translation%20of%20the%20decree%20about%20convening%20the%20Constitutional%20Loya%20Jirga.doc).

61. Paul Watson, *Fears of Vote Buying Muddy Path to Loya Jirga; Such Allegations are Undermining the Credibility of Upcoming Afghanistan Assembly Before it Even Begins to Debate a Draft Constitution*, L.A. TIMES, Dec. 12, 2003, at A5.

62. *Id.*

*E. The Constitutional Loya Jirga ("CLJ")*

The CLJ was a well organized and civil affair in contrast to its rough and tumble predecessor, the emergency *loya jirga*. With only one-third the number of the delegates, and an emphasis on literacy in the selection process, the CLJ had established rules of procedure (albeit often flouted), a respected chair, a library, and sub-committees which undertook intensive debate. After several days of speeches, the participants were divided into ten working groups to review and discuss the draft constitution in detail. Independent facilitators helped to move along discussions, and note-takers recorded sentiments.

But these organizational improvements did little to mask the naked politics involved in dealing with Afghanistan's past and mapping Afghanistan's future. On the fifth day of the gathering, a young woman from a rural province had to be placed under U.N. protection for statements she made criticizing prominent militia figures responsible for Afghanistan's civil war in the 1990s. Lakhdar Brahimi, the Special Representative of the U.N. Secretary General, decried the ongoing control of Afghan politics by armed men in his address to the CLJ:

[F]ear . . . is in the heart of practically every Afghan because there is no rule of law yet in this country. The people of Afghanistan are afraid of the guns that are held by the wrong people and used not to defend them and not to wage a jihad . . . , but to frighten people, to terrorize people, to take advantages for their own. . . .<sup>63</sup>

The men whose conduct Brahimi was addressing were at the center of the CLJ process. They sat in the front rows, were elected the chairs of their working groups, and had access to the VIP tent where President Karzai, SRSG Brahimi, and the U.S. Ambassador Zalmay Khalilzad (an Afghan by birth) worked out political deals.

Although powerful, these factions were by no means united. President Karzai was pushing for a constitution with strong presidential powers. The more fundamentalist factions and non-Pushtun ethnic minorities wanted to limit the President's authority, and pushed for a stronger parliament and constitutional court in which they could share power. Others wanted to increase power for provincial authorities. Heated debates broke out about several related issues, such as national languages and the role of Islam. At one point, some 235 delegates walked out of the CLJ threatening a boycott and refusing to vote on several amendments concerning official languages, presidential, and parliamentary authority.<sup>64</sup> At another point, delegates collected more than 150 signatures for an

---

63. Lakhdar Brahimi, Special Representative of the Secretary-General, Remarks at the Closing Ceremony of the Constitutional Loya Jirga (Jan 4, 2004).

64. Rahimullah Samander & Danish Karokhel, *Loya Jirga Remains Deadlocked*, Inst. for War and Peace Reporting (IWPR), Jan. 3, 2004, available at [http://iwpr.net/?p=arr&cs=f&co=154737&capc\\_state=heniarr200401](http://iwpr.net/?p=arr&cs=f&co=154737&capc_state=heniarr200401).

amendment removing the word “Islamic” from the proposed title, “Islamic Republic of Afghanistan.” Although the petition accorded with the rules of procedure,<sup>65</sup> the Chairman, a cleric, refused to allow a vote on the amendment, announcing that, “people who suggest such things are infidels.”<sup>66</sup>

The new constitution was finally adopted on January 4, 2004. Rather than holding a vote, delegates were simply asked to stand for one minute to denote their accession to the document.<sup>67</sup> Without a formal count or recording of dissenting votes, opposition was muted.

#### IV. SIGNIFICANT ASPECTS OF THE NEW CONSTITUTION<sup>68</sup>

Three fundamental issues addressed in the constitution inspired the most excitement, concern, and debate throughout Afghanistan and within the CLJ: the separation and balance of powers of Government, local and/or regional power-sharing, and the role of Islam.<sup>69</sup> Finding compromises on these issues that satisfy short-term fears as well as the longer-term needs of the state and its people are critical to the success of the constitution. In the end, compromises were reached on each of these issues at the CLJ — although it remains to be seen whether the elite bargaining in the VIP tent will equate to popular legitimacy and effective implementation.

##### *A. The Separation and Balance of Powers of Government*

Afghanistan’s new political system is a purely presidential system, with a directly elected president, two vice presidents, a bicameral legislature, and an independent judiciary. The president is both head of state and head of government, and is not subject to a no-confidence vote by the legislature (barring impeachment). The president chooses his or her own cabinet; however, the president’s choices are subject to approval by both houses of the legislature. The executive is represented and dominated by the powerful, unitary figure of the president.

---

65. Order of the President of the Islamic Transitional State of Afghanistan on the Rules of Procedure of the Constitutional Loya Jirga, No. 4913 (November 2003), at Ch. XII, art. 37, *available at* [http://www.unama-afg.org/docs/\\_nonUN%20Docs/\\_Loya-Jirga/CLJ/rules%20of%20procedure.doc](http://www.unama-afg.org/docs/_nonUN%20Docs/_Loya-Jirga/CLJ/rules%20of%20procedure.doc) (stating that rules may be amended by a majority of the delegates of the CLJ).

66. Massoud Waheedullah, *EU Envoys “Disturbed” as Afghan Assembly Chairman Brands Delegates “Infidels”*, AFP, Jan. 1, 2004, *available at* <http://www.afp.com/english/globe/?pid+archives>.

67. Hamida Ghafour, *Afghans Agree to New Charter*, L.A. TIMES, Jan. 5, 2004, at A1.

68. 2004 AFG. CONST., *available at* [http://www.unama-afg.org/docs/\\_nonUN%20Docs/\\_Loya-Jirga/CLJ/Translation%20of%20the%20Constitution%20May%2030.doc](http://www.unama-afg.org/docs/_nonUN%20Docs/_Loya-Jirga/CLJ/Translation%20of%20the%20Constitution%20May%2030.doc).

69. See CHRIS JOHNSON, WILLIAM MALEY, ALEXANDER THIER & ALI WARDAK, OVERSEAS DEV. INST. (ODI), *AFGHANISTAN’S POLITICAL AND CONSTITUTIONAL DEVELOPMENT* 15–16 (2003), <http://www.odi.org.uk/hpg/papers/evaluations/afghanfid.pdf>. I would like to acknowledge my co-authors Chris Johnson, William Maley, and Ali Wardak for their contributions to this section.

The legislature and judiciary branches of government also play a significant role under the new constitution. The legislature consists of a lower house, the *Wolesi Jirga*, a 249-member body, of which at least 68 will be women,<sup>70</sup> and an upper house, the *Meshrano Jirga*, which is divided equally among representatives of elected provincial councils, representatives of elected district councils, and presidential appointees. The judicial system consists of a Supreme Court whose members are appointed by the president and approved by the *Wolesi Jirga*. Lower court judges are appointed by the Supreme Court with the approval of the president.

The 2004 Constitution attempts to create a meaningful separation and balancing of powers between the three branches of the central government. In the area of law-making, both the legislature and the executive can propose laws, which are passed by a majority of both houses of the legislature. The president can veto laws, however, the president's veto can be over-ridden by a two-thirds majority of the legislature. The Supreme Court has the power to review the constitutionality of laws and treaties and may interpret those laws. The power to propose the budget lies with the executive, but must be approved by the *Wolesi Jirga*. There is also give and take with the presidential appointments process. Cabinet officials must be approved by the legislature, and the *Wolesi Jirga* can both interpellate and dismiss cabinet officials. One-third of *Meshrano Jirga* is appointed by the president, and all Supreme Court justices are appointed by the president subject to the approval of the *Wolesi Jirga*. The president is the Commander-in-Chief of the military, and has the right to declare war with the approval of the national assembly.

While there are important checks and balances in this constitutional set-up, a political system that withstands actual confrontation between competing authorities is far harder to build and sustain. Ultimately, the system must be self-enforcing. If a citizen, an organization, or branch of government fails to obey the law, the executive must be willing and able to enforce the law. The court system itself must be willing to apply the law, regardless of the power of the parties before the court — and regardless of the personal beliefs of judges. Simply put, all the governmental branches and their officials must be willing to submit to the rule of law, and to apply it to others equally.

At present, none of these requirements is met. The executive does not have the power to enforce the law through most of the country and it is unable to control even its own officials. In early 2004, the forces of “Governor” Ismael Khan in Herat clashed with a central government-appointed military commander, and the forces of “Presidential Special Advisor on Security and Military Affairs” Rashid Dostum chased a Kabul-appointed Governor out of Faryab

---

70. 2004 AFG. CONST. art. 83 requires that there must be twice the number of women in the *Wolesi Jirga* as there are provinces. As of 2004 there were thirty-four provinces.

province.<sup>71</sup> For its part, the reach of the Supreme Court is extremely circumscribed, yet it still manages to abuse even this limited authority. Only ten days after the new constitution was ratified, the Supreme Court announced that a video of a female singer shown on Kabul TV was un-Islamic and therefore illegal.<sup>72</sup> This pronouncement, with no case before the court nor any law to back the claim, was itself blatantly unconstitutional. Furthermore, the court's decree was not enforced, demonstrating the shaky foundation on which the new constitution rests.

Is a presidential system the best way forward for Afghanistan? The fragile political situation in Afghanistan suggests that the design of the government should maximize representation and stability; it should aim to reduce the tendency towards conflict and the risk of capturing power by illegitimate means. Further, power-sharing remains a critical aspect of the resolution of Afghanistan's conflicts and the consolidation of peace. The attempt on President Karzai's life in Qandahar in September 2002, and the killing of three ministers between July 2002 and March 2004 all too clearly highlight how any structure must not only take into account Afghanistan's possible political evolution, but also the possibility of political violence. Collegiate systems of government which avoid vesting too much power in one person can be important in maintaining a degree of stability. Such systems enshrine power-sharing by creating coalition executives, or by establishing consultation mechanisms between representatives of major ethnic groups.

However, in Afghanistan's current political reality, short-term interests in the consolidation of authority won out over long-term considerations of power-sharing. It is not hard to see why this choice was made. The three entities controlling the transition in Afghanistan — President Karzai and his supporters, the U.N., and the U.S. — all are invested in consolidating the power of President Karzai; and the U.N. and the U.S. are interested in developing their relations with Afghanistan by working with a unitary, trusted entity.

Trust in the electoral process is a fundamental feature underpinning a successful presidential system. The authority of the executive over the government is tempered not so much by immediate obstacles (like the need for legislative approval), but by the prospect of future losses at the polls. Popular faith in future elections is essential to accountability since bad governmental decisions and policies elicit no immediate sanction. Given Afghans' limited experience with electoral politics and the fragility of the current situation, this faith is not likely to exist at the outset.

---

71. Carlotta Gall, *Provincial Capital in Afghanistan Is Seized by a Warlord's Forces*, N.Y. TIMES, Apr. 9, 2004, at A5.

72. Nick Meo, *Afghan Court Revisits Days of the Taliban With Ban on Cable TV*, INDEP. (London), Nov. 11, 2004, at 33.

There are other aspects of the presidential model of government enshrined in the 2004 Constitution that may destabilize the already fragile political situation in Afghanistan. The concentration of power in the hands of one person is potentially dangerous in an unstable political situation because it increases the rewards of illegitimate capture of the presidency, and thus increases the risk of this happening. A presidential system where the executive and the majority in the legislature are from different parties can also lead to paralysis, a problem that is particularly acute when the legislature controls the budget. Using legislative control over the budget as a brake on the executive could also make strategic financial planning impossible because the budget may become subject to trade-offs between the various parties.

There is also a perception that a strong executive is needed to bring the military and various armed factions under control. This may be true if executive independence is necessary to overcome factional pressures created by various ethnic and regional groups participating in the new government. However, because the executive may well be “another faction” in the eyes of many Afghans, overly concentrated power in the executive and the president’s ability to act unilaterally could undermine the entire process, or tilt it dangerously towards despotism. Ultimately, government stability in Afghanistan will be the result of compromise, not the president’s electoral victory.

On the other hand, given the atomized nature of Afghan political organization, it seems likely that the legislature will be made up of multiple parties, with none gaining a clear majority. While this may slow down progress in a presidential system, it could also lead to instability in the already fragile parliamentary system.

### *B. Local and/or Regional Power-Sharing*

The new Afghan constitution creates a completely centralized state with no political or administrative authority devolved to the provinces. Provincial governors and line-ministry officials are appointed by Kabul. The constitution does establish elected consultative bodies on the provincial and district (sub-provincial) level. However, these councils are merely limited to “securing the development targets of the state” and giving “advice on important issues.”<sup>73</sup> Elected mayors and city councils may have more autonomous authority, yet to be determined by law.

This constitutional model for power-sharing could not be farther from the reality on the ground in Afghanistan. The territory, resources, and even government apparatus in most provinces remain in the hands of regional power-brokers.<sup>74</sup> A true compromise on devolution of authority has yet to be reached, and

---

73. 2004 AFG. CONST. art. 139.

74. See Barnett R. Rubin, *Afghanistan's Uncertain Transition from Turmoil to Normalcy* 26 (Council on Foreign Relations, CSR No. 12, 2006).

thus the extent to which governmental authority will be centralized or decentralized remains a key question. This issue is critical in both a formal sense, as it will have an impact on decisions in the institutional design process, and in a practical sense, as ideas of a strong central government confront the reality of strong regional autonomy created by the turmoil of the last twenty-three years. Ethnic groups that were relatively disenfranchised in the past now have their own autonomous military units, and to a lesser extent, autonomous political structures.<sup>75</sup> The party structures that grew up in the *jihad* have, at times, functioned as mini-state governments, carrying on foreign relations, issuing visas and even printing currency.

Before the CLJ, most Afghans expressed a desire for a strong central state.<sup>76</sup> This popular sentiment developed in response to the level of interference from Afghanistan's neighbors, who were seen as being responsible for much of the disintegration of and destruction in the country. This public sentiment, however, was always accompanied by demands that any centralized government be fair and ethnically unbiased. Given the levels of dispute about the numbers of each ethnic group, however, it is highly unlikely that any central government will be able to satisfy all on this account. Defusing ethnic tensions will rest, in part, on having alternative loci of power where local and regional power-holders feel that they can exert a measure of control. Failure to create such loci risks causing those regions to seek alternative political arrangements through force.

The historical reality is that power in Afghanistan has almost always operated through a negotiation between the country's central authority and local power-holders — and tensions between these two levels have existed for as long as there has been a state. Even the Taliban, which exerted a greater measure of central control than its immediate predecessors, was forced to negotiate with local elites and accept a degree of local autonomy.<sup>77</sup> Most of Afghanistan has always been remote from the center and its infrastructure has been insufficient to impose high levels of central control. Moreover, centralization has never been popular. This is due, in part, to strong local social organization and a well-developed tradition of independence. Decisions imposed from outside are usually resented locally. Moreover, popular distrust of central government has been reinforced by experiences with authoritarianism and brutality.

The concept of a “strong” central state, therefore, needs refining. What does strength mean? Systems that work through power-sharing and negotiation can be stronger than those that seek to impose by decree and force. What exactly needs to be centralized and how should this be accomplished? In interviews with Af-

---

75. Conrad Schetter, *Ethnicity and the Political Reconstruction of Afghanistan* 5–6 (Ctr. for Dev. Research (ZEF), Univ. of Bonn, Working Paper No. 3, 2004), available at <http://www.ag-afghanistan.de/arg/arp/schetter.pdf>.

76. See JOHNSON ET AL., *supra* note 69, at 16–18.

77. See generally MALEY, *supra* note 2.

ghans around the country, there was virtual unanimity that national defense, foreign affairs, and finance were all matters for the central state. Issues considered appropriate for local governments included maintaining police forces, providing for public health and education, managing natural resources, and developing and cultivating cultural policy. The need to guarantee basic rights in the new constitution for each minority was often stressed as well.

Several of Afghanistan's minorities have argued in the past for a federal-type system that would grant relative autonomy to various regions of the country.<sup>78</sup> However, "federal" options were seen as creating too great a danger under current conditions. Even advocates of federalism tended to argue that the state needed to be consolidated, foreign interference brought to an end, and fiscal control established before decentralization could be realized. There was a fear that without an established center, decentralization would simply be a license for continuing fragmentation.

The election or appointment of provincial governors, mayors, and district administrators was also a frequent topic discussed at meetings about Afghanistan's constitution. Historically, provincial governors were appointed from the center and were often not from the area they governed. Central appointments often caused tensions with local leaders; indeed, some of the first armed clashes following the introduction of the AIA occurred over the central government's appointment of a governor in Khost province.<sup>79</sup> Opinion remains split on the question of whether top provincial officials should or should not come from the province to which they are appointed. The argument in favor of appointing "outsiders" is generally that local leaders who are ensconced in their own ethnic, tribal, and kinship networks are likely to be more nepotistic, more corrupt, and less loyal to the center.

On the other hand, changes in Afghanistan over the last three decades have given communities the right to expect or demand some local control. Outsiders may not be seen to be representing local interests, which in the current instability could severely undermine support for the government. At a minimum, appointments should be made in consultation with local authorities, with the explicit goal of enhancing their participation in, and responsibility for, governance.

The years of war opened up a gap between the local and the central structures and further polarized national and regional powers. Central government ceased to have anything to offer provinces, let alone districts. Part of the political challenge for Afghanistan's future will be re-establishing the connection between

---

78. See J. Alexander Thier, *Afghanistan: Minority Rights and Autonomy in a Multi-Ethnic Failed State*, 35 STAN. J. INT'L L. 351 (1999); see also Liam Plevin, *Now a 'Civilian Leader'; Depending on Warlords for Peace*, NEWSDAY, Mar. 26, 2002, at A6.

79. Kathy Gannon, *U.S. Urged to Hand Over Afghans Accused of Gun Attack on Rivals*, INDEP. (London), Mar. 25, 2002, at 13.

the central government and local political structures, and doing so in a legitimate way.

*C. The Role of Islam*

Afghanistan's new constitution is a thoroughly Islamic constitution. Islam is incorporated into 14 of its 162 articles. It appears in the first line of the preamble, and in each of the first four articles, clearly establishing Islam as a fundamental political, legal, and religious basis for the state. The constitution creates an Islamic state, by, of, and for Muslims. Islam is the official religion of the state and no law can be contrary to "beliefs and provisions" of Islam.<sup>80</sup> Political parties cannot have programs contrary to Islam, and the national education curriculum is based, in part, on principles of Islam.<sup>81</sup> Despite clauses prohibiting discrimination and reinforcing Afghanistan's international legal obligations, the president of the country must be a Muslim. However, the 2004 Constitution does allow the practice of other religions and shows greater tolerance towards Shia Islam than previous constitutions.<sup>82</sup>

Afghanistan is a firmly Islamic nation: some ninety-nine percent of its inhabitants are Muslim;<sup>83</sup> the legal system is heavily influenced by the *sharia*;<sup>84</sup> and the political identity of a significant portion of the political leadership is rooted in some identification with Islam. Islam has held a prominent place in the constitutions of Afghanistan. For example, the 1964 Constitution considered Islam a state religion and required religious rites of the state to be performed according to the Hanafi school. The king was also required to be a Muslim. The 1964 Constitution also required that all laws passed by the parliament must not be contradictory to the basic principles of Islam. Because the legislature had the responsibility to pass the laws of the land, judges were required to base their judgments on the law of the state. Therefore, the constitution also required that all judges be competent in the laws and jurisprudence of the nation. Only in those cases where there is no state-made law to cover a case before the judge, could the judge apply the basic principles of Hanafi jurisprudence, in accordance with the limitations of the constitution, to secure justice. This system required the laws of Afghanistan to be in accord with the principles of Islam, but allowed the elected representatives of the people to decide how to do it. As the parliament did its work and passed comprehensive legal codes, the need for judges to apply their own private Islamic legal interpretations became less necessary.

---

80. 2004 AFG. CONST. art. 1–3.

81. *Id.* art. 45.

82. *Id.* art. 131. Compare the reference to Shia schools in Afghanistan's 2004 Constitution with Afghanistan's 1964 Constitution which solely relies on the Sunni Hanafi school. See discussion *supra* note 42.

83. See generally DUPREE, *supra* note 3.

84. See generally MOHAMMAD HASHIM KAMALI, LAW IN AFGHANISTAN: A STUDY OF THE CONSTITUTIONS, MATRIMONIAL LAW AND THE JUDICIARY (1985).

The new 2004 Constitution upends those compromises. The reference to Islamic law was strengthened. Rather than require that no law can be contrary to the “principles” of Islam, as in the 1964 Constitution, the 2004 Constitution requires that no law be contrary to the “beliefs and provisions” of Islam. The use of “provisions” in particular indicates something closer to reliance on the established Islamic *sharia*. Therefore, the role that Islam plays in the formation and application of law is a significant long-term question for Afghanistan’s constitutional structure. Who has the power to decide whether a law is sufficiently “Islamic” according to the standard of the constitution? Article 121 of the 2004 Constitution appears to give this power squarely to the Supreme Court; it provides that the “Supreme Court on the request of the Government or the Courts shall review the laws, legislative decrees, international treaties and international covenants for their compliance with the Constitution and provide their interpretation in accordance with the law.” Thus, the character of the Supreme Court is extremely important. Will the new judicial body reflect a broad and moderate view of Islam and respect the shared constitutional authority of the legislature? The transitional Supreme Court suggests exactly the opposite — that a small, unelected group of fundamentalists will use the court to short-circuit the political process through the use of an Islamic trump card.

## V. CONCLUSION

Only two years after the fall of the Taliban, Afghanistan’s political and military leadership agreed on a new constitution, establishing the framework for the institutions of a new state. The rapidity with which the new constitution was agreed to will represent a significant achievement — if the new constitution proves to be more than paper. At present, however, the constitution is aspirational. It aspires to create a modern, democratic, Islamic state with a strong central government, a monopoly of force, that is guided by the rule of law.

The 2004 Constitution does not reflect the political realities of this physically and politically shattered nation. The country is replete with political and military factions pulling in different directions. There are fundamentalists — inside and outside the tent — whose vision tends more towards theocracy than democracy. There are regional power-brokers — the warlords — who seek autonomy for ethnic politics and personal gain. Others seek control of national institutions for the same reasons. Although these groups participated in the constitutional process, it remains far from certain that they support the vision of the new constitution. Then there are total spoilers, the terrorists and drug traffickers, for whom the failure of the state is a means to a greater end.

The test of this new constitution, as with any law, will be in its implementation. Dozens of new laws and regulations will have to be put into place. Institutions, such as the courts, the police, the Ministry of Justice, the Office of the Prosecutor General, and others, must be built virtually from the ground-up and

furnished with sufficient fiscal and political resources to do their work. But the government must not only be built; it must be made credible and legitimate to a wary population. This process is time intensive, resource intensive, and will be more easily undermined than accomplished in the next few years.

The extent to which the stabilization and state-building in Afghanistan is achieved depends upon the provisions of the new constitution and its success remains to be seen. The 1964 Constitution was to be a serious revamping of the Afghan political system, but it ultimately failed due to internal and external pressures. The 1964 Constitution attempted to ease the way towards democracy by limiting the powers of the king and his family, but leaving them there as a check on the developing system. The 2004 Constitution has little such potential recourse to tradition — the system is bounded by itself, and not by an outside actor or institution of higher authority. This change at once maintains the integrity of the system while also placing immense pressure on its weakly grounded legitimacy to overcome political crises. There is still the potential to call a *loya jirga* within the constitution in times of crises, but it is unclear whether such an institutionalized *loya jirga* can have the necessary effect.

One significant departure from traditional politics in Afghanistan is that the 2004 Constitution has done much more to ensure a diverse parliament and new laws have paved the way for political parties to form and operate. The election law, however, is problematic. It does not allow for party lists in the context of electioneering, and so the first parliament was still elected without a strong party structure to ensure discipline in the people's house. Yet, the 2004 Constitution does much more than previous constitutions for Afghan diversity as a whole because it recognizes other major languages and allows for minority Shi-ite jurisprudence to be used in the courts where applicable. It has also guaranteed a substantial portion of seats for women in the parliament, which has already added more Afghan women to visible political life than previously existed.

The 2004 Constitution does also represent a step backward, however, in its vague yet powerful references to Islam and the legal system of the country. In the wrong hands, the constitutional language ensuring that law must adhere to the "beliefs and provisions" of Islam potentially takes away an important degree of discretion from Afghan's elected leaders and lawmakers and places it into the hands of those wielding clerical authority. This grant of power to the unaccountable threatens the democratic system and protection of individual rights in a country that has decades of struggle ahead of it to consolidate the rule of law.

Ultimately, the new Afghan constitution was borne of haste and imbalanced power relations and it will have to overcome strong challenges to its legitimacy. The structure created is workable and cognizable to most Afghans, but whether it will function and overcome the struggles ahead is far from assured. The most important lesson from the 1964 process, perhaps, is that the spirit of the document needs to be obeyed by those with the power to disobey it.