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Constitutional Issues in the Afghan Peace Negotiations: Process and Substance

By Barnett R. Rubin



Members of the Taliban negotiation delegation during the opening session of peace talks with the Afghan government in Doha, Qatar, on September 12, 2020. (Photo by Hussein Sayed/AP)

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Summary

- Afghanistan has been at war since 1978, with ample participation by external actors. Current negotiations in Doha between the Islamic Republic of Afghanistan and the Taliban's self-styled Islamic Emirate of Afghanistan aim to end the war by agreeing on a future political road map after the withdrawal of US troops.
- The constitution, rejected in its current form by the Taliban, will be a major subject of negotiation.
- The Islamic Republic derives its sovereignty from the multiethnic nation of Afghanistan, which governs itself in accordance with Islam as defined by state institutions. The Islamic Republic chooses its government through periodic general elections.
- The Taliban's Islamic Emirate claims to implement the sovereignty of God through sharia law, as interpreted and applied by qualified Islamic scholars. The Taliban have not proposed any specific alternative to the Islamic Republic's method of governing, but in the past they ruled through an *amir al-mu'minin*, to whom absolute obedience was owed.
- Both sides claim to abide by Islamic law, but they interpret it in different ways. They share a common need to find a way to live as one nation with a stable government that will serve the beliefs and aspirations of the Afghan people.



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Making Peace Possible

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ABOUT THE REPORT

Afghanistan's constitution will almost certainly be a major subject of the peace negotiations underway in Doha, Qatar, between the Islamic Republic of Afghanistan and the Taliban. This report represents an attempt to think through the constitutional issues that the peace process may confront. The report was supported with funding from the United States Institute of Peace and is published in partnership with New York University's Center on International Cooperation (www.cic.nyu.edu).

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A mural depicting Zalmay Khalilzad, the US special representative for Afghanistan reconciliation, and Mullah Abdul Ghani Baradar shaking hands after the signing of a peace deal between the United States and the Taliban on May 15, 2020. (Photo by Jim Huylebroek/New York Times)

Negotiating an Inclusive National Compact in the Context of a Tumultuous History

The peace negotiations between, on one side, Afghanistan's government and constitutional opposition (together the "Islamic Republic" or "constitutional coalition") and, on the other side, the Taliban's self-styled Islamic Emirate began on September 12, 2020, in Doha, Qatar. The negotiators confront a difficult history. After centuries of monarchical rule by tribal elites, Afghanistan has undergone unprecedented political turmoil over the last half century. This report is a preliminary attempt by an outside observer to think through and provide historical context for constitutional issues that the Afghan peace process may confront. It is not a proposal for the agenda of the negotiations, which both parties have made clear they wish to set on their own. The report outlines the starting point and proposes a few ideas about where the process might go, but any solution will be something unforeseen that comes out of the hard, even painful work of negotiation among Afghans.

The current Afghan state is a descendant of the Kandahar-based empire established by Ahmad Shah Durrani of the Saddozai clan of the Popalzai tribe in 1747.¹ His grandson, Timur Shah, moved the capital to Kabul in 1775. From 1823 to 1973, with two brief intervals, the throne of Kabul was

In the forty-seven years since 1973, the Afghan state has been a kingdom, a republic, a people's democratic republic, again a republic, an Islamic state, an Islamic emirate, an interim administration, a transitional Islamic state, and an Islamic republic, averaging a change of regime more frequently than once every six years.

occupied by rulers of the Muhammadzai clan of the Durrani Barakzai tribe, also from Kandahar. Starting with the rule of Amir Abdul Rahman Khan (1880–1901), international aid enabled them to establish a centralized administration in which all appointments were made by the head of state, a system that persists to this day. The Pashtun ethnic identity of the rulers became a basis for one kind of ethnonationalism. The word “Afghan,” which originally meant “Pashtun,” has been defined in the country's constitutions since 1923 as denoting all citizens, but the relationship of Pashtun ethnic identity to Afghan national identity remains a potent source of conflict.

In 1973, the last king, Muhammad Zahir Shah, was deposed by his cousin, Daoud Khan. After 226 years of tribal monarchy, Daoud Khan proclaimed himself the first president of the Republic of Afghanistan, and the Muhammadzai dynasty ended completely in April 1978, when pro-Soviet communist army officers overthrew and killed President Daoud. In the ensuing wars, all segments of the population, including those that had been excluded from the tribal political system, mobilized politically and militarily. In the forty-seven years since 1973, the Afghan state has been a kingdom, a republic, a people's democratic republic, again a republic, an Islamic state, an Islamic emirate, an interim administration, a transitional Islamic state, and an Islamic republic, averaging a change of regime more frequently than once every six years. Religious, legal, and constitutional doctrines have provided the discourse through which groups have contended, but the struggle is not just a theoretical one over ideas; it is also a political contest for power. Afghans have not been able to agree on a formula for a common polity from which none feel excluded. The ever-changing strategic environment in the region and the world has served mainly to exacerbate the conflicts.

In the event that arguably launched the modern peace process, in September 2008, King Abdullah bin Abdul Aziz of Saudi Arabia invited Afghans affiliated with both the government and the Taliban to an iftar dinner in Mecca on the last Friday of Ramadan, Layl al-Qadr, the night of power, when prayers are answered. Before the iftar, the Algerian Abdullah Anas, who had served Afghanistan's “National Hero” Ahmad Shah Massoud for ten years during the anti-Soviet resistance and had helped launch the peace initiative, told the participants:

When the Taliban entered Kabul in 1996, they called the mujahedeen forces of corruption. They never thought of dialogue—they told them to surrender or fight. But they did not capture one district of Afghanistan—Panjshir—and from that district their regime collapsed. The same happened in the Bonn talks. When the Northern Alliance saw the Taliban fleeing the US, they decided, no more Taliban. But now the Taliban are at the doors of Kabul. Will you repeat this experience again or think of power sharing and dialogue?²

The Afghan peace negotiations in Doha provide an opportunity to negotiate a national compact without excluding anyone.

Makeup of the Negotiating Teams

The rapid succession of political changes since 1973 produced an unacknowledged social revolution. The old tribal elites were ousted in 1978 by new elites that had developed from the state educational system. The ensuing war then produced another generation of leaders drawn from every group in the country. One faction trained to serve the state (Soviet-aligned leftists) helped Daoud Khan to power in 1973 and then seized control for itself in the so-called Saur Revolution of 1978, a coup d'état carried out by a small group of military officers. The leaders of the Pakistan- and Iran-based Afghan mujahedeen who resisted the Soviet invasion and the regime it supported were also mostly products of different parts of the same educational system. Armed, funded, and urged on by foreign powers, these groups engaged in mutual destruction, including arrests, purges, and executions.³

Notably absent from these elites was the rural clergy, which remained embedded in much of the society. It participated in the anti-Soviet jihad at the local level but had little share in its national leadership. In 1994, with other elites eliminated, exiled, or decimated, the Taliban movement emerged from a section of this group in Kandahar. It gained backing from Pakistan, Saudi Arabia, and global jihadists, though it remained focused on establishing an Islamic order in Afghanistan. The Islamic Emirate that the Taliban established in 1996 was the first national institution in the history of Afghanistan that placed ulama (religious scholars), and specifically rural ulama, directly in power.⁴

The two negotiating teams in Doha, each with twenty-one members, include most of the elites that have contended for the past decades. Their origins illustrate the social backgrounds of these political forces. The Islamic Republic delegation includes eleven people with university degrees from abroad (from institutions in the United States, United Kingdom, Switzerland, Pakistan, India, Iran, and Turkey).⁵ The other ten received degrees through Afghanistan's state educational system. At least five have higher education in Islamic studies from the Sharia Faculty of Kabul University, government madrassas, or international universities. The team includes six Pashtuns (four from eastern Afghanistan, one from Kandahar, and one from Helmand); six Tajiks; four Hazaras; two Uzbeks; two Sayyids or Saadats, members of religious descent groups (one Sunni and one Ismaili, a Shia sect); and one Baluch. It includes four women, each from a different ethnic group; sixteen Hanafi Sunnis; and five Shia of two different sects.⁶ Several of the delegates belong to prominent families whose members led the resistance to the Soviet invasion or the Taliban regime. Members of the team communicate with each other and the public mainly in Dari (Farsi, Persian).

Taliban leaders were largely educated in *hojras*, boarding schools attached to mosques in rural Afghanistan, in madrassas in rural or provincial Afghanistan, or in Pakistan at madrassas associated with the Deobandi movement.⁷ (One member of the government delegation also studied at a Deobandi institution in Pakistan.) Of the Taliban negotiating team, only two received a secular higher education—one at a military academy in India and the other at Kabul University's Faculty of Journalism. All but one were educated only in Afghanistan and Pakistan. The delegation includes eleven Pashtuns from eastern Afghanistan, seven Pashtuns from southern Afghanistan, one Uzbek, one Turkmen, and one Tajik.⁸ The team includes members of the families of Taliban leaders Mullah Muhammad Omar and Jalaluddin Haqqani. It does not include any women, Hazaras, or Shia. Most of the first generation of Taliban leaders were rural Pashtuns from southern Afghanistan belonging



Abdul Salam Hanafi, the deputy head of the Taliban's Political Office, attends the opening session of the peace talks between the Afghan government and the Taliban in Doha, Qatar, on September 12, 2020. (Photo by Hussein Sayed/AP)

to tribes that had little political influence under the monarchy or its successor regimes, including the Islamic Republic.⁹ The Taliban communicate with each other and the public mainly in Pashto.

The two teams' origins thus differ considerably by ethnic composition, tribe, sect, and educational background. The Islamic Republic side has integrated groups that were at times in conflict

before 2001, and its constitution bears the marks of that difficult effort. Even as its members make common cause against the Taliban, their unity remains fragile. The Taliban, from more homogeneous backgrounds and obedient to a single religious authority, act with greater discipline but have yet to demonstrate the capacity to reflect or integrate Afghanistan's diversity. The members of the Islamic Republic constitutional coalition and the Taliban have had little interaction with each other beyond warfare. What they have in common is that most of the groups from which they come had little or no access to state power before 1978 and have yet to agree on a formula on how to establish and exercise it.

Constitutional Principles of the Islamic Republic and the Islamic Emirate

The constitutional frameworks of the Islamic Emirate and Islamic Republic invoke seemingly contradictory principles. All elements of the constitutional coalition say they intend to maintain and defend the Islamic Republic structure. They are divided partly along ethnic lines over reforms to promote power sharing and decentralization, but they agree on some fundamental principles.

Article 4 of the constitution of the Islamic Republic, adopted at the Constitutional Loya Jirga in January 2004, states that "national sovereignty [*hakimiyyat-i milll*] in Afghanistan shall belong to the nation, manifested directly and through its elected representatives."¹⁰ This is what makes the government a republic rather than a monarchy or a theocracy. The constitution institutionalizes political compromises on the distribution of power among ethnolinguistic groups, social classes

and strata, genders, and schools of jurisprudence (sects), within the frameworks of both Islamic and international law.

The constitution's preamble includes among its goals the establishment of an order based on the "people's will" and "democracy," which is transliterated from the English in both the Persian and Pashto texts.¹¹

True to the diversity of its supporters, the Islamic Republic's constitutional process grappled with a broad range of ethnic, sectarian, and religious issues in an effort to reach consensus on the definition of the nation. That rebalancing had to take into account multiple claims, resulting in a constitution that is unprecedented in explicitly recognizing the ethnic diversity of Afghanistan. Article 4 defines the nation to which national sovereignty belongs:

The nation of Afghanistan is composed of all individuals who possess the citizenship of Afghanistan. The nation of Afghanistan shall be comprised of Pashtun, Tajik, Hazara, Uzbek, Turkmen, Baluch, Pashai, Nuristani, Aymaq, Arab, Qirghiz, Qizilbash, Gujur, Brahui and other tribes [*aqwam*].¹² The word Afghan shall apply to every citizen of Afghanistan.

The ethnic groups in this passage are listed in approximate order of the size of their population.

Articles 16 and 20 of the constitution represent the outcome of tension-filled negotiations over the status of the languages of Afghanistan. Article 16 states:

From among Pashto, Dari, Uzbeki, Turkmani, Baluchi, Pashai, Nuristani, Pamiri and other current languages in the country, Pashto and Dari shall be the official languages of the state. In areas where the majority of the people speak in any one of Uzbeki, Turkmani, Pashai, Nuristani, Baluchi or Pamiri languages, any of the aforementioned languages, in addition to Pashto and Dari, shall be the third official language, the usage of which shall be regulated by law. 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. Academic and national administrative terminology and usage in the country shall be preserved.

"National administrative terminology" refers to the use of Pashto terms for institutions such as the *Stara Mahkama* (Supreme Court), *pohantun* (university), *saranwal* (judicial magistrate or prosecutor), and military ranks. "Preserving national administrative terminology" means using the Pashto terms even in Dari texts.

Article 20 is about the national anthem: "The national anthem of Afghanistan shall be in Pashto with the mention of 'God is Great,' as well as the names of the tribes [*aqwam*] of Afghanistan." The insistence that the national anthem be in Pashto is a reaction to the Dari national anthem adopted by the Islamic State of Afghanistan (1992–96), led by Burhanuddin Rabbani. Acknowledgment of the multiethnic character of Afghanistan in the anthem's text balanced the concession to Pashtuns over its language.

The Taliban have been much clearer about what they oppose than what they support. Their official position is that they have fought to end foreign "occupation" and establish an "Islamic order" (*nizam*). They have never defined reestablishing the "Islamic Emirate" as an explicit goal, and some have indicated they may accept a change in the name to, for instance, "Islamic State." They still endorse many of the principles of governance that shaped the emirate, however, regardless of the name.¹³

The Taliban have not adopted a constitution. In 1998, they convened a group of Islamic scholars to draft one, but they did not adopt or publish it. When the draft was released to the media in 2005, it was accompanied by an introduction saying that the Supreme Shura had adopted it in June of that year, but there is no indication that it was implemented. Taliban public statements and sources interviewed by the author say that the draft does not reflect their current positions in negotiations; nonetheless, it did express the thinking of some influential jurists in the movement at the time of its writing, and is assessed in further detail below.¹⁴ One work that partially elaborated the Taliban's official doctrine is the monograph *Obedience to the Amir (Etat Amir)* by the Pakistani religious scholar Mufti Rasheed Ludhianvi, which was endorsed and distributed by Mullah Omar during 1998–2001.¹⁵ In June–July 2020, the Taliban Cultural Commission published a collection of past political essays and articles under the title, “What Did the Islamic Emirate Give Us?”¹⁶ Taken together, these three documents provide an overview of Taliban-endorsed principles of governance.

Article 2 of the Taliban constitutional draft states, “The system of the Islamic Emirate of Afghanistan is based on the Quranic Verse (6:57), ‘Judgment [decision, rule: *al-hukm*] belongs only to God.’” The subject of the sentence, the Arabic word *hukm*, comes from the same Arabic root as *hakimiyya*, sovereignty, as in article 4 of the current constitution. This is the verse cited by Islamists as the basis for their political principle, “*La hakimiyya ila li Allahi*” (There is no sovereignty but God’s). As God’s plan for sovereignty is contained in the sharia, the Taliban draft constitution establishes in article 5 that “the Islamic sharia is the only source of legislation [*taqnin*].” It places in power ulama who exhibit piety (*taqwa*) and are trained in the interpretation and application (*tasfir wa tatbiq*) of sharia through jurisprudence (*fiqh*).

Under the draft Taliban constitution, the ulama at the highest level of power would be those appointed by the *amir al-mu'minin*, the leader of the Taliban. All high officials would be Sunni Muslims following the Hanafi sect. They would also be predominantly—overwhelmingly—Pashtuns from origins similar to that of the leadership. Taliban doctrine opposes any group preference, but in practice appointments and policies have reflected the movement’s ethnic and tribal composition, and the system contains no representational or other mechanism to counterbalance that tendency. The tract *Obedience to the Amir* makes the lack of any checks or balances on the amir’s power a cardinal principle of the system:

Any weakening of the spirit of observance of Obedience to the Amir weakens the implementation of God’s system. Therefore God has linked Obedience to the Amir to obedience to God and his prophet.¹⁷

Neither the Taliban draft constitution nor *Obedience to the Amir* mentions ethnicity or diversity. The only reference to these issues in the draft constitution is in article 11, which mentions both Pashto and Dari as “official languages” of Afghanistan.

IMPLEMENTING ISLAMIC GOVERNANCE

The implementation of Islamic provisions might in principle seem like a unifying force between the two sides, but decisions about how to do so are inherently political. There is no written code of sharia, and any would-be Islamic state must decide how to apply sharia, whether by privileging one sect, codifying it in written law (*qanun*), or assigning authority to interpret it to

The most controversial decision is not whether to implement an Islamic system but determining who has the power to define and enforce what is Islamic. That is as much a political decision as a religious one.

particular groups or institutions. The most controversial decision is not whether to implement an Islamic system but determining who has the power to define and enforce what is Islamic. That is as much a political decision as a religious one. The two sides have competing or even opposing views of who would have the power to determine what is Islamic.

Article 64 of the 1964 constitution stated: “There shall be no law repugnant to the basic principles of the sacred religion of Islam and the other values embodied in this Constitution.” Such a repugnancy clause is how the constitutions of many Muslim states satisfy Islamic requirements. Contrary to the doctrine that sharia is the only source of law, this doctrine accepts sharia as one source of law. Islam does not prescribe all political decisions, but those decisions may not contravene Islam.

The draft approved by the constitutional review commission and the government in 2003 similarly stated: “In Afghanistan, no law can be contrary to the sacred religion of Islam and the values of this Constitution.” At the Constitutional Loya Jirga, which sat in Kabul in December 2003 and January 2004, this was strengthened to produce the final version that was adopted as article 3: “In Afghanistan no law may contradict the beliefs [*mu’ataqqidat*] and provisions [*ahkam*] of the sacred religion of Islam.” This was a concession to views circulated at the loya jirga by Islamists. For instance, an unsigned document circulated and attributed to Burhanuddin Rabbani and Abdul Rabb al-Rasul Sayyaf, the two “professors” of sharia who were political and ideological leaders of both the jihad against the Soviet invasion and the resistance to the Taliban, proposed that article 3 should read: “No law may be enacted outside the framework of sharia and against the beliefs and provisions of the sacred religion of Islam.”

An analysis of this document submitted to the United Nations Assistance Mission in Afghanistan on December 16, 2003, stated:

The overall effect of the proposed changes would be to make the “beliefs” (*mu’ataqqidat*) of Islam and the “provisions” (*ahkam*) of shari’a, rather than the constitution, the supreme law of the land. The Supreme Court would be the arbiter of what constituted Islam and shari’a, and it would be allowed to take up cases on its own without referrals. A number of rights are specifically limited by references to shari’a and Islam. Though the text is unclear, it appears that the authors wish to remove the reference to Shi’a jurisprudence and make Hanafi jurisprudence the only recognized school. They add to the qualifications of officeholders that they should not have belonged to any non-Islamic (*ghair-i Islami*, which is much broader than “anti-Islamic”) organizations (with the exception of members of the National Assembly, who are prohibited only from having belonged to “anti-Islamic” organizations). A number of provisions also refer to the jihad and resistance and grant their participants a special status.¹⁸

Some elements of the constitutional coalition who continue to advocate such views may find common ground with the Taliban.

The 1964 constitution, like previous Afghan constitutions, made the king the guardian of the Islamic character of the state. The current system relies instead on judicial, legislative, and administrative institutions chosen in different ways and with personnel from a variety of backgrounds.



Delegates, wearing protective face masks to help curb the spread of the coronavirus, attend the Consultative Peace Loya Jirga in Kabul on August 7, 2020. (Photo by Rahmat Gul/AP)

The Ministry of Justice, headed by a minister serving at the pleasure of the president, includes the *Riyasat-i Taqin* (Directorate for Legislation), which is staffed by career legal professionals and has the ex ante responsibility to ensure the conformity of legislation, decrees, and other official documents with the constitution, including article 3. The Supreme Court has the authority to “review the laws, legislative decrees, in-

ternational treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law” (article 121). That includes compliance with article 3. Members of the Supreme Court are appointed by the president and confirmed by the Wolesi Jirga, the popularly elected house of the National Assembly. In addition to having “good character” and being over forty years old, justices of the Supreme Court “shall have higher education in legal studies or Islamic jurisprudence as well as expertise and adequate experience in the judicial system of Afghanistan” (article 118). The term “higher education” (*tahsilat-i ‘ali*) is generally interpreted to mean university rather than madrasa education.¹⁹ The constitution also requires government ministers to have “higher education” (article 72:2). One former Taliban official objected to the requirement that officials have higher education. This provision, he claimed, would disqualify Taliban members from serving in the government or judiciary.

The original text prepared by the 2003 constitutional drafting and review commissions included a chapter establishing a Constitutional High Court (*Diwan-i Ali-i Qanun-i Asas*).²⁰ This body would have the functions of “examining the conformity of laws, legislative decrees and international agreements with the Constitution” and “interpretation of the Constitution, laws and legislative decrees.” This court would have had no other function, and it would have been invested with considerable power: “The verdict of the Constitutional High Court is final and unchangeable.” While the draft did not mention supervising the implementation of Islamic provisions as part of the court’s functions, the court would have had the implied power to determine whether all “laws, legislative decrees, and international agreements” were contrary to the “beliefs and provisions” of Islam. The members of the constitutional court would have been required to have the same qualifications as supreme court justices. The government removed the chapter on the constitutional court from the draft constitution before forwarding it for consideration by the Constitutional Loya Jirga of 2003–4.

During the *loya jirga*, a few delegates tried to reinstate the constitutional court. Some argued that it would be like the Guardian Council in Iran, which they seemed to consider a positive example. The *loya jirga* eventually passed article 157, which provided that “the Independent Commission for Overseeing the Implementation of the Constitution shall be established in accordance with the provisions of the law.” It took years to establish, and it remains a powerless body with only advisory functions.

It is possible that members of the Islamic Republic’s delegation and some of their political sponsors in Kabul would advocate for the establishment of a more powerful body. Some might want to link it to the Council of Ulama of the Islamic Republic of Afghanistan, which currently has no official role in governance, to strengthen the court’s role in safeguarding the Islamic character of the republic—one area in which some Islamic Republic leaders might find common cause with the Taliban. For instance, the Council of Ulama has proposed that it be granted authority to issue binding fatwas, legal opinions.²¹ Others, however, favor structuring a constitutional court in such a way as to strengthen safeguards for the republican aspects of the constitution.

ISLAMIC SECTARIANISM

The 1964 constitution, like those that preceded it, stated: “Religious rites performed by the State shall be according to the provisions of the Hanafi doctrine” (article 2). It also required the King, “the protector of the basic principles of the sacred religion of Islam” (article 7), to be “a follower of the Hanafi doctrine” (article 8). The current constitution, following the precedent of those of 1977 and 1987, reduces the predominance of Hanafi jurisprudence. Article 2 states simply that “the sacred religion of Islam is the religion of the Islamic Republic of Afghanistan,” and article 3 prohibits nonconformity with the “beliefs and provisions of the sacred religion of Islam,” with no mention of any sect. The only mention of Hanafi *fiqh* in the constitution itself is in article 130, which provides that “if there is no provision in the Constitution or other laws about a case, the courts shall, in accord with Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.” The constitution balances that in article 131, which provides that “the courts shall apply Shia jurisprudence [*fiqh-i tashayyu*] in cases involving personal matters of followers of the Shia sect.” This includes both Jaafari jurisprudence and the legal system of the Ismaili Shia sect.

Beyond the text of the constitution, Hanafi jurisprudence does play a role in Afghanistan’s legal institutions. Although article 27 of the constitution provides that no one can be convicted of a crime except on the basis of a written law predating the alleged crime, article 2 of the Criminal Code (both the new code adopted in 2017 and the previous one adopted in 1976) limits the scope of the written law to *ta’ziri* or discretionary crimes, those for which the Quran and Sunna (the practices of the Prophet and his companions) do not prescribe explicit punishments. For *huddud* crimes, for which the Quran or Sunna does prescribe certain punishments, the Criminal Code states that the accused should be tried and sentenced according to sharia as interpreted by Hanafi jurisprudence.

The unadopted Taliban draft constitution clearly makes Hanafi Islam the official state doctrine. Article 3, stating that “the religion of the people of Afghanistan is the sacred religion of Islam,” is immediately followed by article 4, which states that “the official sect [*mazhab*] of Afghanistan is the Hanafi sect.” The drafters of the document consisted entirely of Hanafi ulama, a quarter of

them from Kandahar Province, and the draft constitution contains several additional provisions for Hanafi monopoly of power:

- The preamble states that the constitution “matches and totally complies with sharia and the Hanafi sect [mazhab].”
- Article 6 says that legislation (*qanunguzari*) and the “reorganization of social life” (*tanzim-i mujaddid-i zindigani-yi jami’a*) are based on Quran, Sunna, and Hanafi jurisprudence (fiqh).
- Article 13 says that religious books must be taught according to “the old method of the country’s senior Hanafi scholars” (*tibq-i tarz al-’amal-i sabiq-yi ulama-i akabir-i Hanafi-yi kishwar*).
- Articles 47, 53, and 62 respectively require the members of the Islamic shura, the amir, and the prime minister to be Hanafi Muslims.

The debate over sect is one aspect of a broader issue: religious freedom for Muslims. The legitimacy of disagreements among Muslims on religious issues (known as *ikhtilaf*) dates back to the caliphate of Ali and the dispute with the Khawarij.²² More liberal Muslims cite a purported hadith of the Prophet Muhammad—“Differences among my people are a blessing” (*Ikhtilaf ummati rahmat*)—to legitimate religious pluralism among Muslims.²³ Their opponents widely hold that the hadith is inauthentic. In *Obedience to the Amir*, Mufti Rasheed opposed all forms of *ikhtilaf*. In a section of his book titled “The Foundations of Religion Are Incompatible with Differences [*Ikhtilafat*],” he writes, “If someone through his deeds or words gives rise to dissent, then in reality he is acting against Islam and showing defiance to Islam.”²⁴

For Shia in Afghanistan, a constitutional provision to make the Hanafi sect supreme and restrict the highest state offices to Hanafi Muslims would institutionalize their second-class citizenship or worse. Since at least the time of Amir Abdul Rahman Khan, predominantly Pashtun ruling elites have used the supremacy of the Hanafi sect as a tool to exclude and persecute Shia, mainly the Hazara ethnic group, at times labeling them non-Muslims. These persecutions have included massacres such as the killing of thousands of (mostly) Hazara civilians by Taliban troops in Mazar-i-Sharif in August and September 1998.²⁵ The presence among the Taliban peace negotiators of two commanders of that operation, Mullah Muhammad Fazel Mazlum and Mullah Nurullah Nuri, former detainees at Guantánamo Bay who joined the political office after their release in 2014, could spark fears and traumatic memories for members of the Hazara and other minority populations.

The Taliban now claim to recognize Hazaras and other Shia as Muslims and fellow Afghans, and in private communications, individuals close to the Taliban have indicated that they might accept the implementation of Shia jurisprudence in areas where Shia predominate. This would not satisfy the demands of Shia and the Islamic Republic, but it may indicate that there is room for negotiation. The Taliban’s apparently revised policy on Shia, if borne out in practice during the negotiations, would seem to differ from this dogma. It would be consistent with one of the doctrines of approval of limited *ikhtilaf*, which accepts the legitimacy of differences among schools of jurisprudence based on common Islamic principles.²⁶

So far, however, some verbal recognition of the rights of Muslims to follow other schools of jurisprudence has not led the Taliban to formulate a clear policy. Their delegation’s insistence in preliminary negotiations in Doha that rules of procedure should be governed solely by Hanafi standards indicates how salient the issue is for them. As Taliban negotiator Abdul Salaam Hanafi stated in

There is a myth that the United States imposed a centralized government on “traditionally decentralized” Afghanistan. [However,] centralized administration was established in Afghanistan by Amir Abdul Rahman Khan in the nineteenth century.

an interview, “Using the Hanafi sect as a basis for resolving disputes in talks in no way means we have any prejudice against our Shia brothers. . . . There is no difference between Shia and Sunni in Afghanistan.”²⁷ According to scholar Niamatullah Ibrahim, in 1994 a high-level Taliban emissary to the leaders of the Shia party Hizb-i Wahdat in Ghazni promised official recognition of Shia jurisprudence and autonomy for Hazaras, promises that were never acknowledged or

kept.²⁸ This is likely to be an important issue for building trust between the two sides.

SYSTEM OF GOVERNMENT

The Afghan constitution of 2004 provides for a presidential system of government with a bicameral legislature. The president is directly elected for a maximum of two five-year terms. The president must win over 50 percent of valid votes cast; if no candidate does so on the first round, the two leading candidates compete in a second round. In 2003, the constitutional commission originally proposed a mixed system with a directly elected president and prime minister, which important political actors saw as a method of ethnic power sharing in the executive. The final draft sent to the office of the president for review (dated September 20, 2003) provided for presidential appointment and dismissal of the prime minister and did not require a parliamentary vote of confidence in the government, but it enabled the parliament to dissolve the government through a vote of no confidence. Earlier drafts had granted the prime minister more autonomy from the president, making him responsible to the parliament rather than the president. These drafts lacked any workable mechanism for resolving conflict between the president and prime minister. This indicated the intention of the commission to make the dual executive system a mechanism for power sharing rather than governance. The commission was persuaded to modify the draft to avoid incorporating a direct conflict within the executive. Nonetheless, before transmitting the draft to the Constitutional Loya Jirga, the government replaced that system with a purely presidential system.

There is a myth that the United States imposed a centralized government on “traditionally decentralized” Afghanistan. As noted, centralized administration was established in Afghanistan by Amir Abdul Rahman Khan in the nineteenth century. Article 108 of the constitution of 1964 stated that “the administration of Afghanistan is based on the principle of centralization,” a phrase reproduced word for word in both the current constitution and the Taliban draft.²⁹ The current constitution does contain a compromise with proponents of decentralization. Article 137 states: “The government, in preserving the principles of centralization [*asal-i markaziyyat*], shall transfer necessary powers, in accordance with the law, to local administrations in order to accelerate and improve economic, social as well as cultural matters, and foster peoples’ participation in developing national life.” The centralized nature of the administration, however, remains largely unchanged.

The question of whether or not to change both the structure of the executive and the centralization of the administration splits opinion largely along ethnic lines. While there are individual exceptions, Pashtuns generally support a presidential system with a centralized administration, while non-Pashtuns have favored executive power sharing and some measures of decentralization and local control, up to and including federalism.³⁰ The proponents of presidential centralization won out at the *loya*

jirga, but the conflict has continued, with opposition candidates contesting presidential elections with a platform of constitutional reform to establish an office of prime minister and decentralization.

Establishing the position of prime minister was part of the platform on which Abdullah Abdullah ran for president in 2009, 2014, and 2019. The National Unity Government agreement of 2014, which resolved the dispute over the outcome of the election between Abdullah and Ashraf Ghani, created the prime minister–like position of chief executive officer by executive decree. The agreement also provided for a new constitutional loya jirga to consider modifying the constitution by incorporating a prime minister, but this provision was never implemented. It was again part of the program on which Abdullah ran in 2019. This time the electoral dispute was resolved by making Abdullah the head of the Supreme Council on National Reconciliation, in which capacity he supervises the work of the Islamic Republic negotiating team—an appointment he accepted on the understanding that the negotiations with the Taliban would be the venue for deciding on the future system of government in Afghanistan. The issue is therefore sure to surface again if the negotiations reach the point of discussing the system of government. It has the potential to split the Islamic Republic delegation. The Taliban might agree to a prime minister position. Their 1998 draft constitution authorized the amir to appoint a prime minister, but made clear that the prime minister, like all others, must obey the amir.

The Taliban have interpreted God’s sovereignty to mean that the leader of the community or head of state should be an amir chosen by an assembly of *shura al-ahl al-hal wal-‘aqq*, those qualified to make and dissolve contracts based on their character and knowledge of sharia, sometimes called a reconciliation council in English.³¹ For the Taliban the members of this council must be jurists who meet their standards of qualification and piety. The Taliban have always given preference to ulama appointed by the amir, which is consistent with but not required by traditional Hanafi doctrine. Their draft constitution provides for such a shura. The amir must rule in consultation with the shura, but the decision of the amir always takes precedence.³²

The concept of the shura developed from the ways that the Muslim community chose each of the four successors to the Prophet. Each, however, was chosen in a different way, and the rulers of the subsequent Umayyad, Abbasid, and Ottoman caliphates instituted various forms of hereditary succession. Muslims have never held that God’s sovereignty can be exercised through only one system of government. Contemporary Islamists practice different methods of rule, from parliamentary democracy to the absolute power of the amir.

Some scholars hold that while the shura can nominate the ruler, he must then be accepted by the people through pledging *bay’a*, or allegiance. In modern times some scholars have argued that popular elections are a legitimate means to pledge bay’a. Hasan al-Banna, the Egyptian founder of the Muslim Brotherhood, claimed that under modern conditions elected representatives can perform the functions of the Reconciliation Council. Both the Muslim Brotherhood, in which the Taliban Political Office expressed an interest before the July 2013 coup against Egyptian president Muhammad Morsi, and the Islamic (mainly Deobandi) political parties in Pakistan that are the most vocal Taliban boosters support elections as a means for Islamic rule. Mawlana Fazlur Rahman, a pro-Taliban cleric and parliamentarian in Pakistan, when asked about Taliban political goals, sometimes quotes the hadith: “None of you will believe until you love for your brother what you love for yourself.” This means that he would like the Taliban to accept elections, as he does, once they are no longer labeled terrorists.³³

Afghan President Ashraf Ghani holds up the resolution on the last day of the Consultative Peace Loya Jirga in Kabul on August 9, 2020. (Photo by AP)

The two sides differ in how they choose the head of state, arguably the most fundamental question. Nonetheless, it might be possible to find an alternative, a form of indirect election of the president that is democratic, Islamic, and possible to implement in Afghanistan. The Islamic Republic's direct presidential elections have generated crisis upon crisis. The Afghan state does not have access to information about the citizenry that would



enable it to credibly identify voters and tally their choices. Efforts to fill this gap by the distribution of electronic IDs to all citizens have not yet succeeded. Choosing a leader through an assembly of like-minded ulama fails to account for either the diversity of the society or the complexity of its tasks, but at least everyone knows the result immediately.

Perhaps a more representative form of indirect election of the president could offer a solution. The electorate for the president could be something like what the current constitution provides for in the loya jirga: both houses of parliament and provincial councils plus representatives of other sectors of society, including women.³⁴ The Meshrano Jirga, the upper house of the National Assembly, already includes some ulama (Sunni and Shia), including provincial and rural ulama, and ulama are also appointed or elected to the loya jirga. What role they would play among popular representatives would be the subject of negotiation. Since the entire electorate would fit into the Loya Jirga Assembly Hall, everyone could verify who won. Indirect election of the president is commonly used in systems where the president is head of state but a prime minister runs the government administration, as proposed by the constitutional opposition.

The Taliban draft, like the current constitution, defines Afghanistan as a “unitary” state (article 1 of both texts). The Taliban draft likewise states, in article 15, that “the administration of the Islamic Emirate of Afghanistan is based on the principle of centralization.”

RIGHTS

Both the republican constitution and the draft Taliban constitution contain chapters on fundamental rights based in part on the corresponding chapter of the constitution of 1964. They differ as follows:

- In affirming the equality of citizens before the law, the Islamic Republic constitution explicitly provides for gender equality. The Taliban constitution does not mention gender equality and requires women to wear the Islamic veil (hijab).

- Both constitutions provide for parity of Dari and Pashto, but only the republican constitution provides for instruction in other languages.
- The republican constitution includes protections for rights that are not mentioned in the Taliban constitution, including rights to freedom from forced labor and debt bondage; to voting and election, and to form associations and political parties; to freedom of movement within Afghanistan; to health care; to access to information about the government; and to intellectual property.

The Islamic Republic constitution also establishes an independent human rights commission. Most rights enumerated must be exercised within limits established by law (*qanun*)—potentially a source of curbing rights, but at least requiring specific written laws as the basis for any such limitation.

The Taliban generally respond to concerns about their willingness to respect human rights, including women's rights, by saying that they accept all rights of freedom of expression, women's equality, and other rights in accord with (conformity with) Islamic (sharia, Hanafi) fiqh. The Taliban draft constitution has the following such provisions:

- Article 18 guarantees equality before the law, "taking into account the measures of Islam" (*ba ra'ayat-i mawazin-i Islami*). Article 19 guarantees "freedom" (*azadi*) of the individual as long as it does not affect the freedom of other people, public security or interest, or "Islamic principles and regulations" (*usul wa muqarrarat-i Islami*).
- Article 39 provides for legal regulation of the education of women "within the limits of the Islamic sharia" (*dar huddud-i shari'at-i Islami*).
- Article 99 provides that the Islamic Emirate will respect international organizations and other accepted regulations, including the "[Universal] Declaration of Human Rights," "to the extent that they do not contradict the principles of Islam" (*ta jai keh ba usul-i Islami tazad nadashtah bashad*).
- Article 102 provides that the Islamic Emirate will respect the rights of all nations "within the limits of the Islamic sharia."

The Taliban constitution places additional limits on the rights of women. The 1964 constitution established a right to education, and the 2004 constitution in addition obligated the government to promote the education of women. The Taliban draft constitution modifies the right to education by requiring a "special law" to regulate women's education. As noted, it requires the veil and makes it the responsibility of the government to enforce veiling. It also limits women's participation in government and politics. The amir, members of the Islamic Council (Shura), and judges are all required to be male, and there is no right to vote for anyone.

The aforementioned document attributed to Rabbani and Sayyaf at the 2003–4 Constitutional Loya Jirga similarly proposed subjecting rights to limitations based on "principles of sharia," or "Islamic provisions." It also called for "special measures for the promotion of virtue and the prevention of vice" (*amr bi al-ma'ruf wa nahi an al-munkir*), which was the function of the Taliban religious police. It is possible that the more Islamist elements of the constitutional coalition will return to such proposals to find common ground with the Taliban.

Statements that rights are guaranteed in conformity with Islam or sharia without any specification of who has the authority to interpret and implement those limits do not reassure those Afghans concerned about losing the rights and freedoms they have acquired. Such expressions could authorize

the reimposition of the restrictions the Taliban enacted during their time in power, which they have reimposed in some areas under their control. If such phrases are to be used, the constitution needs to explain how the state will determine what is consistent with Islam according to law.

RULE OF LAW

The current constitution demarcates boundaries between written law (*qanun*), on the one hand, and Islamic jurisprudence (*fiqh*) on the other. *Qanun* is a text (the word is from the Greek *kanōn*), while *fiqh* is the decision of *ulama*, based on books of jurisprudence. Without clear constitutional and legal guidance, a judge can have a lot of discretion in determining how to apply *fiqh*.

The constitution asserts the primacy of law (which must comply with the beliefs and provisions of Islam) over *fiqh* in several ways. Article 27 provides that

No deed shall be considered a crime unless prohibited by a law promulgated prior to commitment of the offense. No one shall be prosecuted, arrested, or detained without due process of law. No one shall be punished without the decision of an authoritative court taken in accordance with the provisions of the law, promulgated prior to commitment of the offense.

Article 130, as quoted on page 11, provides for the use of Islamic jurisprudence where the law is silent. The law may not contradict the beliefs and provisions of Islam (article 3), but no one can invoke Islam or sharia to invalidate or defy a law except through the procedures established by the constitution. Whenever the current constitution restricts itself to general terms and leaves details to be determined, it always says that they will be regulated by “law” (*qanun*), not “Islam” or “sharia.”

Article 2 of the Islamic Republic’s Criminal Code enacted in 2017, however, follows its predecessor, the criminal code of 1976, in limiting the scope of the criminal code to “*ta’ziri*” crimes, whose punishments are left to the discretion of the ruler and the courts because the Quran and Sunna do not specifically prescribe them. Article 2 also states that “those who commit crimes of *huddud* [crimes for which the Quran and Sunna do prescribe specific punishments] . . . shall be judged according to the Hanafi school of jurisprudence of the Islamic sharia.”³⁵ Despite this provision, the government has not taken the initiative to investigate or prosecute *huddud* crimes, as was also the case under most previous regimes. It does, however, implement the sharia provisions of *qisas*, under which in capital cases the court can request the family of a murder victim to forgive the perpetrator and accept blood money (*diyyat*) in lieu of capital punishment. Even the Taliban carried out the *huddud* punishments selectively, using a few dramatic cases for publicity, rather than following them up as a matter of routine.

Under the Islamic Republic, the one case in which the sharia punishment for *huddud* crimes became an issue was the 2006 case of an Afghan convert to Christianity who returned from Germany to seek custody of his child. There was a strong popular demand for the accused to be executed, on the grounds that this was the punishment prescribed by sharia. Advocates for execution cited article 130, claiming that sharia prescribed trial and execution, even if the law did not. President Hamid Karzai resolved the issue by declaring the accused insane and sending him out of the country.³⁶

Afghan legal scholar Murtaza Rahimi has argued that “the inclusion of these [*huddud*] offenses and punishments undermine[s] fundamental principles of criminal law, and [is] inconsistent with Afghanistan’s 2004 Constitution,” as it provides for punishments contrary to Afghanistan’s commitments to human rights under international treaties and the constitution itself.³⁷ Their inclusion

illustrates the persistent differences over the relationship of the state to Islam even within the constitutional coalition.

Both the Taliban draft constitution and the proposals circulated at the Constitutional Loya Jirga in December 2003 and January 2004 provide for an even broader role for sharia and jurisprudence. Propagation of non-Islamic ideas (including proselytism) is prohibited in article 42 of the Taliban draft, and the perpetrators are to be “subject to punishments prescribed by sharia.” Article 64:12 states that it is the responsibility of the government to implement “hijab according to sharia,” with no mention of law. Article 71 authorizes courts to “issue verdicts based on sharia,” without limiting the scope of cases where they may do so. Article 96 provides that fees and harvest taxes are determined “according to sharia law and social justice,” with no mention of legislation. Taken together, these provisions provide ample opportunities for the state to apply jurisprudence instead of written law even where the latter exists.

One of the most controversial institutions introduced by the Taliban during their rule was the directorate for promoting virtue and preventing vice (*amr bi al-ma'ruf wa nahi 'an al-munkir*). This force was empowered to enforce Taliban interpretations of sharia that were neither in the criminal code nor among the huddud offenses. Its members summarily punished infractions, including by public beatings, without any legal procedure. Article 9 of the Taliban draft constitution says that “the propagation of virtue and the prevention of vice are the responsibility of all Muslims. It is a dual duty of the Emirate and the people, and condition and limits are regulated by Islamic sharia law [*qanun-i shar'i*].”

Taliban interviewees claim that this institution has become controversial within the Taliban, with some defending it, and others arguing that it was a mistake. One claimed that when Akhtar Muhammad Mansur was the group's leader in 2015, he opposed it. His successor, Hibbatullah Akhundzada, has reportedly revived it in territories under Taliban control, but with responsibilities limited to disciplining Taliban fighters, not the general public.

The Constitution and the Peace Process

Some observers, seeing how far apart the parties' positions are, conclude that the negotiations cannot possibly succeed. In light of the track record of warfare in resolving the question of governance in Afghanistan, it is unclear what better alternative they advocate. Conflict resolution theory can provide some guidance. When positions are far apart, one strategy is to focus discussion on the needs and interests motivating the positions rather than on the positions themselves, in order to generate alternative solutions.

An understanding of such interests and needs can emerge only through dialogue, but certain observations indicate where one might start. Islamic Republic spokespersons have emphasized the desire to retain the progress the country has made in education, health, human rights (especially women's rights), and recognition of diversity as a positive asset. The Taliban speak of the need for a “pure” Islamic system that would eliminate or at least reduce corruption and restore the authority of religious scholars.

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Both sides agree that whatever systems of governance Afghanistan has tried over the past fifty years have all fallen far short of expectations. The Islamic Republic finds it nearly impossible to hold a presidential election the outcome of which the citizens agree is legitimate. Corruption in the administration and judiciary has engendered cynicism about democracy and the rule of law. For their part, the Taliban cannot regard their five years in power in Kabul as a success. They

do not want to return to a government whose policies on terrorism, women, and personal freedoms make it an international pariah. Because they know that Afghanistan is desperately poor and will need aid for a long time to come, they insisted on adding to the Doha Agreement the provision that "the United States will seek economic cooperation for reconstruction with the new post-settlement Afghan Islamic government." The Taliban also insisted on adding that the United States "will not intervene in [the post-settlement Afghan government's] internal affairs," but they know—because they are being told repeatedly—that there would be no aid for a government that repeated past abuses.

Afghans on all sides have experienced the devastating consequences of failure to agree on a common system of government. The country has experienced decades of displacement and the violent mobilization of all sectors of the population. The Islamic Republic and its international backers have learned that the Taliban are a part of the society that will not disappear. The Taliban have encountered a diverse, urban, and educated Afghanistan that is part of the global community of states and cannot be ruled by force. Having tried all the available alternatives, they may now have no choice but to figure out how to live together in a state recognized by all.

Beyond substance, however, a political settlement will need to respect the dignity of all parties. The Taliban deny the legitimacy of the current Afghan constitution, not only, or even mainly, because of its content, but because it was "written in the shadow of B-52 aircraft."³⁸ When asked about the constitution, one former Taliban official did not refer to its content but to the fact that he could not participate in drafting and ratifying it from his cell in Guantánamo. The current constitution also celebrates opposition to the Taliban. Its preamble expresses appreciation for the Afghan people's "jihad and just resistance," the latter a phrase referring to the resistance to the Taliban.³⁹ Hence, for the Taliban, acceptance of the current constitution, even as a starting point for negotiation, is difficult to contemplate.

On the other side, the fact is that despite its flaws, the government is working. It has security forces that could be redirected to their proper goals—defending the country's borders and enforcing the rule of law. Both sides know—because their senior members experienced it in 1992—the consequences of a transition that breaks the continuity of the state and threatens the breakdown of institutions. Hence, before deciding substantive issues such as those presented here, the negotiators may need to agree on a process that respects both the urgency of maintaining continuity and stability, and the reality that the Taliban will not acquiesce to conditions they consider imposed by force. Both sides must be full stakeholders in the result. Difficult as such a process may be, it requires the hard work of diplomacy, not divine revelation. The global powers that have so much to gain from peace and stability in Afghanistan should grant the Afghans the support, time, and resources to work through that process.

Notes

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1. Ahmad Shah had commanded the cavalry of the Persian ruler Nadir Shah Afshar, whom he helped to overthrow an earlier Kandahar-based Afghan empire, founded by Mirwais Hotak in 1709. Hotak was the last ruler of Afghanistan from the Ghilzai Pashtun tribes until Nur Muhammad Taraki became president in 1978.
2. Interview with Abdullah Anas, London, October 19, 2008. The Panjshir Valley actually included parts of several districts of Parwan Province before becoming a separate province in 2004. The opposition to the Taliban also never lost control of those districts of Badakhshan Province east of the Kokcha River.
3. On the origins of and struggles among these elites, see Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System* (New Haven, CT: Yale University Press, 2002 [1995]).
4. There have been subnational political entities dominated by ulama, such as the *Shura-i Ittifaq* (Unity Council), which took over authority in Hazarajat after expelling the representatives of the communist regime in 1979. I thank Niamatullah Ibrahim for pointing out this event, which Ibrahim analyzes in his seminal work, *The Hazaras and the Afghan State: Rebellion, Exclusion and the Struggle for Recognition* (London: Hurst Publishing, 2017).
5. The Afghan government's Ministry of Peace has published biographies of the negotiators, who together are known as the Peace Negotiation Team of the Islamic Republic of Afghanistan, at <https://smp.gov.af/en/peace-negotiation-team-islamic-republic-afghanistan>.
6. Muslims follow a variety of schools of jurisprudence or *fiqh*. The adherents of each school constitute a sect with a distinct identity, known as *madhhab* in Arabic or *mazhab* in Persian and Pashto. This word is variously translated as school, doctrine, or sect. Afghan Sunnis follow the Hanafi sect, and most Shia in Afghanistan follow the Ja'afari sect, which is also the state religion of Iran.
7. Alex Strick von Lindschoten and Anand Gopal, "Ideology in the Afghan Taliban: A New AAN Report," Afghanistan Analysts Network, June 29, 2017, www.afghanistan-analysts.org/en/special-reports/ideology-in-the-afghan-taliban-a-new-aan-report. The Taliban have published a document providing biographical data on all members of the delegation at <https://justpaste.it/1kdf4>.
8. Mawlawi Abdul Kabir Sahib is listed as a resident of Baghlan Province in the north, but his birthplace is given as Tang-i Zadrán village of Khost Province.
9. Since the time of Ahmad Shah Durrani (reigned 1747–72), the Afghan monarchy granted preference to closely allied tribes in a practice adopted from Turkic polities (see Thomas Barfield, *Afghanistan: A Cultural and Political History* [Princeton, NJ: Princeton University Press, 2010]). The most favored tribes were the "Zeerak" Durrani. The Zeerak included the Popalzai (Ahmad Shah Durrani and Hamid Karzai), Barakzai (all Afghan rulers from 1823 to 1978 except for two short intervals), Alokzai, and Achakzai (a branch of the Barakzais). The top Taliban leadership overwhelmingly comes from either the politically marginalized Panjpai Durrani tribes or the Ghilzai. Panjpai Durrani include Ishaqzai (the former Taliban leader Akhtar Muhammad Mansur and head of the Taliban negotiation team Mawlawi Abdul Hakim Haqqani), Nurzai (current leader Hibbatullah Akhundzada), and Alizai (former military commander Abdul Qayyum Zakir). Ghilzai tribes include the Hotak tribe of the Taliban founder, Muhammad Omar Mujahid.
10. The English-language text of the constitution can be found at <https://president.gov.af/en/afghan-constitution-2>.
11. The Taliban are likely to object to this term. In a working group at the 2003–4 Constitutional Loya Jirga, a mujahedeen leader objected to the use of the transliterated word "democracy" in the draft on the grounds that it was foreign, but another delegate pointed out that the leader had no such difficulty with the word "Kalashnikov."
12. *Aqwam* is the Arabic plural of *qawm*, a word with no precise English equivalent. It refers to any kind of solidarity group. Dari and Pashto also have more specific terms for tribes and their various subdivisions and confederations as well as nationalities and ethnolinguistic groups. *Qawm* is conventionally translated as "tribe," as reproduced here, but the entities listed in article 16 of the draft constitution are more like ethnic groups defined by varying combinations of language, sect, and descent.
13. Abdul Qadir Sediqi and Jibran Ahmad, "Taliban Seeks Image Makeover as Afghan Peace Talks Gain Momentum," Reuters, December 28, 2018, www.reuters.com/article/us-afghanistan-taliban-image/taliban-seeks-image-makeover-as-afghan-peace-talks-gain-momentum-idUSKCN1OR0NJ; and Frud Bezhan, "Taliban Constitution Offers Glimpse into Militant Group's Vision for Afghanistan," Radio Free Europe/Radio Liberty, April 26, 2020, www.rferl.org/a/taliban-constitution-offers-glimpse-into-militant-group-s-vision-for-afghanistan/30577298.html.

14. The author thanks Palwasha Kakar and Belquis Ahmadi of the United States Institute of Peace for providing a copy of the Taliban draft.
15. Rasheed Ludhianvi, *Obedience to the Amir: An Early Text on the Afghan Taliban*, trans. Yameema Mitha, foreword by Michael Semple (Berlin: First Draft Publishing, 2015); and Michael Semple, "Rhetoric, Ideology, and Organizational Structure of the Taliban Movement," *Peaceworks* no. 102, United States Institute of Peace, January 2015, www.usip.org/publications/2015/01/rhetoric-ideology-and-organizational-structure-taliban-movement.
16. The Pashto original is undated. The date is that given for the Dari (Persian) translation. *Islami Emarat Mauz ta Che ra Kare?*, edited by Hafiz Nur Ahmad Said (Cultural Commission of the Islamic Emirate of Afghanistan, Saratan 1399).
17. Ludhianvi, *Obedience to the Amir*, loc. 509 of 1,000, Kindle.
18. Copy of unpublished report in author's files. Arabic terms in parentheses in this passage are in the original. They are not interpolations by the author of this report.
19. All the current Supreme Court justices studied at the Kabul University Faculty of Islamic Law, at al-Azhar University in Egypt, or both, as well as at other Islamic institutions of higher learning. Government of Afghanistan, "Biography of the Supreme Court Current Members," <https://supremecourt.gov.af/en/biography-supreme-court-current-members>.
20. In commenting on the manuscript, Emal Pasarlay observed that the Constitutional Drafting Commission had originally made the constitutional court more powerful than in the draft finally approved by the Constitutional Review Commission.
21. Ron Synovitz and Ahmad Shebar, "Afghan Clerics Want Power to Issue Legally Binding Fatwas," *Radio Free Europe/Radio Liberty*, November 20, 2012, www.rferl.org/a/afghanistan-ulema-council-fatwas-clerics-constitution/24783981.html.
22. On *ikhtilaf*, see Mohammad Hashim Kamali, "The Scope of Diversity and *Ikhtilaf* (Juristic Disagreement) in the Shari'ah," *Islamic Studies* 37, no. 3 (1998): 315–37; and Khaled Abou El Fadle, *The Authoritative and the Authoritarian in Islamic Discourses: A Contemporary Case Study* (Beirut: Al-Saadawi Publications, 2002). Abou El Fadle cites Abu 'Abd Allah 'Abd al-Rahman al-Dimashqi, *Rahmat al-Ummah fi Ikhtilaf al A'imma* (Kuwait: Maktabat al-Bukhari, n.d.). See also Anver M. Emon, Rume Ahmed, and Ayesha S. Chaudhry, "Governing Afghanistan with the Taliban: A Guide for Negotiators," Rockledge Research, 2020.
23. See G. Fouad Haddad, "*Ikhtilaf* (Differences) among the Madhhabs in Islam," Masud.com, n.d., www.masud.co.uk/ISLAM/misc/ikhtilaf.htm. This text cites Bayhaqi and Zarkashi to authenticate the chain of transmission.
24. Ludhianvi, *Obedience to the Amir*, loc. 423 of 1,000, Kindle.
25. This massacre was a reprisal against innocent civilians for a previous war crime: the summary execution of hundreds if not thousands of disarmed Taliban prisoners by anti-Taliban fighters in Mazar the previous year. The anti-Taliban resistance fighters later carried out reprisals on Taliban prisoners who surrendered in Kunduz in 2001. Since that time, despite extreme provocations by the so-called Islamic State, Afghan leaders have prevented the cycle of reprisals from resuming.
26. Kamali, "The Scope of Diversity."
27. Quoted in a tweet by the journalist Mujib Mashal, September 27, 2020, [www.twitter.com/MujMash/status/1310096906484359186](https://twitter.com/MujMash/status/1310096906484359186).
28. Ibrahim, *The Hazaras and the Afghan State*, 197–98.
29. The confusion arises from the state's weakness. In a weak state, local power arrangements often disregard the central government, but the exercise of power by nonstate actors does not constitute decentralization of the state.
30. Barnett R. Rubin, "Crafting a Constitution for Afghanistan," *Journal of Democracy* 15 (2004): 5–19.
31. On *ahl al-hal wal 'aqd* see 'Azizah Y. al-Hibri, "Islamic Constitutionalism and the Concept of Democracy," *Case Western Reserve Journal of International Law* 24, no. 1 (1992): 1–27. See also Ibrahim A. A. al-Marzouqi, "Political Rights and Democracy in Islamic Law," in *Democracy: The Rule of Law and Islam*, ed. by Eugene Cotran and Adel Omar Sherif (The Hague: Kluwer Law International, 1999), 455–75. Muhammad Muhiq, the Afghan ambassador to Egypt, analyzes the Taliban's use of the institution in "Naqd-I Nazariyya-I Shura-yi Ahl-o-Hal-o-'Aqd-i Taliban beh Ja-yi Intikhabat" (Critique of the Taliban Theory of Replacing Elections by the Reconciliation Council), *BBC News*, August 12, 2019. The author thanks Niamatullah Ibrahim for the reference.
32. Ludhianvi, *Obedience to the Amir*, loc. 494 of 1,000, Kindle.
33. 40 Hadith Nawawi 13, cited by al-Bukhari on the authority of Abu Hamzah Anas bin Malik. Fazlur Rahman cited this hadith at the "Pakhtun Peace Jirga" (*Pakhtun Aman Jirga*) convened by the Awami National Party in Peshawar in May 2008 (author's personal notes). Fazlur Rahman repeated the citation in a meeting with US Special Representative for Afghanistan and Pakistan Richard Holbrooke in Islamabad in August 2009 (author's personal notes).
34. The loya jirga must also include representatives of elected district councils, but the government has been unable to hold such elections. Whatever process of constitutional reform is adopted in the peace process could redefine the loya jirga to omit the district councils until such time as they are elected.
35. The complete text of the penal code in Dari and Pashto is available on the International Committee of the Red Cross website's international humanitarian law database at <https://ihl-databases.icrc.org>.

36. Mohammad Hashim Kamali, "Freedom of Religion, Apostasy and Conversion: Issues, Responses and Developments," pre-publication copy provided to the author.
37. Murtaza Rahimi, "Afghanistan's New Penal Code: Whether or Not to Codify Hudud and Qisas," Bernard and Audre Rapoport Center for Human Rights and Justice, University of Texas at Austin School of Law, n.d., <https://law.utexas.edu/humanrights/projects/afghanistans-new-penal-code-whether-or-not-to-codify-hudud-and-qisas>.
38. "The current constitution of Afghanistan is illegitimate because it is written under the shadow of B-52 aircraft" (Chantilly, December 2012). "The present Afghan constitution is not acceptable, as it has been copied from the West and is prepared under the shadow of B-52 jet fighters" (April 2015, statement on the nineteenth anniversary of electing Mullah Omar as amir al-mu'minin). Both in *The Taliban Reader: War, Islam and Politics in Their Own Words*, ed. Felix Kuehn and Alex Strick Linschoten (Oxford: Oxford University Press, 2018), pp. 398, 498.
39. This phrase became an issue during the 2003–4 Constitutional Loya Jirga. On December 17, 2003, a group of non-Pashtun delegates from northern Afghanistan came to the office of the UN mission at the loya jirga to protest that one of the working group chairs, the son of a Pashtun Deobandi political leader from Logar, had proposed removing the reference to the "resistance" from the preamble. That group chair was replaced.

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