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Afghan Taliban Views on Legitimate Islamic Governance

CERTAINTIES, AMBIGUITIES, AND AREAS FOR COMPROMISE

By Clark B. Lombardi and Andrew F. March



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NEGOTIATION
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ABOUT THE REPORT

This report seeks to identify areas and opportunities for Afghan and international actors to engage productively with the Taliban on the nature of the state they will establish and the type of constitution they will draft. Research for the report was supported by the Afghanistan Program at the United States Institute of Peace.

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Cover photo: Taliban spokesperson Zabih Ullah Mujahid discusses Afghanistan's new government in Kabul on September 7, 2021. (Photo by Victor J. Blue/New York Times)

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Summary



With the return to power of the Taliban in August 2021, many inside and outside Afghanistan anticipate the reintroduction of the type of autocratic, Islamist governance that marked the Taliban's rule from 1996 to 2001. But might Taliban attitudes to governance have evolved since they were driven from power after 9/11? Is there an opportunity for actors within both Afghan society and the international community to engage with the Taliban in the search for possible compromises between what the Taliban regard as a "true Islamic system" and the relatively liberal 2004 constitution?

As they were in the 1990s, the Taliban are committed to establishing a government consistent both with canonical theories from the medieval Islamic tradition and with the modern Islamist project of creating an Islamic state. Yet the Taliban movement itself appears to contain diverse views about the forms that an Islamic order might take. Furthermore, Islamic constitutions in other countries, as well as previous Afghanistan constitutions, provide very different models, as well as insight into possible future evolutions.

So far, Taliban leaders have not articulated a clear vision of how they plan to structure the state. They have softened their traditional rhetoric on some issues, such as girls' education, but have cautioned that implementation of policy commitments requires security, resources, and time. Some observers have expressed guarded optimism that the Taliban can be persuaded by interlocutors from the international community and from Afghan civil society to establish a government that differs subtly, but significantly, from that which they built during their first time in power and to retain or refashion at least some elements of the 2004 constitutional order.

Sensitive engagement, coupled with leverage involving foreign aid and international recognition, might encourage the Taliban to adopt a hybrid order that gives the general electorate more say and to respect internationally recognized human rights, at least in part. Engaging the Taliban on these issues will be extremely challenging, but if negotiators understand the paradigm through which the Taliban see the world, and if they are able to translate their requests into an Islamic paradigm that is informed by classical texts and the example of other modern Islamic states, then the Taliban might be convinced to move away from some of the most authoritarian and illiberal aspects of their first regime.



Khalil Haqqani speaks in Kabul on August 20, 2021. Before the city fell, Haqqani appeared at a mosque to establish Taliban authority. When the Taliban declared a caretaker government, they appointed many loyalists, including Haqqani, from their rule in the 1990s. (Photo by Victor J. Blue/New York Times)

Introduction

With the fall of the internationally recognized, elected Afghan government in August 2021, Afghanistan is facing a period of great uncertainty. It is once again under the control of the Taliban, the Islamist movement that ruled Afghanistan between 1996 and late 2001. During those five years, which the Taliban refer to as the “First Emirate” or the “Islamic Emirate,” the Taliban governed autocratically without ever formally enacting a constitution. After the Taliban were forcibly removed from power in 2001 by a coalition of Afghans supported by a US-led coalition of foreign military allies, most Afghans appear to have embraced the new government’s vision for a far more democratic and liberal constitutional order, one that informs many provisions of the 2004 Afghan constitution. Over time, however, chronic mismanagement by the governments elected under the 2004 constitution sapped popular support for those governments. This created room for the Taliban to regroup, capitalize on

distaste for the government in power, wage an armed insurgency, and eventually return to power. For some Afghans and for countries that champion democracy and human rights, there is now great concern about what type of government the Taliban will establish. Will they reestablish the First Emirate? Or will they create a modified form of government—and if so, what sorts of modifications will they make?

After their ouster in 2001, the Taliban repeatedly admitted that they made some “mistakes” while they were in power, but they never specified how their approach to governance would change if they were to return to power. Not accepting the legitimacy of the 2004 constitutional order, they clearly do not intend to govern according to the terms of that document. What type of new constitutional order they intend to establish, however, is still mysterious. Although they have reiterated that

Important constituencies within Afghanistan . . . are already clamoring for the Taliban to clarify the nature of the state that they now intend to impose and seeking guarantees that at least some of the democratic and liberal elements of the previous constitutional regime will be retained.

they do not intend to govern exactly as they did before, they have also said that, as in the past, they will exercise power according to the mandates of Islamic law, the sharia. By themselves, however, such statements do little to spell out the Taliban's plans for governing their country. Muslims over the centuries have disagreed deeply about what the sharia requires, and they continue to disagree today. Among the self-styled "Islamic states" around the world today, one finds very different approaches to religious interpretation, democracy, and fundamental rights.

Important constituencies within Afghanistan, including religious minorities and liberal civil society groups, are already clamoring for the Taliban to clarify the nature of the state that they now intend to impose and are seeking guarantees that at least some of the democratic and liberal elements of the previous constitutional regime will be retained. The international community is also trying to understand the Taliban's constitutional vision, and many are asking the Taliban for promises of respect for democratic and liberal norms. Some important countries that sit on the UN Security Council or that could provide Afghanistan with desperately needed foreign aid have suggested that they are prepared to condition recognition or aid for the new regime on actions that demonstrate the Taliban's commitment to abide by those norms. As of December 2021, the United States, the European Union, and some of Afghanistan's regional neighbors are continuing to hold talks with Taliban representatives in Doha, Qatar. The United States is demanding that the Taliban take steps to "form an inclusive and representative government."¹ The US leverage for achieving serious Taliban political or constitutional concessions is limited, but so far Washington is withholding recognition of the Taliban government (in forums such as the United Nations) and continues to hold Afghan government assets that the Taliban are seeking to access. US policy on these questions is not fixed at this point, and the Taliban themselves are also still working to

form and formalize their governing structure. This dynamic and fluid situation, along with the Taliban's caginess about what sorts of compromises they are willing to contemplate, creates challenges, but it also presents opportunities for those who would like to engage productively with the Taliban on the shape of government in Afghanistan going forward.

The Taliban's unwillingness (as of February 2022) to provide details about their plans may reflect uncertainty and internal debates about how far they should depart from their previous pattern of governance and, in particular, about whether they are willing to retain any of the democratic and liberal aspects of the 2004 constitution. Alternatively, their caginess may simply reflect an understanding that their vision for the state would be unacceptable both to some groups in Afghanistan and to foreign countries that they need if they are to receive international recognition and much needed donor aid. In other words, it may indicate a willingness to compromise, up to a point, regarding the type of state they establish. They might be willing, albeit begrudgingly, to establish a government other than the one that they would ideally want as long as the alternative falls within the range of what they deem to be a "sufficiently Islamic" approach to governing. Whatever the reason for the Taliban's ambiguity to date about their constitutional vision for Afghanistan, it suggests that if liberal actors in Afghanistan and their allies in the international community are willing to engage seriously and sensitively, there may be opportunities to open productive discussions with the Taliban regarding the nature of the state they are going to establish or the type of constitution they will draft.

Anyone hoping to engage with the Taliban in an effort to encourage a new constitutional order that retains some of the democratic and liberal elements of the

order established under the 2004 constitution must understand the roots of the Taliban concerns about the legitimacy of that constitution and of the Afghan government that was formed under it. They must also engage sensitively and respectfully with the Taliban's claim that its government from 1996 to 2001 represents an authentic realization of classical Islamic political theory and, conversely, that the government established under the 2004 constitution failed to satisfy even a minimal threshold for an Islamic system. Drawing on classical Islamic legal theory, on the historical understanding of classical theory by Afghan governments over the years, on the writings of modern Islamist thinkers, and on the constitutions of numerous contemporary Islamic states, one can engage with the Taliban on these points and can challenge some of their conclusions while accepting that their core beliefs are nonnegotiable. Notwithstanding the Taliban's concerns, it is possible to argue in good faith that the current constitution actually does satisfy minimal standards of Islamic legitimacy, as those have been understood historically in Islamic societies, including Afghanistan. This case will have to be made carefully, however. Those who wish to engage with the Taliban on the shape of Afghanistan's constitutional future must be prepared to articulate a vision for a future Afghan constitutional order that reflects the Taliban's demands for a government that articulates its legitimacy more clearly in classical Islamic terms—borrowing, perhaps, from other Islamic governments in the contemporary world.

For those actors—Afghan or international, state or non-state—that are willing to shoulder the challenge of negotiating with the Taliban on these issues, this report provides information, contextualization, and recommendations. The report's first section analyzes Taliban communications

(especially ones produced recently) to identify the core Taliban attitudes toward the legitimacy of a constitutional order from a doctrinal religious perspective.²

The second section contextualizes the Taliban's political philosophy in light of four kinds of texts that have shaped that philosophy. First are the classical Islamic legal and political texts to which the Taliban explicitly look for inspiration. Second are the numerous Afghan constitutions adopted since 1923, each of which represents an attempt to create an Islamically legitimate government order that is acceptable to the Afghan people. The Taliban explicitly claim to have studied these texts and to have drawn lessons from them. Third are the political writings of influential postcolonial Islamist thinkers from whom some of the movement's leadership appears to have drawn inspiration. Fourth are the constitutions in other contemporary self-styled Islamic states.

The third and final section identifies possible areas of tension, flexibility, or room for maneuver in Taliban doctrine and offers suggestions for how actors that engage the Taliban can work within those areas to find possible compromises between the Taliban's vision of "true" Islamic governance and liberal democracy. The section looks first at the question of the structure of government and then at women's rights, minority rights, and the right of freedom of expression. Above all, however, anyone who wishes to encourage the Taliban to depart from the model adopted by the First Emirate must present its alternative as one that honors classical Islamic and traditional Afghan approaches to government in a manner that addresses the needs of a modern state. If this seems like an impossible task, it may be encouraging to remember that other modern Islamic states have conducted just the same sort of balancing act.

Taliban Demands for a “True Islamic System”

Muslims around the world have always understood Islam as a religion profoundly concerned with ethics. All Muslims look for ethical guidance in the Islamic scriptures: the Quran and the collection of hadith literature. As Islamic history makes clear, however, these texts can be approached in different ways.

From the ninth through the nineteenth centuries, Sunni Muslims agreed that these texts should be interpreted by scholars with deep training in a complex method of interpretation. Sunnism developed four main schools of legal interpretation: Hanafi, Maliki, Shafi'i, and Hanbali. Scholars of each school combined textual reasoning and precedential reasoning; each school started with different precedents and each developed, over time, its own, unique interpretation of God's command. Sunnis recognized (and continue to recognize today) each of the four school's interpretations as plausible.³ Every Muslim ruler could select for himself an official school to be used in his courts' judicial decisions. But where a ruler did not impose a rule upon his subjects, Sunni Muslims could choose to follow whichever Sunni school they preferred and could ask to have decisions rendered according to the school of their choosing.⁴

In the modern era, however, some Sunni Muslims have come to question the classical approach to Islamic legal reasoning. They have suggested that modern Muslims should reengage with the scriptures in a new way and should develop new understandings of God's commands. These “modernist” Muslims do not feel that they need to defer to the interpretations developed in the past by any of the classical Sunni schools or to interpretations developed today by classically trained

scholars who issue opinions in the name of a particular Sunni school. Modernists come in many stripes.⁵ Some develop interpretations of God's law that resemble, in many respects, the teachings of classically trained Sunni scholars. Others, however, develop interpretations that depart significantly from those teachings. In some cases, they are quite tolerant of Shia practices. In other cases, they embrace liberal rights and principles. Not surprisingly, modernists have aroused the ire of Sunni Muslims who continue to embrace the classical approach to Islamic law. Those “neotraditionalists” accept the authority of classically trained scholars and think that every Muslim ruler and every citizen must select one school to follow and defer to the interpretation of God's law taught by the contemporary representatives of that school. The Taliban are explicit about their neotraditionalist commitments and about their belief that Islam, properly interpreted, is Islam as developed by classically trained scholars who interpret law according to the Hanafi school.⁶

This section of the report reviews a variety of Taliban texts and pronouncements that voice the movement's objections to the 2004 constitutional order and desire to replace it with a “true Islamic system.” It should be noted, however, that the Taliban is a broad movement that is home to a diversity of views on models of governance. Uncertainty about what, if anything, constitutes the “official” Taliban perspective is accentuated by the fact that most of the public proclamations referenced in this section were published in the context of an ongoing conflict and were probably aimed at a variety of constituencies, including the Taliban's own fighters and commanders, the Afghan people,



Under the Taliban, there has been a campaign to remove artworks from all aspects of life, including by painting over street murals, such as these in Kabul on October 29, 2021, in an attempt to make society “more Islamic.” (Photo by Kiana Hayeri/New York Times)

the government of Afghanistan, and the international community. Nevertheless, a review and comparison of multiple Taliban texts will at least reveal the broad outlines of Taliban thought on a number of key issues.

THE ILLEGITIMACY OF AFGHANISTAN'S POST-2001 CONSTITUTIONAL ORDER

The Taliban have long maintained that the twin fundamental aims of their armed struggle are the withdrawal of international forces and the establishment of a true Islamic system. The Taliban see these two aims as inextricably linked and nonnegotiable. The Taliban have always claimed that post-2001 constitutional governance was fundamentally illegitimate due both to the manner by which it came into existence and to the fact that it was insufficiently Islamic. A similar view has been adopted toward the still extant (though effectively suspended) 2004 constitution of the Islamic Republic of Afghanistan.

In a March 2020 commentary on the political order in Afghanistan before and after the fall of the Taliban's First Emirate, the Taliban presented a theological explanation for their position regarding the illegitimacy of the then ruling government:

Prior to the American invasion, there existed in Afghanistan a sharia system and a religiously legitimate amir who had announced the Emirate with the oath of allegiance of fifteen hundred Islamic scholars. Subsequently, the arrogant unbelievers of the world led by the Americans invaded Afghanistan with the assistance of a number of our unworthy Afghans and with this the rule of the Islamic Emirate was driven back. However, from the perspective of sharia, the religiously legitimate amir is not considered to have been legally deposed as a result of invasion. . . . [A]ccording to the principles of the sharia, the legitimate ruler remained in place after the American occupation and the Emirate continues.⁷

The Taliban have regularly stated that, under Islamic law, its First Emirate was never vanquished but went into abeyance. By inference, the only Islamically just and legitimate outcome of the conflict and the only means to restore a true Islamic system is the reinstitution of a Taliban First Emirate. If the Taliban continue unreservedly to embrace this position, the scope for inclusive government and a relatively expansive role for women in public life will be limited.

ESSENTIAL ELEMENTS OF A “TRUE ISLAMIC SYSTEM”

The Taliban have now effectively reestablished their emirate and have a monopoly of power, despite previous assurances by Taliban leaders that they did not necessarily seek such a monopoly.⁸

If the Taliban are willing to depart at all from the First Emirate model, the question is what sorts of alternative government structure they might create. To try to answer this question, it is helpful to examine the Taliban’s position on four interrelated issues:

- The constitutional commitments necessary to establish legitimate Islamic governance
- The structure of a legitimate Islamic government
- The mechanisms for governmental accountability in a true Islamic system
- Individual rights and duties under a true Islamic system

Constitutional Commitments Necessary to Establish Legitimate Islamic Governance

According to the Taliban, the 2004 constitution has two fatal flaws. First, it is a foreign imposition. Concern about its origins appear clearly in Taliban statements such as that issued at the International Pugwash Research Conference in Qatar in May 2015: “The present Afghan constitution is not acceptable as it has been copied from the West and was prepared under the shadow of B-52 jet fighters. The articles are unclear and contradictory and are imposed on the Islamic society of Afghanistan.”⁹ Second, the Taliban consider the 2004 constitution to be insufficiently Islamic.

Taliban concerns about the substance of the 2004 constitution are laid out in a lengthy June 2018 opinion piece.¹⁰ The author posits that the 2004 constitution is not only “foreign,” it is also un-Islamic and mendaciously designed to facilitate secularism and moral degradation in Afghanistan. Acceptance of the 2004 constitution threatens the universal necessities of the sharia, namely, the preservation of religion (*din*) and lineage (*nasl*).

The author first complains that the 2004 constitution omits the foundational Islamic concept that all sovereignty belongs to God: “The fundamental principle of Islam has been consciously and very skillfully removed completely from the constitution. In its place, the door has been open to the aims, beliefs [of secularism].” According to the author, the sovereignty of God must be the foundational normative commitment of the constitution.

Second, the author decries that fact that the 2004 constitution fails to establish God’s commands as the basis of all law and policy in the state. Instead, the democratic commitment in Article 6 allows the government to apply rules and regulations that reflect the discretion of humans elected to legislative or executive office, a line of reasoning that other Taliban affiliates also commonly employ.¹¹ On the author’s reading, the failure of the 2004 constitution to give absolute primacy to the sharia is fatal to the religiosity of society:

Public sovereignty consists of implementing the constitution. Because the public ruler applies the rules of the constitution, real obedience is to the constitution. Public sovereignty is constrained by the constitution. According to leading Islamic scholars, the fundamental basis for a state—to which there is obedience—to be Islamic is that the commandments of God Almighty distinguish and decide between what is legitimate and illegitimate. . . . If the axis of the constitution was that “the sovereignty of God Almighty is supreme and implemented,” then the government could be called Islamic. If what is legitimate and illegitimate is decided upon the views and intellect of his creations, then the government is un-Islamic.

The 2018 article asserts explicitly that the commitment in Article 6 of the 2004 constitution to the realization of democracy is inherently in tension with Islamic principles and risks engendering irreligiosity in the country: “The door to domination by the disbelievers and usurpation of public sovereignty is opened by Article 6 of the constitution. By this path, they penetrate public sovereignty with the aims, beliefs, and traditions of the disbelievers, which have afflicted the pure Muslim society of Afghans with innumerable corruptions.”

This statement reflects a tendency for some Taliban—and some other modern Islamist thinkers—to place Islamic principles and “Western” democratic theory in binary opposition. Such thinkers present democratic theory as resting on a corrupt notion of limitless popular sovereignty. However, many other contemporary Islamists around the world have retreated from the absolutist claim that democracy is incompatible with Islamic governance. They have tried to articulate visions of a state in which democratic institutions are embraced and many government policies are to be decided through democratic institutions and procedures, with the crucial qualification that the discretion of a democratic majority must be constrained to ensure that the democratically elected government never violates (or permits its citizens to violate) core principles of Islamic ethics. Such thinkers propose Islamic democracies in which majorities are given significant power over government decision-making, but in which the government is constrained to respect true Islamic values.

It is not clear if the author of the 2018 article is rejecting entirely the possibility of a legitimate Islamic democracy. If the Taliban do accept the possibility, however, they would accept it only if the boundaries of democratic discretion are constitutionally identified and policed by institutions that can be trusted to interpret Islam and prevent majoritarian pressures permitting (or even requiring) un-Islamic behavior. To this end, it is apparently insufficient for the Taliban that

Article 3 of the 2004 constitution states that “no law shall contravene the tenets and provisions of the holy religion of Islam” and that Article 130 provides that activities not regulated by legislation shall be governed by the rules of Hanafi jurisprudence (with a carve-out provision in Article 131 for the courts to apply Shia [*Jaʿfari*] jurisprudence in cases involving family matters for followers of Shiism).

The Taliban will likely make significant changes to the commitments that are made in the 2004 constitution and have already suggested that there should be a significant role for Islamic scholars—impliedly of the Hanafi school—in drafting a revised constitution.¹² At a minimum, the Taliban are likely to give greater primacy to sharia law—perhaps making clear that the state’s primary commitment to respect Islam trumps all other constitutional commitments. Arguably more impactful though, the Taliban are likely to specify that a constitutional commitment to respect Islamic law means a commitment to respect Islamic law *as taught by the Hanafi legal school*. This clarification was included in many previous Afghan constitutions and in the Taliban’s own draft constitution, which was prepared in 1998 and eventually published in 2005.¹³

The Structure of a Legitimate Islamic Government

Taliban commentaries, including those of their current leader, emphasize that a true Islamic system requires a dominant leader in the scholar-statesman mold of classical Islamic jurisprudence. An entire section of the current Taliban leader Hibatullah Akhundzada’s 2017 book, *Instructions to the Mujahidin from the Amir al-Muʿminin*, focuses on this need.¹⁴

The necessity for a male ruler from the Hanafi School.

One work of theology cited by Hibatullah Akhundzada is a classical Hanafi text by the medieval scholar al-Nasafi (d. 1142 CE). *Al-ʿaqaʿid al-nasafiyya* is repeatedly referred to in Taliban texts on the role and attributes of a leader, as is the most famous premodern work of Islamic

constitutional law, the Abbasid-era judge and scholar al-Mawardi's (d. 1058) *al-ahkam al-sultaniyya* [*The Ordinances of Government*], particularly its proposition that the ruler's primary duties are to "guard the faith" and execute sharia judgments. This latter work has been cited by Taliban sources as the "fundamental authority" on questions of constitutional jurisprudence.¹⁵

Following such texts in practice would require that significant legislative and executive power be placed in the hands of a male Muslim leader who is able to perform both spiritual and material functions in the manner described by medieval jurists. The requirement that the president be Muslim is already enshrined in the 2004 constitution (Article 62); however, the Taliban may enshrine a constitutional requirement that the head of state be male and not just Muslim but a follower of the Hanafi school (as suggested in the Taliban's draft constitution).

Selection of the ruler by the "People Who Loose and Bind." The Taliban never had to deal with the challenge of electing a new leader during the First Emirate; Mullah Mohammad Omar was already recognized as the Taliban amir when the Taliban conquered Kabul in 1996, and he remained the unquestioned leader of the movement after 2001. Nevertheless, their descriptions of the appointment of all three Taliban supreme leaders always refer to selection by the so-called People Who Loose and Bind (*Ahl al-hall wa'l-'aqd*), with that ruler's selection confirmed by the pledge of obedience (*bay'a*).¹⁶ Taliban texts cite classical works, including Ibn Nujaym al-Hanafi's (d. 1561) *Al-bahr al-ra'iq* and Ibn 'Abidin's (d. 1836) *Radd al-muhtar*, as evidence that these are the two fundamental conditions of a leader's legitimacy.¹⁷

The People Who Loose and Bind is an ambiguous and underdetermined categorization. Islamic tradition refers to the electors of the ruler by this collective title, but their identity was always vague and subject to the particulars of time and place. This amorphousness is reflected in the Taliban's own descriptions of

the People Who Loose and Bind, those whose *bay'a* legitimizes a leader. Different Taliban statements describe the members of this group in different ways: as eminent individuals, Islamic scholars, prominent leaders of the jihadi and other national figures, *da qaumuno mishran* (tribal or ethnic leaders or elders), and *ashraf-ow-mukhawar* (persons of nobility and prominence). Each of these categories could be interpreted widely or narrowly. For instance, *da qaumuno mishran* could conceivably encompass elders of all tribes and ethnic groups in Afghanistan.

The People Who Loose and Bind could, in theory, be interpreted in an inclusive way and could even conceivably leave the power of appointing a leader to the population of Afghanistan. However, some Taliban leaders have, on occasion, indicated that they do not favor a one-citizen, one-vote system to choose a leader, as illustrated by the following 2012 statement from spokesperson Zabih Ullah Mujahid that was republished in 2020.

As for the issue of general elections, in Islam the votes of the people who speak and understand are worthy of respect and deference because the establishment of governance and the question of the choice of a leader is an extremely important and complex issue. It requires much thought and consideration and the distinction between good and bad which unqualified people cannot make.¹⁸

It remains unclear whether the Taliban administration will elect leaders by a small group of the People Who Loose and Bind and, if so, how they will want the members of this electing body to be selected. This ambiguity is particularly noteworthy in light of the fact that secondary sources have indicated that other options suggested by some Taliban representatives in unofficial communications include a *loya jirga* (i.e., a national *shura*, or consultation).¹⁹ If the Taliban were to establish a more representative system for selecting future heads of government and heads of state, they will have to adopt a capacious definition of the People Who Loose and Bind.

Taliban scholars have suggested that a leader has a religious obligation of accountability and that he must make and fulfil two promises of dutifulness: one to God, the other to the people he is to rule.

Issues Regarding Government Accountability

Taliban writings describe as a sacrosanct obligation obedience (*ita'at*) to leaders selected by the People Who Loose and Bind.²⁰ If the People Who Loose and Bind are defined in a narrow way—meaning that the choice of a leader falls to a small group of elites—then leaders in the Taliban’s proposed system of government may be largely unaccountable to the public as a whole. If that is the case, how would the populace in the Taliban’s true Islamic system hold their government to account?

Taliban scholars have suggested that a leader has a religious obligation of accountability and that he must make and fulfil two promises of dutifulness: one to God, the other to the people he is to rule. According to them, a leader’s failure to fulfil his attendant duties will condemn him to hell.²¹ Elsewhere, Taliban texts focus on the reciprocal duties between the state and the population to maintain piety, stability, law and order, fidelity, and correct behavior in commercial practices as a means of ensuring societal welfare and individual well-being in this world and the next. In so doing, they reflect a belief in the need for the state and society to preserve the five universal human necessities that represent the objectives of the sharia: religion (*din*), life (*nafs*), lineage (*nasl*), intellect (*'aql*), and property (*mal*).²²

These positions may reflect an embrace of the modern Islamic political notion (discussed on pages 24–25) that leadership or governance is a pact between a principal (the Muslim community, the *umma*) and an agent (the ruler) for the latter to execute the former’s obligation to implement divine law in the world. It may also reflect a modern reimagining of the traditional Islamic legal obligation of *all* Muslims to hold each other accountable by “commanding right and forbidding wrong” (*al-amr bi'l ma'ruf wa nahy an al-munkar*).²³ This concept

was explicitly invoked by a now reestablished ministry (its name is sometimes translated as the “Ministry for the Promotion of Virtue and Prevention of Vice”), which was central to the Taliban’s First Emirate.

During the First Emirate, this ministry evinced, in theory, a commitment to the concept of “commanding right” as an individual obligation for every Muslim and thus as a reciprocal obligation by which government demanded proper behavior from its citizens and citizens demanded proper governance from their rulers. In practice, though, the ministry during the First Emirate focused primarily on ensuring, often coercively, the first prong of the reciprocal obligation and far less on ensuring that government officials acted in accordance with traditional Islamic notions of good governance. Taliban texts acknowledge failings with respect to the heavy-handedness with which officials held private citizens “accountable,” but they do not admit to the lack of a reciprocal mechanism to hold government officials accountable.²⁴

As discussed below (see pages 13–14), Taliban commentaries on freedom of expression hold up as Islamic the right of the weak to demand entitlements from the dominant. In some Islamic thought and also in some Islamic constitutional regimes, the rights to criticize the government and even to sue officials are considered essential to true Islamic governance and are recognized as constitutional rights implied by a provision requiring the state to respect Islamic values.²⁵ However, it remains unclear what, if any, mechanism the Taliban envisage for ensuring the right of citizens to identify official wrongs and seek redress, whether they see this as falling within the remit of the reestablished Ministry of Commanding Right and Forbidding Wrong (*al-amr bi'l ma'ruf wa nahy an al-munkar*), or whether they think that the institutions created to uphold that principle should be restructured to protect those rights.



Afghan girls listen their teacher at Tajrobawai Girls High School in Herat on November 25, 2021. Most high school girls in Afghanistan are forbidden to attend class by the country's Taliban rulers, but one major exception are those in Herat Province. (Photo by Petros Giannakouris/AP)

Individual Rights and Duties

The Taliban have issued a variety of public statements in recent years concerning their position on key rights for those governed under a future Islamic system and key duties of a government that is tasked with protecting those rights. These pronouncements reveal some evolution in their attitudes toward women's rights, freedom of expression and the press, and minority rights; but considerable ambiguity and uncertainty remain.

Women's rights. The Taliban's political leaders are aware that future donor aid to Afghanistan from certain states will be (at least partly) contingent on commitments to protect women's rights. At the same time, the Taliban will be determined not to alienate their rank and file and conservative elements of Afghan society over this sensitive subject. The potentially incendiary nature of this issue may explain the Taliban's tendency

to refer opaquely to their commitment to women's rights within the framework of "Islamic tenets and Afghan traditions."

In recent years, the Taliban have offered a little more clarity about their views on the rights that Islam affords to women. The most detailed recent comments were provided by Taliban official and negotiating team member Shaykh Shahabuddin Dilawar in a speech at the Intra-Afghan Conference for Peace in Doha in July 2019 and in a semipublic video conference broadcast on Facebook in July 2020. Dilawar declared that Islam has given more rights to women than any other religion—and that the Hanafi *madhhab* (school of law) has given more than any other madhhab—and listed the following as "Islamic rights" guaranteed to women: "the right to live a safeguarded [*ma'sum*] life with dignity [*'izzat*] and chastity [*ifat*]," the right to marry, the right

to own and obtain property, and the right to education and to work within religious boundaries.²⁶

The Taliban have defended the lack of female education during their rule by reference to economic and infrastructural constraints.²⁷ Dilawar articulated a future commitment to girls' education with the proviso that this should not imperil Islamic requirements:

The Prophet of Islam—Peace Be Upon Him—said that all women and men must acquire knowledge—that is religious knowledge. Modern knowledge should be considered necessary in an Islamic system and by an Islamic government. Obtaining it is permissible for women, within the framework of sharia. . . . If we do not educate ourselves in modern sciences, we will remain indigent and living under the hand of foreigners. However, learning should be in a proper Islamic environment, for example, there should not be coeducation.

Dilawar also suggested that the Taliban are no longer in favor of a prohibition on women working such as was implemented under their Islamic Emirate:

Women have the right to work, in accordance with the tenets of Islam and Afghan traditions, for the improvement of the country and the well-being of their families. . . . The hijab is necessary, and women must be preserved from encroachment. . . . An environment must be constructed in which a woman can work and serve society whilst preserving her honor and that of her family.

Other Taliban officials have reiterated Dilawar's suggestion that the Taliban do not oppose women working in fields "required by society," subject to their work being conducted in a "proper" Islamic environment. However, it is unclear how the Taliban think a proper environment should be ensured. Taliban texts have emphasized the importance of the hijab, of women being accompanied by a close male relative (*mahram*) whenever they travel outside of the home, and of the prohibition on gender intermingling (*ikhtilat*). Insistence on a broad definition of such requirements could have significant ramifications for the areas of education and employment open to women.

Even after returning to power, beyond ambiguous references to areas of work that benefit "the country" and "serve society," the Taliban have not clarified which areas of employment they consider permissible for women to engage in beyond certain (female-specific) roles in the fields of health and education. The Taliban's official position on the role of women in public office also remains undefined.

Freedom of expression and the press. The Taliban's approach to media has changed significantly since the First Emirate.²⁸ The Taliban's attitude toward freedom of expression has also evolved. Although the notion was previously dismissed as a tool to undermine Islam, Taliban commentaries in recent years have referred to freedom of expression as a vital means for citizens to demand their rights and as a right protected by Islam, provided it is exercised within the bounds of the sharia.²⁹ In an October 2020 interview, for instance, the Taliban's official spokesperson offered a working definition of freedom of expression:

Generally, we can say that freedom of expression that is for the well-being of society, press freedom that preserves national interests and takes national benefits into consideration and focuses on national values and correctly critiques the system . . . that is the freedom [that we believe in and consider beneficial for society]. One thing that we should remain aware of is that limitless freedom does not exist anywhere in the world. Nobody wants unboundedness where there are no limits and one can do whatever one wants. . . . [T]his freedom should absolutely not be in contradiction with Islamic values. It should not harm national unity or, God forbid, the values of Afghanistan and the harmony between ethnic groups.³⁰

Mujahid's comments do not necessarily represent the Taliban's institutional and crystallized policy on the issue. More important, they leave significant questions unanswered. The press is permitted to critique the political system as long as the press "correctly critiques" in accordance with "Islamic values." But what constitutes a "correct" critique, and when do "Islamic values"

preclude a particular criticism? These ambiguities allow the Taliban the flexibility to adopt either a generous approach to speech and press freedoms—and it may be noted that since the Taliban’s return to power, commercial news stations have continued to operate in Afghanistan—or a very restrictive one.

Although analysts have noted that Article 34 of the 2004 constitution contains strong guarantees for freedom of expression and press freedom, Afghanistan’s Penal Code criminalizes defamation, and some courts have taken the position that blasphemy is punishable by death under the 2004 constitution.³¹ Taliban commentaries on the issue suggest an approach to freedom of expression that goes beyond prohibiting transgressions that reach the threshold of criminality and instead reflect the concept of commanding the right and forbidding the wrong.

Protection of minority rights. During the intra-Afghan negotiations that took place in Qatar in 2020 and early 2021, the Taliban demanded that Hanafi jurisprudence serve as the authority for dispute resolution.³² Afghans who favored different versions of Islam found this ominous, including its many Shiites and non-Hanafi Sunnis. They warned that participation by the Taliban in the future governance of Afghanistan could lead to an abrogation of the rights of religious minorities, including the constitutionally enshrined rights for Shia to have certain matters of law decided by reference to their (Ja’fari) legal

school’s jurisprudence, to hold high-level state offices, and to worship in ways that may be objectionable to Sunnis (for example, during *Muharram* ceremonies).

As noted, Taliban officials have declared that, in their view, Hanafi jurisprudence should be the only officially recognized school of Islamic law. In theory, this should require that Shiite Afghans be subject to Hanafi rather than Shiite law. However, in September 2020, a Taliban Political Office official and negotiating team member indicated that Shia would be recognized as Muslims with attendant rights and would be afforded their own personal status law.³³ This would appear to be a reference to the Shia Personal Status Law of 2009, enacted in accordance with Article 131 of the 2004 constitution. Such statements, however, do not allay Shia fears about a return to a regime in which the state is obliged not merely to respect Islamic legal principles generally but to respect and possibly enforce Hanafi jurisprudence, which may restrict the religious speech and rituals of Shia.



To conclude, Taliban political and constitutional thought represents a mix of efforts to remain loyal to canonical theories of governance from the Islamic tradition and the modern Islamist project of creating an “Islamic system.” This leads to a few core commitments that create tensions between the Taliban and supporters of the 2004 Afghanistan constitution.

Contextualizing Taliban Views on Legitimate Islamic Governance

To better understand the Taliban's views of what constitutes a "true Islamic system," it is necessary to see those views in the context of the intellectual and constitutional traditions from which they have emerged. This section provides a brief overview of the points of agreement and areas of ambiguity or flexibility within the classical Islamic discourse on legitimate governance.

THE CLASSICAL ISLAMIC TRADITION

The Taliban justify their constitutional views in part on the basis of their reference to premodern jurists' writings on the legal requirements for legitimate governance. The Taliban appear to have drawn some general principles for government structure and practice from the classical tradition, particularly from the writings of Hanafi scholars. These principles can, theoretically, be interpreted on a spectrum from the (relatively) democratic and liberal to the decidedly authoritarian and antiliberal. When they ruled Afghanistan, the Taliban embraced this second, antidemocratic understanding of classical principles. In their more recent communications, the Taliban have ambiguously suggested that they may have begun to rethink their position. Depending on the audience that they are addressing, the tone of their pronouncements sometimes suggests an openness to (relatively) democratic and liberal interpretations; at other times, it suggests that they remain more rigidly antidemocratic.

While it remains unclear exactly what the Taliban might agree to, one can say with certainty that they will probably *not* establish any government whose structures and practices cannot plausibly be described as ones that reflect classical principles. This subsection,

therefore, describes the classical tradition. While the Taliban regime in Afghanistan from 1996 to 2001 represented one possible way of applying classical Sunni Islamic political doctrines in a modern state setting, some modern Muslim thinkers have taken different approaches. Some have reimagined the ideal structures of the classical Sunni state in more inclusive, democratic, and liberal ways than the Taliban did prior to 2001 (a state described in their 1998/2005 constitution). Those wishing to encourage liberalism and democracy in Taliban-led Afghanistan will need to be familiar with the classical Sunni doctrines, as well as with the work of modern thinkers who have articulated a vision of a state that honors those doctrines and still leaves room for democratic and liberal practices.

Much classical Islamic political thought held that God ordained for Muslims not only the obligation to obey the powers that be, but also certain specific offices, particularly the caliphate. Islamic constitutional theorists since the origins of Sunnism have asserted that the specific office of the unitary caliphate (sometimes referred to by other titles such as the imam (leader) or the *amir al-mu'minin* (commander of the faithful) is a collective religious obligation for the Muslim community, known through reason ('aql) and certain hadith, but most importantly through the consensus of the earliest Muslims.³⁴ The necessity of the caliphal office was clearly established in scripture, and it is thus not a subject about which reasonable Muslims can disagree. Indeed, denying the necessity of the caliphate might be regarded as a grievous sin or error, if not an outright act of apostasy.

It is not far-fetched to say that the People Who Loose and Bind are described in Islamic constitutional theory in quasi-sovereign terms: they enjoy the right to delegate and appoint nominally in the name of the umma, but they are not themselves appointed, and they are unaccountable to the umma.

Traditional Islamic constitutional theory (or political theology) is built on four fundamental principles. First, it holds that the most basic constitutional structure is established by scripture and the early experience of the Muslim community. It provides that Muslims are members of a community that must recognize the authority of a single leader, who must have particular qualities, who assumes power through particular procedures, and who, once he takes office, has particular responsibilities. This office was created not by humans but by God. Humans—whether caliph, sultan, scholar, or the umma at large—do not have any constituent authority that would allow them to create a form of government without such a leader.

Second, certain aspects of the caliphal office are held to be known by law and are thus not a matter of political judgment or negotiation. Sunni jurists from the tenth century onward more or less agreed on the conditions of eligibility for the caliphal candidate and on the caliph's legally ordained duties.³⁵ The jurists held these constitutional essentials to be known through the law, the fact of which constrains in some way the freedom of the Muslim community to create and authorize new institutions.

Third, the people at large do not need to be directly involved in appointment to political office or in recognizing the authority of scholars to speak in the name of the divine law. For Sunni Muslims, the ruler's authority is derived in a sense from the appointment and the consent of the umma. However, as noted earlier, the people are represented directly by an amorphous group of electors known as the People Who Loose and Bind (or, alternatively, the "People of Consultation," *Ahl al-Shura*). Some idealistic accounts of this arrangement claim that the People Who Loose and Bind derive their representative authority from their religious knowledge or from their proximity to the popular mood. More realistic accounts

describe them as the elites who hold actual power and influence in a society and are thus the ones able to guarantee obedience to a new ruler.³⁶ The power of this group is extraordinary. It is not far-fetched to say that the People Who Loose and Bind are described in Islamic constitutional theory in quasi-sovereign terms: they enjoy the right to delegate and appoint nominally in the name of the umma, but they are not themselves appointed, and they are unaccountable to the umma.

Fourth, the relationship between the authority of rulers and scholars is not definitively delineated. Beyond some very clear areas of law or policy, there are many areas that might be seen as falling either under the authority of the scholars (*fiqh* law) or under the authority of the rulers (*siyasa* law). This uncertainty creates the potential for crisis in Islamic constitutional theory. This is not only a matter of whether a substantive area of the law belongs to one legal sphere or the other. It is also a question of a contest of knowledge and authority within each legal system, one based on text and tradition, and the other based on considerations of public interest.

In addition, the rulers and the scholars have something to say about each other's spheres of authority because, in traditional constitutional theory, the ideal ruler is supposed to be one of the "people of knowledge," someone who holds enough religious expertise to act as the final court of appeal in legal (but not creedal) questions. Classical scholars were eager to make pronouncements on whether the ruler's policy and administrative decisions conflicted with the sharia.

Historically speaking, the relationship between the scholars and sultan is more one of cooperation than of conflict.³⁷ At the same time, however, permeating the tradition, one also finds a commitment to the principle that executive action should be constrained by the

sharia and that the scholars are the ones entitled to define the limits beyond which the state cannot go. Once Muslims prioritized the regulation of political power through written constitutions, they struggled to articulate language and develop institutions that could define the relative roles of Islam (and of the people trusted to articulate Islam) and the ruler. More specifically, the challenge was to create institutions with the power to interpret the sharia for the state, to examine legislation or other government actions to ensure that they respected sharia, and, if necessary, to void any state action that violated the sharia.

For those trying to establish constitutional rules that would define the relationship between Islam (as understood by authoritative interpreters) and the public interest (as understood by the ruler), a number of questions arise. In the abstract, the sharia can tolerate some governmental rules or policies that are made in the name of expediency or public policy. That said, scholars have debated precisely how much expediency the sharia can tolerate; whether a norm established by Islamic scholars (i.e., fiqh rules) is always at the mercy of judgments of the immediate public interest; and whether a ruler can legitimately claim the right to judge or command purely on the basis of political judgment, regardless of a scholar's assertion that the judgment or command in question is incompatible with sharia.

Given that the Taliban claim to adhere faithfully to the premodern classical tradition of Islamic political thought, how do the aspects of traditional constitutional theory just described influence the Taliban's constitutional views?

In the first place, the Taliban insist that a legitimate state must act in accordance with Islamic law as understood by the Hanafi school of Sunni jurisprudence. Such a position is not unprecedented in Islamic tradition. The Ottomans and, historically, Afghanistan's rulers have also preferred the Hanafi school of jurisprudence to all others. Historically, however, most Islamic sultanates,

emirates, and other polities have tended to refrain from favoring any one school of law, either out of a commitment to legal diversity or because of the divide between governed populations and the ruling elite.

Second, the Taliban seem to want, as expressed in Article 5 of the Taliban's draft constitution of 1998/2005, "the sharia of Islam [to be] the only source of legislation in the country." "Sharia" is a term that can be used in different ways. Some Islamic thinkers use the term to refer to the body of specific rules laid down by classical jurists, rules that those thinkers consider the most plausible interpretation of God's law. It is likely that the Taliban are following this approach, and thus, to them, the term "sharia" really means Hanafi fiqh, the interpretation of God's law that has been elaborated over the centuries by credentialed Hanafi jurists. If the Taliban are using the term "sharia" in this way, however, they will find that precise rules govern only certain limited areas of social relations. They will find that many areas of public policy and governance are not governed by clear, precise rules and will conclude that these areas are subject to rules developed by the ruler using his discretion to advance what he believes to be in the public good. Although these discretionary policies have not been elaborated within the fiqh texts and thus are somewhat open-ended, the rules themselves must be elaborated and applied in a manner "consistent" with the sharia.

Consistency must ultimately be evaluated by some authority. In many polities, the power to examine laws for consistency has been left in the hands of a chief scholar or, more recently, a supreme court.³⁸ Many of these institutions have been flexible in their judgments. As long as law is consistent and does not contravene any of the rules established clearly in the scriptures or the fiqh literature, and as long as the ruler can plausibly argue that the rule seems to advance the public welfare, then the reviewer will accept the law as consistent. In short, in areas where scriptures or the official version of fiqh has not spoken precisely, many institutions performing Islamic review have granted the political powers in their

state a significant margin of appreciation to determine what laws can legitimately be applied.

The Taliban will likely be willing to follow this path. Article 9 of the draft constitution indicates that “law shall regulate the requirements and limits of the duty” to command the right and forbid the wrong. Historically, commanding the right and forbidding the wrong refers to the public enforcement of morality by various actors through a variety of means, from verbal admonition to physical force (“the tongue” and “the hand”). It has also implied a public right to supervise, check, and control public authorities. The draft constitution’s acknowledgment that the precise ways in which this “reciprocal duty” may be exercised requires legal regulation is an example of the fact that with respect to many—indeed most—areas of human behavior, “the sharia of Islam” does not represent or enforce itself. There are many areas of ambiguity and conflicting values that must be in some way regulated by law.

Third, perhaps surprisingly, notwithstanding their regular invocation of Hanafi interpretations of Islam as the only valid ones, the Taliban frequently demonstrate commitments that depart from classical Hanafi doctrine and are instead much more in line with modern political Islam and assumptions about state-society relations. For example, Article 10 of the draft constitution declares that “training the Muslim individual, Muslim family, establishing a completely Islamic society, striving for unity of the Muslim nation, and spreading Islamic education are responsibilities of the Islamic Emirate of Afghanistan.” This statement is a more comprehensive and invasive interpretation of the duties of the ruler than what classical constitutional doctrines would have claimed for an emirate. For example, the most prestigious classical statement on constitutional law, al-Mawardi’s *al-Ahkam al-Sultaniyya*, asserts that the ruler must “guard the faith” and “personally oversee matters in order to the manage public policy and guard the faith,” but there is no assumption that the public authorities have the capacity to transform society and the individual in this way. Rather, the assumption is that religious

education and moral transformation are achieved through local-level practices and institutions. This is not to say that the Taliban are “wrong” in this aspiration, only that their views are as informed by modern political Islam as by a pristine reading of premodern tradition.

Fourth, the “Islamic Council” envisioned in Articles 46–51 of Chapter 3 of the draft constitution represents a level of institutionalization of constitutional values that is inspired by classical thought and represents a plausible attempt to realize institutionally some elements of classical thought in a modern form. Nevertheless, classical jurisprudence does not require the establishment of an Islamic Council. In theory, Islamic governance could be carried out through some other institutional form. Al-Mawardi, for example, requires the ruler to “appoint men who are reliable and sincere and of good counsel to perform the functions or take care of the funds he charges them with,” and there is an assumption that in the dispensation of all of his duties the ruler is relying on the counsel of scholars and other experts in matters of public concern. The form that this consultation takes, however, is at the discretion of the ruler himself, who is the locus of all public authority. Moreover, no classical work of jurisprudence would refer to this as the “legislative organ,” as Article 46 does. In short, all powers of the Islamic Council as articulated in Article 50 can be clearly discerned from classical priorities of governance, but they represent a degree of formality and institutionalization reflective of modern Islamic constitutionalism (roughly dated to the mid-nineteenth century) more than the unwritten rules of premodern Islamic constitutional law.

Fifth, Taliban statements on the role and powers of the amir al-mu’minin (commander of the faithful) represents a hybrid of premodern and modern constitutional concepts. To begin, there is a somewhat inflated quality to this title. In classical scholarship, the title “amir al-mu’minin” is one of the titles of the caliph, and it traditionally signifies a claim to be the imam or caliph of the entire Muslim community. The Taliban do not assert that the leader of Afghanistan has any pretensions to this



Zabih Ullah Mujahid, the Taliban's chief spokesperson, addresses a gathering of religious leaders at the Loya Jirga Hall in Kabul on August 23, 2021. Mujahid is also the deputy information and culture minister of the Taliban's caretaker government. (Photo by Victor J. Blue/New York Times)

role. Also, the Taliban's insistence in Article 53 of the draft constitution that the ruler adhere to only the Hanafi *madhhab* is not a requirement that Islamic constitutional thought has traditionally placed upon a ruler or upon his people—although it is one that some past Afghan constitutions have imposed. Similarly, the reference in Article 55 to the power to “ratify laws” reveals tacit acceptance of the modern state model over the classical model of governance in Islam. This reference reflects a recognition that the rules of Islam are not organically applied in courts by autonomous judges but require codification and enunciation by the state. Moreover, the problem of who applies the sharia, and how, raises again the question of the division of labor between ordinary laws derived from the Hanafi legal school and laws that govern areas where the Hanafi jurisprudence is sufficiently open-ended (or silent) that rulemaking is a matter of discretionary public policy or state-formulated law.

Sixth, and finally, the draft constitution does not indicate procedures for the election and possible removal of the amir al-mu'minin. This startling omission might reflect the fact that the draft first appeared in 1998 and was eventually published in 2005, at which point the late Mullah Mohammad Omar was already the Taliban amir. At those times, key decision-makers may have considered it inappropriate to explicitly address these questions and, by inference, envision the replacement or removal of the venerated founding leader of the Taliban movement.³⁹ Other texts (and Taliban practice) indicate that the ruler is elected by whatever group has been designated as the People Who Loose and Bind; some sources also suggest that the Taliban deem election by a national council or loya jirga as legitimate.

This discussion has not sought to pass judgment on whether the known constitutional views of the Taliban

are or are not authentically Islamic. The point is that they are indebted not only to classical texts but also to many modern assumptions about the role and structure of constitutions for modern states. The Taliban's views are not mere facsimiles of treatises of Islamic jurisprudence before modernity. This fact suggests that some range of their views should be regarded as subject to negotiation and reinterpretation and that a fuller understanding of these possibilities requires putting them in the context of modern Afghan constitutional history and the broader discourse around state legitimacy developed by twentieth- and twenty-first-century Islamist thinkers.

MODERN AFGHAN CONSTITUTIONALISM IN LIGHT OF CLASSICAL ISLAMIC TRADITION

The Taliban present themselves simultaneously as Islamic revivalists and as Afghan nationalists, upholding the Afghan tradition of governing themselves according to constitutions that are drafted without foreign intervention and that guarantee respect for Afghanistan's Islamic traditions.⁴⁰ They thus insist that when in 1997 they began to prepare to draft a constitution, their first step was to study past Afghan constitutions. Given their commitment to be both Islamic and distinctively Afghan, it makes sense to briefly explore the rich tradition of Afghan Islamic constitutionalism to understand how this tradition may inform the Taliban's current understanding of a true Islamic state. This history might also uncover alternative options for an Afghan state structure and for provisions related to Islam and the state—options that negotiators could discuss in the hopes of finding a form of government that has proven, in the past, to be acceptable to a wide range of Afghans.

The first Afghan constitution was promulgated in 1923 by Amir (later King) Amanullah Khan, the grandson of the "Iron Amir" Abdul Rahman Khan (r. 1880–1901), who had united modern Afghanistan and helped to negotiate the "Durand Line" between an independent Afghanistan and the British Empire in India. The 1923 constitution inaugurated a distinctly Afghan constitutional tradition. Since 1923, almost every successive Afghan government has

drafted a new constitution to mark its coming to power and to establish the grounds on which it will assert its legitimacy as a distinctly Afghan Islamic government. With only one exception, all Afghan constitutions have invoked Islamic ideas of good governance. Each has reimagined those traditional ideas in a slightly different way—to reflect the ideological commitments of the new regime's elites and to address the evolving needs of the country. Among these successive constitutions, a few patterns are notable.

First, Afghan constitutions have almost invariably announced that the head of state or government assumed power through a process that is implicitly modeled on the selection of a caliph in the classical tradition. Most state that a self-proclaimed ruler who has demonstrated the power to control the country, defend the borders, and keep the peace may have his claim to power legitimated by the approval of a body of electors—a group that plays the role of the traditional People Who Loose and Bind. Different regimes, however, have recognized different qualifications for the electors whose ratification was necessary, meaning that different regimes have recognized different constituencies as qualified to ratify the rule of a leader.

Second, again following classical thought, all constitutions but one have insisted that the discretionary power of the ruler and his government is limited by an overarching duty to rule in accordance with Islamic principles. However, within Afghanistan, as throughout the world, one can find an enormous variety of Islamic factions, each embracing a different approach to ritual and, more important, to Islamic legal interpretation. In some cases, constitutions have specified a particular interpretation of Islam as the one that will rigidly constrain the state. In other cases, constitutions have suggested that state institutions are free to examine different possible interpretations and are free to act in accordance with whatever interpretation the government considers to be most beneficial to the health, safety, and moral welfare of the people.

When powerful factions permitted a broad cross-section of their fellow citizens to participate in the selection of a ruler or the election of legislators, those factions often tried to constrain the freedom of that government to ensure that it followed their preferred interpretation of Islam.

Arguably, there has been an inverse relationship between, on the one hand, the inclusiveness of the procedure by which a government is recognized and its officials selected and, on the other hand, the latitude that a government is permitted to select, for itself, the version of Islam that it will follow. When powerful factions permitted a broad cross-section of their fellow citizens to participate in the selection of a ruler or the election of legislators, those factions often tried to constrain the freedom of that government to ensure that it followed their preferred interpretation of Islam. Conversely, if a small group of Afghans tightly controls the selection of a leader and the composition of his parliament, that faction is often willing to give that leader and his government more discretion to follow whichever version of Islam they prefer.

Afghanistan's first constitution, Amanullah Khan's 1923 constitution, implicitly embraced the classical Islamic idea that rule can be established by conquest and will be legitimate as long as the conquest is followed by formal recognition from the political and religious elite, and as long as the ruler legislates and pursues policies consistent with core principles of Islamic law.⁴¹ In terms of defining electors, the 1923 constitution did not explicitly describe the qualifications of the people who approved the king's accession or who must approve a successor.⁴² Having been selected, the king was obligated, however, to respect the principles of Islam. As initially drafted, the constitution did not require respect specifically for Hanafi interpretations of Islam. Article 2 proclaimed Islam to be the official religion of the state. Article 4 provided, "His majesty the king on ascending the throne will pledge to the nobles and to the people that he will rule in accordance with the principles enunciated in the sharia and in this constitution and that he will protect the independence of the country and remain faithful to his nation." Article 5

declared "the king [to be] the servant and the protector of the true religion of Islam." As originally drafted, then, the 1923 constitution left the ruler significant discretion to enact any laws that he personally considered to be Islamically legitimate, impliedly even if those laws were inconsistent with Hanafi Islam (or indeed any other particular version of Islam). As things turned out, the king consistently pursued policies that tribal leaders and influential conservative Islamic scholars considered immoral—most famously when he ordered his wife to appear in public unveiled. By 1925, rebellions fanned by conservative Hanafi ulama forced the king to amend the constitution specifically to require that state law and policy would reflect traditional Hanafi interpretations of the sharia, rather than the modernist versions preferred by the king. When the king continued to follow policies informed by modernist Islam, another rebellion in 1929 forced him to flee the country.

Following a prolonged war of succession, a new Afghan king in 1931 drafted a new constitution, one that continued to assert the legitimacy of the sitting king in classical terms—noting that he had established his ability by force to pacify the country, had been recognized by representatives of the people, and had recognized an obligation to respect Islamic legal principles. The 1931 constitution appeared to condition rule on acclamation by some type of representative body.⁴³ Simultaneously, though, this ruler, elected by a more diverse group of Afghans, felt that he had less discretion than his predecessor to interpret Islam as he thought best for the country.⁴⁴ Nadir Shah showed systematic respect for Hanafi Islamic institutions and Hanafi interpretations of the sharia. He created institutions through which the government consulted with scholars, and, as a result, was able to avoid policies that would have provoked rebellion. When Nadir Shah died, his son and heir, Zahir Shah, was an infant and his regents ruled under the 1931 constitution.⁴⁵

In force for thirty-three years, the 1931 constitution is to date Afghanistan's longest-lasting.⁴⁶ However, by the time Zahir Shah reached his majority in the early 1960s, Afghanistan had undergone remarkable social changes. Wishing to respond to the demands of a growing urban bourgeoisie, the young king oversaw the drafting and adoption a new constitution in 1964, one that moved significantly in the direction of establishing a liberal constitutional monarchy.⁴⁷ According to Article 51 of the 1964 constitution, the popularly elected "Shura (Parliament) in Afghanistan manifests the will of the people and represents the whole of the nation," When a king abdicates or dies, he is to be succeeded by his brothers, in order of age. But if there is no qualified brother, the king is to be selected by an "electoral college" that serves the traditional function of the People Who Loose and Bind. This college primarily comprised elected parliamentarians.⁴⁸ The 1964 constitution guaranteed to all Afghan citizens a wide range of individual rights, including equal protection rights, which went far beyond those laid down in the 1931 constitution. In order to reconcile the state's new commitment to liberal rights with its traditional claim to Islamic legitimacy, the 1964 constitution gave the Afghan government significant latent power to enact statutes and pursue policies that promoted what it, in its discretion, determined to be in the public good. Hanafi law would be applied only when the state had enacted statutes that imported Hanafi rules or where statutes had failed to provide any rule at all.

The move away from privileging Hanafi Islamic law took a further huge step backward under a series of republican and communist constitutions enacted during the 1970s and 1980s. After a military coup ended the monarchy in 1973, the leader of the coup established a short-lived, one-party state. Its 1977 constitution provided that the president assumes power upon the approval of a party-controlled *loya jirga* that acted as an electoral college. This body was not, however, representative; it was instead composed, as spelled out in Article 65, entirely of figures selected directly

or indirectly by the ruling party. According to Article 77, the ruler had to be a Muslim but not necessarily a Hanafi Muslim. Having ensured that a small group of party elites controlled the makeup of the government, the constitution left that government enormous latitude to identify for itself the version of Islam that would shape state policy, freedom that predictably led the state to act in accordance with Islamic socialism—a version of Islam that was spreading in Pakistan and elsewhere in the Muslim world.⁴⁹ Thus, the president was required to swear an oath that he would "protect the basic principles of the religion of Islam" but not necessarily the principles as understood by the Hanafi legal school. The constitution contained no provision requiring that statutes be consistent with Hanafi Islam or any other specific version of Islam. When statutes failed to provide a rule of decision for a dispute, the 1977 constitution did not require courts to look to Hanafi *fiqh* for a rule. Article 99 allowed them to look either to Hanafi *fiqh* "or the Shariat of Islam" as the judge thought most appropriate to "secure justice in the best possible way."

After the republican government was ousted by communist forces in 1978, the new communist government tried to impose by force a series of revolutionary economic and social policies.⁵⁰ Such a program was doomed to failure in a society as conservative as Afghanistan, and it inspired an avalanche of separate, ill-coordinated revolts in almost every part of the country carried out by a variety of militias, each representing a different section of the polity and different visions of a true Islamic state. In 1987, the communist government promulgated a new constitution that tried, unsuccessfully, to assert its legitimacy in modernist Islamic terms. The 1987 constitution argued implicitly that the government's policies fell within areas left to the discretion of government and that, by pursuing social justice, those policies were clearly in the public interest.⁵¹ This ploy proved unconvincing to the proliferating Islamist militias, and after five more devastating years of civil war, the communist government fell.

In 1992, after finally taking power, the fractious coalition of rebel militias (collectively known as the mujahideen) sought to form a government. Eventually, leaders associated with the most powerful Sunni-oriented militias produced a provisional draft constitution that strongly embraced a vision of Afghanistan as a state that sought to operate according to Hanafi understandings of Islamic law and governance. This document remained unratified at the time that the mujahideen government was ousted in 1996 by a newly formed Islamist militia, the Taliban. Nevertheless, it was surely among the constitutional documents reviewed by the Taliban when they developed their own draft constitution, and it was among the documents studied by the commission that prepared the first draft of the 2004 constitution.⁵² According to Article 50 of the mujahideen draft constitution, ultimate power rested in a “High Council” that exercised the electoral powers of the traditional People Who Loose and Bind, among many other expansive powers. This High Council was not an elected body but was rather (as laid down in Articles 46 and 47) a body of “ulama, commanders and jihad leaders”—presumably meaning that it was composed of representatives selected by the victorious militias. According to Articles 3 and 4, the official religion of the state was to be Islam as understood by Hanafi scholars. Islamic sharia, and by implication Hanafi fiqh, was declared in Article 1 to be “the only source of legislation in the country.” The same article stipulated, “No laws or regulations can be enacted which contradict the principles of Sharia.” Article 22 specifically noted that alongside the punishments criminalized by the statutes, the state can impose traditional Islamic punishments for acts deemed “offenses” by Islam. The mujahideen constitution represents a dramatic attempt to reconstitute Afghanistan as a Hanafi-centric state.

The draft constitution prepared by the Taliban in 1998 and published in 2005 draws in many ways on the mujahideen constitution. It is notable, however, insofar as it not only requires the selection of a Hanafi Muslim through a nonrepresentative process, but it refuses to give its

carefully selected Hanafi Muslim leader discretion as he tries to understand and realize “Islamic” values as he thinks best, requiring instead that all policies conform to the dictates of Hanafi fiqh.⁵³ At the same time, it contains no formal mechanism to enforce the requirement that all state action respect Hanafi understandings of Islamic law.

After the fall of the Taliban in 2001, a new government spent three years drafting a new constitution. The 2004 constitution envisions a leadership selected not by narrow elites but rather through popular election. Article 62 does not require that the head of state or the head of government be a Hanafi Muslim. It does provide that, in most situations, a judge who cannot find a rule of decision in statutory law should apply a rule taken from Hanafi fiqh. But the constitution also appears to leave the state considerable discretion to enact statutes that depart from Hanafi fiqh, as long as the statutes do not depart from the basic principles of “the religion of Islam.” In short, the state can enact statutes consistent with Hanafi scholars’ understandings of correct behavior; however, if the state deems the public interest is better served by adopting laws that follow other understandings of Islam—including, in theory, liberal modernist versions—the state is permitted to do so.



How does this brief background of Afghanistan’s constitutional history inform our understanding of the Taliban’s constitutional views and our understanding of areas in which they might depart from the First Emirate model?

Afghan constitutions almost invariably require the government to rule in a manner consistent with Islamic principles—a principle that can be understood very differently depending on what version of Islam one follows. Historically, Afghan constitutions seem to have recognized two different ways in which the government’s discretion can be constrained when it comes to selecting its preferred version of Islam. The first is to ensure that the leaders of government are selected

The concern to distance the idea of an Islamic state from associations with tyranny and totalitarianism, not only by portraying it as regulated by law and responsible to the people but also as safeguarding “civil freedom” and “public liberties,” has been a constant theme in twentieth-century Islamic writing.

through a nonrepresentative process that guarantees, implicitly, the selection of a person with the “correct” understanding of Islam. The second is to require that the government (possibly led by someone who personally leans toward the “wrong” interpretation of Islam) act in accordance with a constitutionally mandated “correct” version of Islam. The Taliban’s draft constitution and the 2004 constitution are each unusual, albeit in different ways. The former is remarkable insofar as it employs both of the available tools to ensure that the government can be trusted to follow a rigidly Hanafi understanding of Islam. The 2004 constitution is aberrant insofar as it employs neither.

If there is any middle ground to be found between factions who prefer the 1998 Taliban constitution and those who prefer the liberal democratic constitutionalism to which the 2004 constitution aspired, the process of compromise might start by stating that some offices will be selected through representative processes and others will be selected through some nondemocratic form of appointment. Alternatively, some middle ground might appear in the context of discussions about the nature of the institutions that will be trusted to articulate an official interpretation of Hanafi Islam that the government is bound to obey and that will have the authority to strike down any state actions that are inconsistent with this official interpretation of Hanafi Islam. To date, the Taliban have not proposed a mechanism by which Hanafi Islam’s constraints on state discretion should be interpreted and enforced against a government.⁵⁴ Could they imagine an institution that they would trust to control a democratically elected government and to ensure that this government never acted in a manner that authoritative Hanafi scholars felt was repugnant to Islam? There may be room in discussions with the Taliban for significant creativity in finding compromises that are acceptable to both sides at the negotiating table.

POSTCOLONIAL ISLAMIST POLITICAL THOUGHT OUTSIDE OF AFGHANISTAN

International and Afghan actors looking for ways to engage productively with the Taliban in the pursuit of a compromise between the post-2004 order and the order established under the First Emirate may look to the experience of other countries that have tried to manage constructively the countervailing demands of constitutionalists (usually liberal) and Islamic political factions demanding that the state tie itself more closely to Islam.

The concern to distance the idea of an Islamic state from associations with tyranny and totalitarianism, not only by portraying it as regulated by law and responsible to the people but also as safeguarding “civil freedom” and “public liberties,” has been a constant theme in twentieth-century Islamic writing.⁵⁵ By now, this literature includes dozens, if not hundreds, of scholarly monographs on Islamic constitutional jurisprudence (*fiqh dusturi*) in a comparative framework and on “the principles of government” (*usul al-hukm*) and “system of government” (*nizam al-hukm*) in Islam, as well as some studies that continue to frame the inquiry in terms of “religiously legitimate governance” (*siyasa shar’iyya*) or even the caliphate.

Alongside this technical academic literature lies the discourse developed by Islamist public intellectuals. Although Muslim Brotherhood founder Hasan al-Banna’ himself wrote on “the system of government” in Islam, Abu’l A’la Mawdudi, the Pakistani thinker, activist, and pioneer of modern Islamist political thought, formulated the most comprehensive constitutional theory by a major Islamist thinker.⁵⁶ Since the 1970s, many Islamist thinkers have written treatises on the kind of Islamic state Islamists should be striving for. Activist intellectuals such as Muhammad al-Ghazali, Hasan al-Turabi, Yusuf al-Qaradawi, ‘Abd al-Salam Yasin, and Rashid al-Ghannushi have produced a substantial and diverse

body of writing and discourse.⁵⁷ However, it is possible to summarize some points of general consensus that together form a kind of modal modern Islamic constitutional theory outside of Afghanistan.⁵⁸

The first of these points of consensus is that reason and revelation make clear that governance (*hukm*) is a necessary condition for mankind. Whatever freedom Muslims have to extend and revoke authorization for rulers, they are not free to choose to not be governed at all. Government is a form of social contract, and the ruler is an agent of the people chosen by some form of consultation among the people or their representatives. It follows that the ruler is constrained by law, is accountable to the people (or their representatives), and is subject to removal when his violation of his duties exceeds certain boundaries.

Second, government in general is characterized first and foremost as the application of a preexisting law, the sharia. The social contract between the ruler and the ruled is largely seen as a pact between a principal (the umma) and an agent (the ruler) for the latter to execute the former's divinely imposed obligation to implement divine law in the world. Thus, the law is portrayed as largely preexisting the political sphere and as waiting to be discovered rather than to be made, particularly through an independent judiciary. In constitutional terms, because the sharia is declared to be the supreme law and the source of all legislation, there are certain ordained limits on the legislative authority of any state office or institution.

Of course, no one holds that the sharia has legislated fixed and unalterable preexisting rules for every conceivable area of social life. The task of government is not only to apply the law that the jurists discover (*fiqh* law) but also to issue policy and administrative directives in areas untouched by the jurists or where flexibility is required. Thus, modern Islamic constitutional theory explicitly anticipates a realm of lawmaking that is distinct from law derived from classical *fiqh*, including in the area of constitutional design itself. Almost always, this kind of

lawmaking is framed in terms of the Quranic concept of "consultation" (*shura*). Such laws are not legislated without limitations, however. They must aim at the welfare of the umma (*maslaha 'amma*, or the "public good"), and they must not violate the sharia. Thus, a major theme in modern Islamic constitutional theory is the idea that all laws made and enforced by a state must either be compatible with the sharia or, at least, not repugnant to it.

Third, modern Islamic constitutional theory, while stressing the primacy of the sharia, elevates the status and role of the people in new ways. The Islamic umma preexists any particular political regime or contract of rulership. The umma is almost always portrayed as the "source of all political authorities" (*masdar al-sultat*). Islamic constitutional theorists often refer to the "sovereignty of the people" (*siyadat al-umma* or *siyadat al-sha'b*) on the basis of it being the source of the legitimacy of all political authorities and having effective rights of appointment, supervision, and removal over the government. Modern Islamic constitutional theory stresses the participatory role of the umma not only in electing and appointing the government but also in whatever process is envisioned for institutionalizing *shura* and policy-oriented lawmaking. Thus, while concepts such as the People Who Loose and Bind remain operative, there is a general (if not universal) acceptance of the idea that those representatives may receive their authorization to loose and bind by election from the people more broadly.

Fourth, the grounding of the umma's status as the source of political legitimacy has increasingly been based on its collective status as "God's caliph," entrusted by God with the execution of law and political power on earth. This theological doctrine has become essentially canonical. The doctrine of the universal *caliphate of man* is an almost ubiquitous trope in contemporary Islamic political and constitutional theory.⁵⁹ This principle also implies limitations on the sovereignty of the people, which is not free to violate God's law and its moral commands. This is the most commonly cited difference between Islamic and Western democratic theory by thinkers who wish to

assert the existence of some kind of democracy within Islam and who, like the Taliban themselves, frequently see non-Islamic democratic theory as resting on a completely limitless (and thus amoral) popular sovereignty.

Finally, constitutions are often used as important sites for declaring ideologically transformative goals within society. Moral goals related to the family, social solidarity, religious education, social welfare, public dress and modesty, and the ethical conduct of politics are often articulated as constitutional obligations of an Islamic state.⁶⁰

Thus, the aspects of constitutionalism that are more or less subject to agreement in modern Sunni Islamic thought are that the people are, broadly speaking, the source or origin of the legitimacy of political institutions; that they can elect and supervise political officers; and that they can participate in various forms of consultation and lawmaking. Similarly, it is broadly agreed that elected rulers are agents or civil servants subject to the law and limited in their authority, and that all laws and enactments are subject to some kind of sharia review. This is what is meant when some contemporary Islamic constitutional theorists claim that the state in Islam is neither theocratic nor fully secular but rather a “civil state.”

Any scheme that is capable of garnering so much agreement across the full ideological spectrum of modern Islamic thought, however, must be masking some significant ambiguities. Significant points of disagreement and debate within modern Islamic constitutional theory include the following.

First, how far does the constituent authority of the umma extend? Is the umma free to create new institutions and forms of governance suitable to its time and place? Or is the specific office of the caliphate a permanent obligation of the sharia in principle? (Incidentally, this would seem to not be a major issue in Afghanistan, because the Taliban do not claim to be reestablishing the caliphate, per se, despite their use of the term “amir al-mu’minin.”)

Second, how broadly based must the election of the ruler or other representatives be? Although Sunni legal thought has always held that the caliph is an elective office—elected by selection (*ikhtiyar*) rather than, as within the Shia school of thought, by designation (*nass*)—it does not follow that participation in the election of the caliph needed to involve a wide segment of the population. Technically, the election was by the People Who Loose and Bind, which could be an ad hoc council of notables or even just the sitting caliph, who could “elect” his successor on the grounds that he was best placed to know what was in the umma’s interest. By and large, modern Islamic constitutional theory is not comfortable with limiting the election of the ruler to a limited group of the People Who Loose and Bind, but this nevertheless remains an issue of discussion.

Similarly, there is disagreement about the source of authority of other intermediary or representative bodies. Traditionally, scholar-jurists and whoever constituted the People Who Loose and Bind of the time stood in between the ruler and the people, and to that extent they mediated the ruler’s power. But they occupied this role on their own authority, whether epistocratic (in the case of the scholars) or functional (in the case of the military and bureaucratic elites who claimed to fulfil the role of the People Who Loose and Bind), rather than by any authorization or consent of the people; accordingly, they are often said to be the ones who represent sovereignty. It is an active point of debate whether their practical political authority depends on the consent and authorization of the people, or whether it can be imposed on the people because of the People Who Loose and Bind’s intrinsic capacity to govern in the people’s interest.

Thus, while all Islamic constitutional theorists make some kind of “application of the sharia” central to the understanding of political legitimacy, there is substantial disagreement about what it means to apply the sharia, what is timeless and what is flexible in the sharia, and whether the sharia is more or less identical to the classical fiqh tradition or is instead a living process of reinterpreting the meaning of revelation based on

present circumstances (*ijtihad*). Consequently, there is ambiguity as to the core constitutional question of how free political authorities are from legal and moral constraints to legislate about public matters.

Related to this problem, there is disagreement about the meaning and institutionalization of sharia adjudication. What should modern codified state law be evaluated against to determine if it is compatible with sharia: traditional fiqh law as found in the compendia and summaries of the legal schools, some new direct evaluation of what the primary sources of revelation require, or some combination of the two? Are all bodies of law treated equally in terms of the requirement of sharia compatibility? Or is there a distinction between areas of law where the sharia is thought to speak directly, and possibly definitively, and areas of the law where the umma and its representatives have greater freedom to pursue the public interest?

There is a further dimension to the question of sharia adjudication, namely, who decides on the question of the compatibility of state law with the sharia, and what is the implication of a finding one way or the other for the bindingness and validity of law within a given state? There is significant disagreement over who holds the authority to speak in the name of the sharia in the modern state. More intriguing perhaps is the question of the authority of the sharia as such. Suppose a new law is held to be in violation of sharia principles. Does this immediately invalidate a law, or does it merely subject it to further scrutiny or revision? When other branches or authorities of government override an initial judgment of sharia incompatibility, should this action be seen as governing beyond the limits of the “sharia,” or might the overall dialectical process of enacting law and policy in consideration of revealed texts, traditional scholarly knowledge, and temporal considerations of the umma’s best interest itself be what it means to govern within the sharia?

It is an open question what, if any, form of government can satisfy the Taliban’s core principles while still

retaining some elements of the order established in the 2004 constitution. Those who wish to explore this question might fruitfully consider some modern experiments in Islamic governance—experiments that involve practices and institutions that might, in theory, be adopted in Afghanistan. The next section describes some of these experiments and explains that each different set of practices and institutions have their own pros and cons.

CONTEMPORARY ISLAMIC CONSTITUTIONS OUTSIDE OF AFGHANISTAN

The challenge facing those who are trying to imagine a form of Afghan government that incorporates elements both of the Taliban’s previous government and of liberal democratic constitutionalism is not unprecedented. In other polities, competing groups, each believing themselves to be “Islamic,” have struggled to develop a mutually acceptable design for “legitimately Islamic” government. In those polities, successful systems emerge only when groups with competing understandings of Islam are willing to demonstrate flexibility and sophistication, particularly with respect to the questions of how to implement the principle that the sharia is the “chief” or “only” source of legislation, and how to develop acceptable modes of government that involve more than a single, ideologically homogeneous Islamic Council with a monopoly on legislative authority.

Increasingly, the constitutions of Muslim-majority states reflect the principles that the preceding subsection described as principles on which Islamic constitutional thinkers are in consensus. Insofar as those principles can be interpreted and applied in different ways, different constitutions have taken different approaches.

The first written constitutions in Muslim countries—namely, in Tunisia (1861), the Ottoman Empire (1876), and Egypt (1882)—came about in the context of European imperial pressure and the desire of various local elites to form strong, centralized states capable of resisting that pressure. They were the products of efforts to stabilize and strengthen existing state structures.

Taken together, the constitutional texts adopted during the Persian constitutional revolution of 1906–11, particularly the 1907 Supplement, can be characterized as the first constitution to bear the hallmarks of twentieth-century Islamic constitutionalism. The key feature of that constitution was found in its 1907 Supplement, which, after considerable conservative and clerical opposition to the first version, revised the legislative powers of the National Consultative Assembly in a new Article 2: “At no time must any legal enactment of the Sacred National Consultative Assembly . . . be at variance with the sacred rules of Islam or the laws established by His Holiness the Best of Mankind (on whom and on whose household be the Blessings of God and His Peace).”⁶¹ In order to guarantee the sharia compatibility of all enacted laws, the same article provided for a council of religious scholars to review legislation:

It is hereby declared that it is for the learned doctors of theology (the “*ulama*”) . . . to determine whether such laws as may be proposed are or are not conformable to the rules of Islam; and it is therefore officially enacted that there shall at all times exist a committee composed of not fewer than five *mujtahids* [scholars of the highest rank] or other devout theologians, cognizant also of the requirements of the age.

Once constituted by the National Assembly with the advice and consent of the scholars, this committee would be authorized to

carefully discuss and consider all matters proposed in the Assembly, and reject and repudiate, wholly or in part, any such proposal which is at variance with the Sacred Laws of Islam, so that it shall not obtain the title of legality. In such matters the decision of this ecclesiastical committee shall be followed and obeyed, and this article shall continue unchanged until the appearance of His Holiness the Proof of the Age.

Although the Persian constitutional experiment was short-lived, some of its innovations were resurrected in the postrevolutionary constitution of the Islamic Republic of Iran.⁶² Moreover, some features of this Iranian experiment have since regularly appeared in the constitutions of other Islamic states, particularly Sunni countries.

First, because modern Islamic constitutional theory is a reaction to the rise of the modern state, it tends to assume that the government will include a representative, consultative body with some legislative and policy-making authority. The mechanics by which the body is selected (and thus the mechanism by which representativeness is guaranteed) differ from country to country. In some cases, elections are freely contested. In other cases, they are managed by elites who strive to guarantee the moral fitness of candidates.

Second, Islamic constitutional theory is designed to ensure that any democratically elected legislature or executive is constrained to respect the sharia, even at times when a majority of citizens demands that it do otherwise. The mechanics of guaranteeing respect for the sharia, however, can be different in different countries. In some cases, an Islamic system will establish a requirement that the sharia be consulted during the process of lawmaking, rulemaking, or policy setting. In other cases, an institution is established to ensure that the government recognizes the sovereign superiority of the sharia over any enacted statute or executive rule. Usually, this is done through a review of laws or government policies for consistency with sharia norms and the voiding of any government laws or actions that do not conform to those norms.

Third, whether the sharia is embedded in the process of lawmaking or policymaking or is instead a standard against which to measure laws or policies in force, the sharia must be interpreted. Some kind of body has to be given the authority to define the sharia, either for lawmakers who are deciding what sort of law to craft or for people who want to be sure that laws that are being enforced are, in fact, consistent with God’s law.

Fourth, Muslims up until the modern age uniformly assumed that the custodians of the meaning and interpretation of the sharia must be classically trained scholars of Islamic law; in the modern age, many Muslims, including the Taliban, continue to accept this. Nevertheless, some modern Muslims have ceased to recognize the authority

of classically trained scholars as exclusive. Some modern Islamic constitutional theory argues that the authority to interpret Islamic law may reside not only with the ulama but with other kinds of experts as well. If people disagree about who has authority to interpret the sharia, then they will naturally design different institutions for the purpose of identifying and enforcing Islam's constraints on government power. Egypt says that the question of whether a state law conforms to the commands of Islam is a question to be resolved by judges in the national court system. Clerical training is not required for appointment as a judge in Egypt; indeed, most judges do not have such training. In Pakistan, Islamic review is performed in the first instance by secular judges, but their decisions are subject to review by a special branch of the Supreme Court, one in which several clerically trained judges serve alongside a majority of regular, "secular" judges. In Iran, conversely, Islamic review is performed initially by a court composed exclusively of clerics, but their judgment is, under some circumstances, subject to review by a special court composed equally of clerics and nonclerics.

Islamic review is not the only mechanism available to countries that want to ensure their government legislates in line with sharia norms. Some countries have established advisory bodies that can help legislative and administrative entities understand what the sharia requires and can help them review (or even draft) laws that comply with sharia norms. Some countries already have a procedure in place for Islamic review; in such countries, the advisory body helps lawmakers create laws that will survive eventual challenges before the institution with the power of Islamic review. In other countries, the advisory body exists where there is no mechanism for Islamic review, meaning the advisory body is the sole guarantor of respect for Islam. In 1962, a new Council of Islamic Ideology was established in Pakistan with these powers.⁶³ The council continued to operate even after Pakistan's judiciary was given the power of Islamic review. In Egypt during the 1970s and 1980s, parliamentary subcommittees were assigned the task of reviewing legislation and advising the full parliament as to any

legal reforms that might be advisable in a country that is committed to ensuring that state law respects the principles of Islamic law.⁶⁴ In Indonesia, the constitution does not require the state to legislate in accordance with Islamic principles; nevertheless, powerful Muslim political factions have pressured the government to demonstrate respect for Islamic norms. As a result, presidents have created special advisory boards to produce reports that will lead to better understanding and application of Islamic law in areas such as family law and banking.⁶⁵

Most self-styled Islamic states today explicitly recognize some legislative or executive role for popularly elected officials. Some of them, however, provide for ultimate supervisory authority to be held by a ruler appointed by a small elite group of scholars, although the powers of this supervisor and the method of selection differ from country to country. All of these states create a constitutional requirement that the government (however structured) refrain from ever acting in a way that requires people to violate the core principles of Islamic law. Again, however, agreement on this basic principle devolves into disagreements about how best to apply it. Self-styled Islamic states diverge on which version of Islamic law the government should respect, who is qualified to interpret Islamic law for the state, and the institutional mechanisms through which the review should take place.

In recent decades, many constitutions in the Muslim world have been revised to reflect demands for a more explicitly "Islamic" state. Where constitutional Islamization has been successful, it has tended to reflect the intuitions of the population. In some countries, however, the population is divided over whom to trust on questions of Islamic jurisprudence. Similarly, the population may be divided over what sort of government is trusted to govern efficiently in the public interest. In countries divided on one or both of these axes, the challenge of developing a sustainable program of Islamic reform is complex; it often requires the development of hybrid institutions that will be acceptable to groups who have very different assumptions about Islamic interpretation or about ideal government structure.

Conclusion and Recommendations

As noted at the outset of this report, the United States, the European Union, and some of Afghanistan's neighbors are engaging with the Taliban in an effort to press them to adopt a more inclusive and democratic form of governance than that which marked the First Emirate. A variety of Afghan constituencies are also urging the Taliban to retain some democratic elements of the 2004 constitution and the protection in law of key citizens' rights. These interlocutors have some leverage over the Taliban, but it is limited. If they are to have any hope of success, they must make a persuasive case that embracing some elements of democracy will not render the Afghan system un-Islamic in the eyes of the Taliban.

This final section of the report offers current and would-be interlocutors a series of points to consider when forming a strategy to explore possible compromises with the Taliban on issues of governance. The section looks first at the question of the structure of government and then at women's rights, minority rights, and the right of freedom of expression.

STRUCTURE OF GOVERNMENT

The Taliban seem to favor an approach to Islamic governance that resembles, in important respects, the approach they took during their period of control that ended in 2001. This is a system in which a government selected by Hanafi scholars is required to act in accordance with Islamic law as taught by a small group of scholars trained in the classical Hanafi school of jurisprudence. A wide range of Afghans is likely to oppose the Taliban's insistence that all government policies privilege the Taliban's Hanafi-derived understandings of appropriate

behavior and foreseeable institutional mechanisms that the Taliban believe are necessary to ensure that the government legislates to uphold these understandings.

Where, then, is there room for departure from the First Emirate model? An important debate in recent scholarship on the Taliban asks whether the movement has moved from its origin in Deobandi, Hanafi traditionalism toward conversation with the broader field of Islamist discourse. As Anand Gopal and Alex Strick van Linschoten wrote in an article published in 2017: "[T]he Taleban's ideology has transformed over the past two decades. While the movement once typified a 'traditionalist' Islam—that is, it sought to articulate and defend a particular conception of Islam found in the southern Pashtun village—it is now, during its insurgency phase, closer to the form of political Islam espoused in the Arab world."⁶⁶ If this is true, it opens up a wide variety of possibilities for negotiation.

First, the scope for elections to representative bodies has widened significantly in modern Islamist thought, often arriving at a commitment to something like universal suffrage. While the Taliban have historically sought to restrict election of the amir al-mu'minin to trustworthy male electors with the classical qualifications of the People Who Loose and Bind and have granted extremely broad authority and discretion over other appointments to the amir himself, Islamist political thinkers since Mawdudi locate the entire Muslim community, including women, as the source of legitimate authority for political institutions. Even the Taliban included tribal elders and other significant (but nonclerical) male local leaders in the assembly that first empowered Mullah

Omar. Perhaps areas of overlap could emerge on who exactly constitutes the People Who Loose and Bind. Such a model could be compatible with hybrid constitutional systems in which the general electorate votes for lower-level representative bodies that themselves fill the primary constitutional bodies.

Second, while the Taliban are notoriously insistent on the requirement that religious authority be defined in terms of adherence to the Hanafi legal school, this is somewhat at odds with the spirit of modern Islamist thought, particularly modern Sunni Islamist thought. Modern political Islam in some ways can be defined as the effort to bring modernity in line with Islam and Islam in line with modern political demands. Thus, there is a general skepticism that the requirements of political agility and success for modern statecraft can be satisfied by reducing the resources of Islam to the traditional jurisprudence of one legal school. One possibility would be for the Taliban to reengage with writings by classical Hanafi scholars who asserted that a Hanafi ruler had the discretion to follow (and impose) a rule that reflected the intuitions of a different school of Islamic interpretation—as long as that preferred rule did not violate a clear scriptural command and as long as it promoted the public interest.

Third, the core dilemma of modern Islamic constitutionalism is how to balance the commitment to sharia compatibility with the needs of a modern state. Thus, all states that aim to institutionalize some form of Islamic constitutionalism must develop rules for regulating the authority of legislative or executive and bureaucratic bodies that have the freedom to form legislation or policy on the basis of their conception of the public interest. At the same time, those states must also establish legislative or judicial bodies tasked with codifying traditional Islamic legal rules or reviewing legislation for sharia compatibility. One irony of modern Islamic statecraft is that, in practice, institutions that govern on the basis of public policy often come to be recognized as supreme vis-à-vis their more exclusively traditionalist Islamic rivals. This has been true not only in countries such as Egypt and

Pakistan, where religious scholars and Islamists compete for power with numerous “secular” elites, but also, to a degree, in the paradigmatic case of a modern Islamic state: the Islamic Republic of Iran.

It is not currently clear what sort of institutions, if any, the Taliban will trust to interpret Islamic law and ensure that a popularly elected government never enacts laws or pursues policies repugnant to Islamic law. Surely, the Taliban would not trust an institution, such as the Egyptian Supreme Constitutional Court, whose judges have no classical training and are not required to engage with (let alone follow) classical techniques of Islamic reasoning. Conversely, Afghans who favor a liberal democratic model of government, of the sort established under the 2004 constitution, are likely to resist strenuously any attempt to establish an institution modeled closely on Iran’s Guardian’s Council, in which clerics alone are empowered unilaterally to hear and resolve cases in which a law is challenged on the grounds that it violates the principles of Islam.

The most productive approach might be a hybrid institution of Islamic review, akin to Pakistan’s Federal Shariat Court, in which secular-trained lawyers and Islamic scholars are all allowed to vote on the question of whether a challenged law is consistent with Islam. If they are willing to contemplate creating such an institution, however, the Taliban will want the proportion of scholars on the court to be higher than in the Pakistani case and would probably demand that they constitute a majority of the members. Furthermore, the Taliban will want the scholars’ required qualifications to be defined with more specificity than is the case in Pakistan. Finally, the Taliban will likely want some structural mechanism that will allow them to control the appointment of the scholars. It should be noted also that if Islamic review is carried out by an institution composed, at least in part, of Islamic scholars, Afghani Shiites will reasonably demand that a Shia scholar be present, if only to handle constitutional questions that implicate Shia law.⁶⁷

RIGHTS

During the two decades between the fall of the Taliban's First Emirate in 2001 and their conquest of Kabul in August 2021, great progress was made in the areas of women's rights, minority rights, and the right to freedom of expression. It is unclear whether the Taliban aspire to undo all of this progress and, if they do, it is unclear whether they would be able to do so. Although the Taliban's rhetoric on the question of international human rights has evolved over time, they remain critical of the importation of Western secular human rights norms that they see as unconstrained and incompatible with Islamic tenets and Afghan traditions.

Women's Rights

As discussed earlier in this report, the Taliban have offered a typology of rights that they describe as being afforded to women by Islam. The limited number of rights that the Taliban recognize are already enshrined in Afghanistan's 1977 Civil Code (for the Sunni majority) and the Shia Personal Status Law (SPSL). The Taliban are likely to maintain those laws and to accept that, in theory, they are binding. Nevertheless, for a number of social and cultural reasons, Afghan women have frequently been deprived of many rights to which they are legally entitled under the Civil Code and the SPSL. If that was often the case under the recently departed government, women are likely to be denied their rights on a consistent basis under a Taliban government. It will be a great challenge for negotiators to develop proposals that will ensure that women are able, as a practical matter, to enjoy the rights that Taliban law will say are theirs.

Optimists might be heartened by the fact that some recent Taliban commitments to female access to education and employment depart from the approach adopted during their earlier rule, when women's opportunities in these areas were negligible. However, such commitments come with significant caveats regarding strict observance of rules regarding *parda* (covering) and the wearing of the hijab, avoidance of

intermingling of the genders in places of work and education, the need for women to be accompanied by a close male relative when leaving their home, and the proviso that areas of employment open to women will be those that benefit "the country" and "serve society."

Currently, Article 22 of the 2004 constitution forbids discrimination and establishes that all citizens, "man and woman, have equal rights and duties before the law." Article 7 declares that the state will observe "international treaties which Afghanistan has joined," which include the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Furthermore, provisions relating to qualification for the offices of president (Article 62), ministers (Article 72), members of the national assembly (Article 85), and justice of the Supreme Court of Afghanistan (Article 118) contain no gender qualifications.

Statements by Taliban leaders in 2020 referred to commitments to nondiscrimination and to the right of all Afghans to participate in a future Islamic system based on merit or qualification.⁶⁸ However, the Taliban remain highly critical of Western "equality" insofar as it is said to oblige women to seek paid work and therefore deprive them of the right (derived from Quran verse 4:34 and various hadith) to be provided with a home and the means of subsistence by their husband. The notion that men and women have the same right (and duty) to paid employment is similarly presented as impinging on a woman's rights (and duty) to care for her children and thus as a threat to the sanctity of family life.⁶⁹

The Taliban may declare that they intend to replace Article 22 with a commitment instead to respect men's and women's reciprocal or complementary rights as defined by Islam. In response, it might be argued that abrogating a constitutional commitment to equality would go beyond measures taken by other majority-Sunni Muslim states, including Egypt, Indonesia, Jordan, Pakistan, and the United Arab Emirates, as well as Qatar, home to the Taliban's political wing. It might

Efforts by Western diplomats and others negotiating with the Taliban to address potentially conflicting visions of Islam and society will require sensitive discussions on the interpretation and application of sharia tenets and prescriptions.

also be observed that Article 22 and Afghanistan’s ratification of CEDAW already exist alongside provisions of Afghan law—particularly the 1977 Civil Code and the SPSL—that reflect gender inequitable sharia provisions.

On the question of areas of work open to women, one approach may be to invite the Taliban to reflect on their own stated commitment to nondiscrimination and the rights of all Afghans to participate in a future system on a meritocratic basis. Areas of female employment that “benefit the country” and “serve society” would thus not be defined by necessity (such as certain areas of medicine and the teaching of female students) and could potentially include any area of work that a female candidate is equally or more qualified than a male to undertake.

If the Taliban seek to enshrine in law the qualifications for leadership as described by al-Mawardi and others, this will require that the head of state be male. The Taliban’s position on the acceptability of women in high public office and other senior roles entailing male subordinates is unclear, but they are likely to adopt an interpretation of the sharia that centers on women’s unfitness or ineligibility for positions of executive authority. Arguments against any general prohibition on women assuming positions of authority could draw on work focusing on gender-equitable verses of the Quran and examples of women in roles of authority during the rule of the first caliphs after the death of the Prophet, a period (632–661) that the Taliban, like all Sunnis, revere as the period of the “Rightly-Guided Caliphate.”⁷⁰ Examples of Sunni-majority countries—such as Bangladesh, Egypt, Indonesia, Pakistan, and Tunisia—that have or have had female heads of state, senior ministers, or judges may also be used to argue against establishing in law gender discrimination relating to positions of authority.

Efforts by Western diplomats and others negotiating with the Taliban to address potentially conflicting visions of Islam and society will require sensitive discussions on the interpretation and application of sharia tenets and prescriptions. In preparing for these discussions, and in conducting them, diplomats and negotiators might benefit from cooperation with external scholars. This might be particularly relevant in relation to the Taliban’s apparent aversion to allowing gender-mixed workplaces and to coeducation. It might be useful also in discussions about the scope of the requirement for *mahram*. Moves to nudge theological debates in a positive direction could be complemented by practical suggestions such as introducing reporting mechanisms to mitigate against female harassment as an alternative to a legal requirement for strict gender segregation in the workplace.

Rights of Religious Minorities

As discussed earlier in the report, Taliban officials have indicated that in a future system they would permit Shia to have certain matters of law—particularly family and marriage law—decided by reference to their (Ja’fari) legal school’s jurisprudence. However, this does not address Shia fears of a return to a constitutional regime in which the state is constitutionally obliged not merely to respect Islamic legal principles generally but, more specifically, to enforce Hanafi jurisprudence as understood by Taliban scholars. Their concerns will be shared by Sunni Muslims who do not follow the teachings of the Hanafi school.

Many Afghan Sunnis with liberal beliefs can be reconciled only with modernist interpretations of Islam, interpretations quite different from the classical Hanafi interpretations that the Taliban follow.

In some countries where the constitution requires the state to act in accordance generically with “Islamic

principles,” courts have embraced elements of these modernist interpretations and have been able to combine constitutional commitment to Islam with simultaneous commitments to liberal rights. Pakistan’s Federal Shariat Court and Egypt’s Supreme Constitutional Court are among those that have done this successfully. However, if courts were interpreting a constitution requiring the state to respect Islamic law as interpreted by the Hanafi school, particularly Hanafi principles as understood by scholars associated with the Taliban, they might find it extremely hard to harmonize a constitutional commitment to Islam with a concurrent commitment to intra-Muslim religious freedom or liberal rights.

Beyond preserving a constitutional provision like Article 131 in the 2004 constitution, which obligates courts to apply Shia (Jaʿfari) jurisprudence in cases involving matters of Shia personal law, people who do not follow Hanafi interpretations of Islam (and any negotiators who are trying to represent the interests of such people) must try to ensure that their views are represented within the courts or whatever other expert institution performs Islamic review and determines whether state laws or government policies are consistent with the commands of Islam. They might seek to have seats reserved for Shia scholars and representatives of other Sunni schools of thought on the court or council.

Freedom of Expression

Taliban criticisms of freedom of speech and expression tend to conflate the right with that of freedom of religious thought, conscience, and religion. Accordingly, in the past, the Taliban have suggested replacing Article 34 of the 2004 constitution, which provides:

Freedom of expression shall be inviolable. Every Afghan shall have the right to express thoughts through speech, writing, [and] illustrations as well as other means in accordance with provisions of this constitution. Every Afghan shall have the right, according to provisions of law, to print and publish on subjects without prior submission to state authorities. Directives related to the press, radio, and television as well as publications and other mass media shall be regulated by law.

In its place, the Taliban have suggested that a new provision be drafted with wording similar to Article 22 of the 1990 Cairo Declaration on Human Rights in Islam, which conditions freedom of opinion by allowing the state to ban speech that is contrary to the sharia and which explicitly prohibits speech that disparages the Prophets or undermines the moral and ethical values of society.⁷¹ In addition, the Taliban are likely to seek a reservation on Afghanistan’s ratification of the International Covenant on Civil and Political Rights for the purpose of opting out of Article 18(1), which provides that the right of freedom of religion shall include the freedom to adopt a religion or belief of one’s choice. Those engaging with the Taliban should be prepared to grapple in the near future with similar proposals and, perhaps, to develop compromise proposals reflecting a narrower retreat from the 2004 constitution’s expansive protections for free speech. For example, actors engaging with the Taliban might propose that instead of amending the current constitution’s categorical language in Article 34, the Taliban could amend the enabling legislation that Article 34 calls for, so as to clarify that the right to free expression shall not be construed to protect blasphemy.



Elements of the Taliban’s apparent model of a true Islamic system have clear antecedents in classical Islamic political theory, particularly in the principles of governance explicated by jurists of the Hanafi school of fiqh law, in Afghanistan’s own constitutional history, in past efforts to achieve legitimate Islamic governance, and (albeit to a lesser extent) in more modernist Islamic theory on governance and state. However, the Taliban’s current model is by no means certain to be implemented. Other models exist that the Taliban may adopt, at least in part, instead of reimposing the restrictive and backward-looking form of governance they implemented during the First Emirate. There are myriad ways in which efforts have been made to respond to key questions of governance and constitutionalism—both in



A Taliban fighter stands guard during Friday prayer at the Shah-Do Shamshira Mosque in Kabul on September 24, 2021. (Photo by Victor J. Blue/New York Times)

Islamic political thought and in efforts to design legitimately Islamic systems in various Muslim countries, not least Afghanistan itself, in the modern era.

Those international actors and domestic constituencies that are engaging with the Taliban in an effort to induce them to adopt a more flexible and progressive stance on some issues of political and social governance are thus faced with a complicated picture of a movement simultaneously intransigent and evolving. If the Taliban are no longer bound by a single, fixed set of religious doctrines on the structure of government, the rights of women and minorities, and freedom of expression, and are instead increasingly participating in an intra-Islamic discourse that has been evolving since the late twentieth century, then the Taliban may accept that some areas are open to interpretation, especially if considerations of expediency also encourage flexibility.

The question of how precisely to organize institutions in a modern Islamic state has been met with a broad range of answers from contemporary Islamic thinkers across the modernist-traditionalist divide. There are some broad parameters pertaining to the supremacy of the sharia and the need for strong executive authority, but how exactly authority is distributed between an executive, a judiciary, and a consultative body, and how the question of the compatibility of laws and edicts with the sharia is adjudicated, are not fixed textually by the religious law.

Two questions are of particular interest here. First, if, following Islamic tradition, executive authority is constituted and supervised by a body of representatives known as the People Who Loose and Bind, how are *they* constituted or identified? In many cases, there is a kind of mutual recognition between a ruler and the elites of a society; however, in much modern Islamic thought and practice,

the appointment of the People Who Loose and Bind themselves has been seen as a task that should involve ever-widening circles of the governed, up to universal or near universal suffrage. The question here is whether the Taliban will continue to see themselves as an insular group that governs all of Afghanistan, or whether they will see the Afghan people as a whole as the governed who have the right to appoint their representatives and rulers.

The second question pertains to how the sharia is defined and who adjudicates the distinction between acts of public policy and fixed rulings of the sharia. Religious movements want to claim the authority of the divine law, but governing powers want the flexibility to adopt laws and policies according to their political interests. In Islamic public law, there is a lot of space to recast Islamic governance as allowing for more use of discretion and judgment on the part of officials rather than merely enforcing timeless religious provisions.

The other areas discussed in this report perhaps leave less room for development. The Taliban appear to be

more open to female education at all levels than they were before 2001, but provisions related to gender and the family tend to be regarded as more or less fixed parts of religious law. Many modern Islamic scholars have seen no barrier to female participation in all parts of the political and social spheres, but at present it is difficult to imagine the Taliban converging with modern international law on women's rights. Similarly, although the Taliban seem less determined than before to subjugate Shia and other religious minorities, it is difficult to imagine them adopting a view of the public sphere as incorporating all communities on the basis of equality and parity of esteem. Finally, freedom of expression is a notoriously ambiguous concept. It is very easy to endorse, in principle, the right to speak out in public on matters of conscience or the right to criticize present government policies. Virtually all regimes of free expression include provisions pertaining to threats to public order or social cohesion, and it is a hallmark of all forms of authoritarianism to act on the prerogative to label annoying and distasteful speech as forbidden on the grounds of general social harm or sedition.

Notes

1. See “USA Delegation Met with Afghan Taliban Representatives in Qatar—State Department,” Reuters, November 30, 2021, www.reuters.com/world/asia-pacific/us-delegation-met-with-afghan-taliban-representatives-qatar-state-department-2021-11-30.
2. In preparing this and the last sections of the report, the authors have had the benefit of being able to consult a library of Pashto-language communications collected and translated (but until now unpublished) by the Afghan specialist Frank Conway. The authors gratefully acknowledge his generosity in sharing these texts and translations along with his insights into how to understand the Taliban’s positions.
3. Bernard G. Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 1998), 113–20.
4. See Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari’a into Egyptian Constitutional Law* (Leiden, Netherlands: Brill, 2006), 47–54; and Clark B. Lombardi and Nathan J. Brown, “Do Constitutions Requiring Adherence to *Shari’a* Threaten Human Rights: How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law,” *American University International Law Review* 21 (2006): 396, 402–5.
5. Roxanne L. Euben and Muhammad Qasim Zaman, *Princeton Readings in Islamist Thought* (Princeton, NJ: Princeton University Press, 2009), 5–19; and Lombardi and Brown, “Do Constitutions Requiring Adherence to *Shari’a* Threaten Human Rights?,” 406–14.
6. Gilles Dorronsoro, *Revolution Unending: Afghanistan 1979 to the Present* (New York: Columbia University Press, 2005), 272–75, 283–84.
7. R. Afghani, “In Response to the BBC: The *Shari’a* Classification of the Palace Administration” [د بي بي سي په خواب کې: د ارگ د ادارې شرعي حيثيت], March 12, 2020, <https://bit.ly/3v4Luxc>. Translation provided by Frank Conway.
8. See “Message of Felicitation of the Amir-ul-Mu’minin on the Occasion of Eid-ul-Fitr,” May 20, 2020, www.alemarahenglish.net/?p=35078. See also “Statement of Taliban Lead Negotiator Shaykh Abdul Hakim to the Joint Meeting of Intra-Afghan Negotiating Teams” [د بين الافغاني مذاكراتو د تيمونو گډې ناستې ته د «شيخ عبدالحكيم» د وينا متن], September 17, 2020, www.nunn.asia/173018: “Our jihad and struggle were not for a desire to seize power. They were to achieve the country’s independence from foreign occupation and create an Islamic system. Therefore, we assure our nation and the world that beyond these two aims, we do not support the monopolization of power by anyone, including ourselves.” Translations provided by Frank Conway.
9. See “Statement Delivered by the Delegation of the Political Office of the Islamic Emirate in the International Pugwash Research Conference,” Qatar, May 2–3, 2015 (translated by Aaron Zelin), www.jihadology.net/2015/05/05/new-release-from-the-islamic-emirate-of-afghanistan-full-text-of-statement-delivered-by-the-delegation-of-the-political-office-in-the-international-pugwash-research-conference.
10. See, for example, S. Salik, “Teaching for the Public Intellect: Arguments for the Ongoing Jihad” [د عامه ذهنيت تنوير، د روان جهاد دلانل], June 22, 2018, www.mujali.net/?p=1149. The authors thank Frank Conway for highlighting the significance of this document and providing a translation.
11. Article 6 stipulates that “the state shall be obligated to create a prosperous and progressive society based on social justice, preservation of human dignity, protection of human rights, realization of democracy, attainment of national unity as well as equality between all peoples and tribes and balance development of all areas of the country.”
12. The transcript of the speech delivered by the delegation of the Islamic Emirate at the Moscow Conference, February 2019, is available in Pashto at <https://bit.ly/3HgYbr7>.
13. *Dastor-i Emarat-i Islami Afghanistan* [Order of the Islamic Emirate of Afghanistan], published in Pashto online; unpublished English translation by Shamshad Pasarlay, in possession of the authors.
14. Shaykh Hibatullah Akhuzada “Instructions to the Mujahideen from the Emir-ul-Momineen,” 2017, 98–100. The authors thank Frank Conway for highlighting the significance of this text.
15. See, for example, A. R. Afghani, “Elements of the Existence of Islamic Rule’ [د اسلامي حاكميت د وجود عناصر], April 3, 2018, <https://bit.ly/3JNK12l>. See also S. Omar, “The Definition, Authority and Purpose of an Amir According to the *Shari’a*,” posted on Al Emera’s standalone “Jihad” subdomain website, April 28, 2014, in *The Taliban Reader: War, Islam, and Politics in Their Own Words*, ed. Alex Strick van Linschoten and Felix Kuehn (Oxford: Oxford University Press, 2018), chapter 114.
16. See, for example, “Biography of the Martyr Amir al-Mu’minin Mullah Akhtar Mohammad (Mansoor)” [د شهيد امير المؤمنين ملا اختر محمد] (منصور), May 21, 2020, <https://bit.ly/3v6fmt3>; and “Condolences and *Bay’a* of the Leader from Members of the Islamic Emirates Directorate of Mines” [د اسلامي امارت د معدنياتو ادار د مشر او غرو تسليم او بيعت], May 26, 2016, <https://bit.ly/3ld7o4V>. All translations here by Frank Conway.

17. A. H. Ahmadi, *Da Mujahid Tora*, Cultural Affairs Commission of the Islamic Emirate of Afghanistan, 2007, 98–100; and A. R. Afghani, “Afghanistan’s Modern Jihad from the Perspective of *Shari‘a*,” part 19 [د افغانستان معاصر جهاد د شريعت له نظره نولسمه برخه], August 8, 2018, www.azamnews.com/?p=35343. The authors thank Frank Conway for pointing us to this text and providing a translation.
18. Z. Mujahid, *The Islamic Emirate and the Process of the Ongoing Jihad, Questions, and Answers* [پوښتنې او ځوابونه], Cultural Affairs Commission of the Islamic Emirate of Afghanistan, 2020, 30–33. Translation by Frank Conway.
19. See Khalilullah Safi and Thomas Ruttig, “Understanding Hurdles to Afghan Peace Talks: Are the Taliban a Political Party?,” Afghan Analysts Network, June 2018, www.afghanistan-analysts.org/en/reports/war-and-peace/understanding-hurdles-to-afghan-peace-talks-are-the-taliban-a-political-party.
20. The obligation of obedience to leaders is set out in significant detail by the Taliban’s current supreme leader in Shaykh Hibatullah Akundzada, *Instructions to the Mujahideen from the Emir-ul-Momineen*, Cultural Affairs Commission of the Islamic Emirate of Afghanistan, 2017, 68–72.
21. R. Haleem, “The Responsibilities of the Ruler and the Ruled” [د حاکم او محکومو مسؤولیتونه], YouTube, May 8, 2020, www.youtube.com/watch?v=d4KCSJRJE6o&t=675s. The authors thank Frank Conway for highlighting the significance of this source and for providing a translation.
22. See, for example, Abdul Kareem, “The Islamic Emirate Enforced Islamic Rule,” in *The Islamic Emirate: What Did It Give Us*, ed. Hafez Noor Ahmad Sayyed, Cultural Affairs Commission of the Islamic Emirate of Afghanistan, 2019.
23. See Quran 3:104, 3:110, 9:71, 9:112, and 31:17.
24. See Kareem, “The Islamic Emirate Enforced Islamic Rule,” 37. See also Mujahid, *The Islamic Emirate and the Process of the Ongoing Jihad, Questions and Answers*, 26. The authors thank Frank Conway for suggesting these sources.
25. See Clark B. Lombardi and Connie J. Cannon, “Transformation in Muslim Views about ‘Forbidding Wrong’: The Rise and Fall of Islamist Litigation in Egypt,” in *Sharia Law and Modern Muslim Ethics*, ed. Robert W. Hefner Jr. (Bloomington: University of Indiana Press, 2016), 135–58.
26. This quote and the two that follow are from a short speech made by Dilawar at a semipublic Facebook conference on July 17, 2020. It was previously available on YouTube at www.youtube.com/watch?v=kllqOWAi3yU.
27. See N. M. Mutmaeen, *Six Days with Talib Leaders* [طالب مشرانو سره سیز ورځې] (Kabul: Da Saba Fikr Tolna, 2018), 28–29; and Mujahid, *The Islamic Emirate and the Process of the Ongoing Jihad, Questions and Answers*, 127.
28. See discussion in Borhan Osman and Anand Gopal, “Taliban Views on a Future State,” Center on International Cooperation, New York University, July 2016, https://cic.nyu.edu/sites/default/files/taliban_future_state_final.pdf.
29. See, for example, A. Afghani, “Ideological Invasion—Part 4,” December 5, 2016, www.azamnews.com/?p=17792. See also A. R. Afghani, “The Great Achievement of Democracy: Human Freedom—Truth or a Claim?” [د جمهوریت ستره لاسته راوړنه، انساني ازادې، حقیقت که دعوا؟], March 5, 2020, <https://bit.ly/3JKEzGH>.
30. Zabiullah Mujahid, interview with Shamshad TV, October 8, 2020, [www.twitter.com/BilalKarimi14/status/1314107723563167745?s=20](https://twitter.com/BilalKarimi14/status/1314107723563167745?s=20). The authors thank Frank Conway for pointing us to these sources and assisting with translation of them.
31. See the 2008 case of Sayed Pervez Kambaksh. Punishment in this and similar cases was said casuistically to be required because the criminal code does not explicitly prohibit, nor does it explicitly permit, blasphemous speech. Given that blasphemous speech is unregulated, a judge is constitutionally permitted, indeed required, to punish speech that is punishable under Hanafi fiqh.
32. See, for example, Taliban spokesperson Zabih Ullah Mujahid’s interview with Payam-e-Afghan TV on September 22, 2022, www.youtu.be/OmdYhHPZH0s. The authors thank Frank Conway for steering us to this source.
33. Khairullah Khairkhwah, interview with the semiautonomous Taliban news site Nunn.asia September 26, 2020, www.youtube.com/watch?v=pCUQnnd6YCU. The authors thank Frank Conway for highlighting the significance of this source and providing a translation.
34. Although they derive the title of their leader from this tradition, the Taliban do not claim their leader is the commander of all believers (or the entire *umma*), but rather the leader of all Afghans.
35. Traditionally, Islamic jurists list the following as necessary qualifications: male, free, adult, sane, Muslim, just, courageous, Qurayshi descent, and knowledgeable and competent to rule, including in matters of war and statecraft and righting the wrongs against the oppressed.
36. Al-Mawardi: “Umar delegated the selection of the Imam to a council [*ahl al-shura*], the members of which were accepted by the community, as they were the leading men of the age believed to be able to validate the appointment” (Abu al-Hasan al-Mawardi, *The Ordinances of Government* [Reading, UK: Garnet, 1999], 9). See also Patricia Crone, “*Shura* as an Elective Institution,” *Quaderni di Studi Arabi* 19 (2001): 8, 39.
37. Ottoman religious scholars expended great efforts not only to guard their own autonomy but also to reform the sultan’s (*kanun*) law and harmonize it with Hanafi legal doctrine, with the full endorsement of the sultan. See Colin Imber, *Ebu’s-Su’ud: The Islamic Legal Tradition* (Stanford, CA: Stanford University Press, 2009) on the efforts of the eponymous sixteenth-century jurist.

38. The Ottomans created an office of the *Shaykh al-Islam* staffed by a leading scholar to issue official fatwas on sultan edicts and decisions. In modern states, the power to exercise “Islamic review” is often vested in a judicial institution, such as a supreme court. See Clark B. Lombardi, “Designing Islamic Constitutions: Past Trends and Options for a Democratic Future,” *International Journal of Constitutional Law* 11 (2013): 615–45.
39. Articles 46(11) and 46(12) of the Taliban’s draft constitution describe procedures in the event of the amir wishing to abandon his position or in the event of his death. However, it does not prescribe the method by which a new leader would be appointed.
40. Indeed, the draft constitution Taliban leaders created in 1998 and reissued after their ouster in 2001 expressly noted that they developed their own constitution only after studying all previous Afghan constitutions. This seems to imply that the Taliban would generally prefer to maintain structures and institutions that are consistent with the nonderogable rules established in the Sunni tradition and have previously demonstrated efficacy in Afghan context. See *Dastor-i Emarat-i Islami Afghanistan*.
41. For an English translation of the 1923 constitution, see www.dircost.unito.it/cs/docs/AFGHANISTAN%201923.htm.
42. Article 4 suggests they are “the nobles” who represent the people. Similarly, Article 73 asserts that the constitution is legitimate and binding because it was proposed by the king and adopted by 872 “representatives of the nation” gathered in Grand Council. Having assumed power, the king was recognized as holding enormous discretionary powers, including the right to appoint and dismiss ministers, ratify laws, and promulgate both state law and the sharia.
43. According to Articles 5, 6, and 27–32 of the 1931 constitution, the assembly that would recognize any successor to the king would have to be an inclusive elected body that represents the entire polity.
44. Article 6 of the constitution obliged the new king and subsequent kings only to swear before the elected shura that they would obey “the sacred principles of the religion of Islam.” However, against the backdrop of Article 5 and Article 51, it is impossible to imagine the oath-taker or the electors who accept his oath to understand it as other than a promise to obey the sacred principles as taught by the Hanafi school.
45. Article 5 says acceptance of the king’s legitimacy was made because of his “commit[ment] to the Islamic Shari’a and the Hanafi madhhab.” Article 88 states that state laws must be aligned not just with “Islamic principles” but with “the rules and regulations of the Hanafi sect.” See Dorransoro, *Revolution Unending*, 35.
46. See Shamshad Pasarlay, “Rethinking Afghanistan’s Longest-Lived Constitution: The 1931 Constitution through the Lens of Constitutional Endurance and Performance Literature,” *Elon Law Review* 10 (2018): 283–308.
47. For a translation of the 1964 constitution, see “Constitution of Afghanistan,” *Middle East Journal* 19, no. 2 (Spring 1965): 215–29.
48. As can be seen from a comparison of Articles 19, 78, and 41–77.
49. See, for example, Harvie M. Conn, “Islamic Socialism in Pakistan: An Overview,” *Islamic Studies* 15, no. 2 (1976): 111–22.
50. See Dorransoro, *Revolution Unending*, 95–97.
51. For an English translation of the 1987 constitution, see: www.afghan-web.com/history/afghanistan-constitution-of-1987. There is no requirement that the leader of the country be Muslim. Article 2 establishes Islam as the official religion of Afghanistan and requires state legislation to respect the principles of “the Islamic religion” without requiring it to respect Hanafi principles. Article 74 requires the president to swear he will always respect the principles of Islam but not necessarily Hanafi Islam. Under Article 112, courts faced with behavior unregulated by a code or statute shall develop a rule of decision that considers, alongside basic justice, the values of “Islam” but not necessarily Hanafi understandings of Islam.
52. The authors thank Shamshad Pasarlay, who had interviewed many of the drafters, for this information.
53. This requirement is laid down in numerous articles, including Articles 4, 5, 6, 10, 13, and 42.
54. Judging from their draft constitution of 1998/2005, the Taliban may have believed in the past that identification of a sharia-compliance mechanism would be urgent in light of the fact that the powerful head of state and government was to be a devout Hanafi Muslim selected by an electoral college composed largely of Hanafi scholars. If the Taliban ever accept a form of government where the leader is selected through a more inclusive process, they will likely insist on a powerful institution that can be trusted to correctly interpret Hanafi law and to check any government that violates Hanafi law.
55. See, for example, ‘Abd al-Hakim Hasan al-‘Ayli, *Al-hurriyyat al-‘amma fi’l-fikr wa’l-nizam al-siyasi fi’l-Islam: dirasa muqarana* [Public Freedoms in Islamic Thought and Political System: A Comparative Study] (Cairo: Dar al-Fikr al-‘Arabi, 1974), which is widely cited in subsequent literature.
56. Hasan al-Banna, “Nizam al-hukm” [The System of Rule], in *Majmu‘ rasa’il al-Imam al-shahid Hasan al-Banna* [The Collected Treatises of the Martyr Hasan al-Banna] (Cairo: al-Maktaba al-Tawfiqiyya, n.d.), 245–61.
57. For representative works by each of these thinkers, see Muhammad al-Ghazali, *Al-Islam wa’l-istibdad al-siyasi* [Islam and Political Authoritarianism] (Cairo: Dar Nahdat Misr, 1997); Hasan al-Turabi, *Al-siyasa wa’l-hukm: al-nuzum al-sultaniyya bayna al-usul wa sunan al-waqi‘* [Politics and Governance: Systems of Rule between the Principles and Reality] (Beirut: Dar al-Saqi, 2003); Yusuf al-Qaradawi,

- Fiqh al-dawla fi'l-Islam: makanatuha—ma' alimuha—tabi'atuha, mawqifuha min al-dimuqratiyya wa'l-ta'addudiyya wa'l-mar'a wa ghayr al-Muslimin* [The Jurisprudence of the State in Islam: Its Place, Its Characteristics, Its Nature, and Its Stance on Democracy, Pluralism, Women, and Non-Muslims] (Cairo: Dar al-Shuruq, 1997), and *Al-siyasa al-shar'iyya fi daw' nusus al-shari'a wa maqasiduha* [Sharia Governance in Light of the Texts and Objectives of the Sharia] (Cairo: Maktabat Wahba, 1998); 'Abd al-Salam Yasin, *Al-shura wa'l-dimuqratiyya* [Consultation and Democracy] (Beirut: Dar Lubnan li'l-Tiba'a wa'l-Nashr, 2003); and Rashid al-Ghannushi, *Al-hurriyyat al-'amma fi'l-dawla al-Islamiyya* [Public Freedoms in the Islamic State] (Beirut: Markaz Dirasat al-Wahda al-'Arabiyya, 1993).
58. The following draws on Andrew F. March, *The Caliphate of Man: Popular Sovereignty in Modern Islamic Thought* (Cambridge, MA: Belknap Press, 2019), particularly 9–15, where the full extent of primary source citations supporting the claims in this section can be found.
 59. See March, *The Caliphate of Man*.
 60. See, for example, al-Azhar's 1977 "Draft Islamic Constitution." See also Muhammad Asad, *The Principles of State and Government in Islam* (Berkeley: University of California Press, 1961), which discusses social rights and ideological goals beyond the structure of governance.
 61. See the English-language translations of the 1906 and 1907 constitution at, for example, www.fis-iran.org/en/resources/legaldoc/iranconstitution.
 62. See Asghar Schirazi, *The Constitution of Iran: Politics and the State in the Islamic Republic* (London: I. B. Tauris, 1997).
 63. For the relevant provisions of Pakistan's 1973 constitution, see www.pakistani.org/pakistan/constitution/part9.html.
 64. See Lombardi, *State Law as Islamic Law*, 124–40.
 65. See Mark E. Cammack and R. Michael Feener, "The Islamic Legal System in Indonesia," *Pacific Rim Journal of Law and Public Policy* 21 (2012): 13–42 at 18–19.
 66. Anand Gopal and Alex Strick van Linschoten, "Ideology in the Afghan Taliban," AAN Thematic Report 01/2017, Afghanistan Analyst Network, June 2017, www.afghanistan-analysts.org/wp-content/uploads/2017/06/201705-AGopal-ASvLinschoten-TB-Ideology.pdf.
 67. These might include questions about government compliance with the constitutional provisions permitting Shiites to have questions of family law adjudicated under Shia family law.
 68. See, for example, "Speech by Deputy of Islamic Emirate and Chief of Political Office H.E. Mullah Baradar Akhund at Opening Ceremony of Intra-Afghan Negotiations," September 12, 2020, www.alemarahenglish.af/?p=37222; and "Message of Felicitation of the Esteemed Amir-ul-Mumineen, Shaykh-ul-Hadith Mawlawi Hibatullah Akhundzada (May Allah Protect Him), on the Occasion of Eid-ul-Adha," July 28, 2020, www.alemarahenglish.af/?p=36053.
 69. See, for example, A. R. Afghani, "Women's Rights in an Islamic System," [د بنحو حقوق په اسلامي نظام کې], September 29, 2020, <https://bit.ly/3p4HRU4>; and "Women in Islam and a Secular Republican System," [سلام او سيکولر جمهوري نظام کې], August 24, 2020, <https://bit.ly/34UfBgD>. The authors thank Frank Conway for providing a translation of this document.
 70. See, for example, Engy Abdelkader, "To Judge or Not to Judge: A Comparative Analysis of Islamic Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia, Egypt, and Iran)," *Fordham International Law Journal* 37 (2013): 309ff; and Wesam Shahed, "Re-examination of Islamic Laws: The Entrance of Women in the Sharia Courts," *Michigan State International Law Review* 28, no. 1 (2019): 139.
 71. For the text of the Cairo Declaration, see www.refworld.org/docid/3ae6b3822c.html.

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Since their return to power in August 2021, Taliban leaders have not articulated a clear vision of how they plan to structure the Afghan state. Some observers have expressed guarded optimism that the Taliban can be persuaded by interlocutors from the international community and from Afghan civil society to move away from some of the most authoritarian and illiberal aspects of their first regime. This report is intended to help these negotiators by identifying the core Taliban attitudes toward the legitimacy of a constitutional order from a doctrinal religious perspective and by offering suggestions for how actors that engage the Taliban can work within those areas to find possible compromises between the Taliban's vision of "true" Islamic governance and liberal democracy.

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