



The Nature of the Afghan State: Republic vs. Emirate

Afghan Peace Process Issues Paper

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Summary: The Afghan government, backed by public opinion and a declaration of the April 2019 consultative Peace *loya jirga*, has stated that the Afghan peace negotiations must uphold the integrity of the Islamic republic's system. The Taliban have expressed a clear desire for a more "Islamic system" of government and continue to call themselves an "Islamic emirate." These seemingly opposite demands obscure a more nuanced discussion about what form of government may satisfy both negotiating parties' desire for a system that can achieve mutual goals of a peaceful and inclusive state that respects Islamic values. This paper focuses on the elements and principles of governance rather than labels to identify opportunities for compromise.

The Issues

Who holds political power over Afghan citizens and determines the actions of the state? How are they chosen? How is power defined and limited? These are the central questions that will animate much of the discussion over potential political settlement and constitutional reform in Afghan peace negotiations. Their answers describe the nature of the Afghan state and sovereignty. There are a broad range of governing models available and almost every country has a unique approach in some respects. However, there is a fundamental disparity between the nature of a republic and that of an emirate.

Afghanistan's 2004 constitution established a republican form of government, defined as one in which sovereignty belongs "to the nation, manifested directly and through its elected representatives. The

nation of Afghanistan is composed of all individuals who possess the citizenship of Afghanistan.”¹ This means, ultimately, that all of Afghanistan’s citizens are entrusted with the power and responsibility to choose their representatives to govern, and that those representatives are accountable to the people. This language is similar to Article 1 of the 1964 constitution.

The key attributes of “the republic” in the 2004 constitution are:

- sovereignty is manifested through the people, citizens;
- citizens choose their leaders through elections with universal suffrage;
- no one is above the law, which passes through an elected legislature;
- three independent branches of government check each other’s power; and
- all citizens have basic rights which cannot be infringed.

The Taliban ruled a self-described emirate from 1996 to 2001 and continue to use that terminology for their government-in-exile. According to their practice and rhetoric, and a draft Taliban constitution from 1998,² the Taliban’s conception of an emirate is that of a state founded on the basis of Quranic text: “There is no command except for Allah, God” [ان الحكم الا لله] and ruled by an emir, a commander of the faithful chosen by a limited group of Islamic leaders or *Shura-Ahl al-hall wal-aqd*.³ The emir has near absolute executive, legislative and judicial authority, and while hypothetically having the same rights and responsibilities as other Afghan citizens⁴ there are no provisions for accountability. Individual rights and freedoms are also subject to the limits of Sharia as determined by the emir and selected ulema.

The key attributes of “the emirate” as described and practiced by the Taliban are:

- sovereignty is manifested through implementation of Sharia;
- leader is chosen by a select Islamic *shura*, or council;
- all branches of government are subject to the authority of the emir; and
- basic rights are defined/limited by Sharia as interpreted by the emir/leadership.

It is notable that these two systems not only differ in their basic attributes, but many of them are diametrically opposed, or at least mutually exclusive. That said, according to a comparison of past constitutions (ratified and draft), joint declarations from informal talks in Moscow and Doha in 2019, public interviews and reports with senior leaders⁵ and numerous interviews and focus groups conducted by the United States Institute of Peace, there are several important principles that appear to be broadly agreed between the parties:

¹ Afghan Const. of 2004, art 4.

² See, Kakar, Palwasha L., and Alex Thier. Forthcoming. “Comparing and Contrasting the Afghanistan Islamic Republic Constitution of 2004 and the Taliban’s Draft Islamic Emirate Constitution of 2005.”

³ Literally “those who loosen and bind,” i.e., those qualified to elect or depose a caliph on behalf of the Muslim community.

⁴ The Taliban’s draft Const. of 1998, art. 59.

⁵ See, e.g., International Crisis Group. 2020. *Taking Stock of the Taliban’s Perspectives on Peace*. Asia Report N°311. August 11. Brussels: International Crisis Group.

- Afghanistan needs to be governed by an agreed, written constitution that reflects Afghan values and traditions;
- Afghanistan’s government should have an Islamic character;
- Afghanistan will be sovereign, independent and should have positive and peaceful relations with its neighbors and beyond;
- Afghanistan’s governance must be inclusive of its ethnic, sectarian, and geographic diversity; and
- Afghanistan’s territory will not be used as a safe haven or launching pad for terrorist groups or activities.

A Range of Views on Reform

Are there means to reconcile these fundamentally differing systems? At its heart, there are not only political and ideological barriers to overcome, but a deficit of trust as well. Even if a system could potentially protect the rights and prerogatives of many, there will be deep-seated fear that abuse of power will override such protections in reality. Each side asserts that they can find room in their concept of the post-peace-deal Afghan state for others to share power, but only on their own terms. So, the system must not only accommodate a range of views and groups, but must also offer assurance that power can be constrained.

All interlocutors outside the Taliban express clear views that Afghanistan should continue to embrace the core principles of the republic. They do not believe Afghanistan can or should become an emirate, which they believe is out of character with Afghanistan’s history, regional approaches and popular demand. They favor a republic that has accountable leadership, checks and balances and a political system that favors the inclusion of a broad political, ethnic, and geographic spectrum and guarantees basic rights and freedoms to its citizens.

It is difficult to imagine that Afghanistan’s diverse polity and its current leaders at the national and provincial level could agree to an emirate-style system with such concentrated power, even if issues like the means of selection of the members of the different branches can be negotiated. Some nations supporting Afghanistan also indicate similar redlines for their continued support. However, once the labels of “republic” and “emirate” are shed, there is mixed support for a peace process that will accommodate some of the Taliban’s demands.

For the Taliban, several ideas appear to loom large. First, the state must be reborn independent of outside influence, especially that of “non-believers.” Second, their jihad was not only to rid the nation of infidel occupiers, but to refashion the state as truly Islamic. Both of these require, in their view, ridding Afghanistan of the constitution and government “imposed under the shadow of the B-52s.” The corrupted nature of their creation makes them haram, or forbidden by Islamic law, regardless of the content of the constitution or piety of individual leaders—although there may be agreement on much of the content, which is derived from the 1964 and earlier Afghan constitutions. Third, the idea of a powerful head of state or “commander of the faithful” selected by a small group of Islamically “valid” elites is deep at the heart of 25 years of Taliban ideology and practice. Fourth, the Taliban believe there needs to be an “Islamic check” on all spheres of law and governance, which can only be performed by a

small, qualified clerical elite. They oppose, for example, elections with universal suffrage and an empowered legislature that can make any law, including those not conforming to Islam.

Options

Although it remains unclear whether there is a solution set to satisfy both parties in a negotiated settlement, the following options may provide an avenue for opening the space for debate.

Articulate a set of “constitutional principles.” This could be done in a framework agreement that will not predetermine the outcome of a review/reform process during an interim period, but which will be sufficient to enumerate important areas of existing agreement and to safeguard certain basic issues for all parties to feel comfortable moving forward, including governance principles and safeguarding of individual rights. These would include the points of commonality identified above.

Dispose of the “republic versus emirate” binary in favor of a focus on interests. All constitutions have a mix of national traditions, elected and appointed officials, qualifications and provisions which favor the majority balanced with those protecting rights. Rather than debate republic versus emirate, focus discussions instead on specific interests that parties are trying to achieve. Trade-offs can happen along this continuum on different issues. The definition of a “republic” is rather broad in international practice and includes many options for (re)structuring the Afghan state. Democratic systems may include direct or indirect election models and different configurations of central or local control.⁶

Define sovereignty to accommodate the sacred and the profane. Room for agreement may exist in defining a “national sovereignty”⁷ that is vested in the people for the affairs of state, which is itself delegated from the divine. Pakistan’s 1973 constitution achieves this balance by saying that ultimate sovereignty belongs to God, but is delegated to the people to lead their country: “Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust.” Following from this, the executive and legislative branches can operate democratically and serve the people first, but the system overall is in line with Islam.

Make the separation of powers a safe harbor for core interests of all parties. If there is not going to be a monarch or “emir” with virtually unrestricted power, all parties, including the Taliban, will be

⁶ For example, there are a variety of methods for selecting and dividing authority between heads of state and heads of government. The president of France is directly elected by popular vote, and the prime minister is appointed by the president. But the prime minister can only be dismissed by the Parliament, so, in reality, the president’s choice must reflect the will of the majority. Pakistan’s 1973 constitution allows for the election of a president with important but limited powers by an electoral college, similar to the *loya jirga*. The Constitution of Qatar has a hereditary monarchy, passed down through a single family, and not according to the selection of recognized Islamic clerics. Qatar also allows for a legislature elected by “public, secret, direct ballot.” The only current system of Islamic government which gives nearly exclusive power to an Islamic leader and Council of Clerics is in the Islamic Republic of Iran.

⁷ Afghan Const. of 2004, art. 4.

negotiating for a system of government with checks and balances to ensure their potential bases of power cannot be easily compromised. The kernel of such agreement can be found, for example, in the Taliban's 1998 draft constitution that gives the judiciary (hypothetical) independence. Even if the head of the judiciary is nominated by the head of state, that person would need to be approved by another body (e.g., the legislature) that has independent constitutional authority. The 1998 Taliban document also creates a prime minister, with head of state and head of government as separate roles. This establishes a means for power sharing; the difference in the role of a leader that has important symbolic authority and one whose job it is to manage the government effectively.

Use Afghanistan's diverse spheres of authority as an advantage. Much of the authority and institutions in Afghanistan have never derived from the constitution. The exercise of authority happens in different areas and different levels of formality. For example, there are informal tribal *jirgas* and community *shuras* that do much of the work of local governance and problem-solving. Some aspects of these have grown more formal over time — for example, through National Solidarity Program development *shuras*. The network of masjids and waqfs has significant power and resources. The Taliban have created a system of Sharia courts that resemble structures in pre-1964 Afghanistan.⁸

Recognizing these different, often traditional, spheres and allowing them to function within the bounds of the law can provide an important avenue for authority and legitimacy. For example, Afghanistan's National Ulema Council could be envisioned to contribute to the religious and interpretation needs of the Afghan people while remaining outside the formal legislative process, or the local councils cited in previous constitutions could be given more explicit roles in national reconciliation, local dispute resolution or management of natural resources in accordance with long Afghan tradition.

The "right to select" leaders must be defined so as to prevent capture by a narrow group. The 2004 constitution gives the right of selection of executive and legislative leaders to all citizens of a certain age. It also provides for convening of *loya jirgas*, or legal assemblies, consisting of elected representatives to address national issues. Attempts to narrow the franchise only to those with certain attributes or credentials are discriminatory, exclusionary and hard to enforce. There are no clear standards in Afghanistan or modern Islamic practice, more broadly, to define the members of the *Ahl al-Hal wa'l Aqd*, which Taliban-linked scholars suggest is the rightful leadership-selection body. While members of the ulema can be given roles in a variety of institutions, the Afghan approach to governance and the rule of law (both historical and contemporary) is at odds with the notion that they would be exclusively responsible for selecting leaders, writing laws, and managing justice.

Most non-Taliban Afghan Islamist leaders support elections because, as former Afghan Prime Minister Gulbuddin Hekmatyar said, "The problem with such *shuras* is that anyone can convene them anywhere and choose their *Emir ul Momineen* (leader of the faithful). Historical experience shows that authoritarian leaders favor such *shuras*. This has been a recurrent theme in our history, where a ruler

⁸ Looking outside Afghanistan, one can find models of formal recognition of informal authority: Al-Azhar in Egypt is recognized as a basic component of society in the 2014 Egyptian constitution. Although the state provides resources, the constitution states that Al-Azhar's "Grand Sheikh is independent and cannot be dismissed."

gathers his hand-picked men, labels them as a *loya jirga* and gets them to make whatever decision he wants ... All the Muslims of a country should be involved in electing its president.”⁹ Indeed, the Taliban have also spoken out against the *loya jirgas* organized by other Afghan leaders as having been improperly selected. Furthermore, Afghanistan’s egalitarian traditions do not mesh well with a political system that narrowly defines a small elite. Instead, while elites will compete for leadership in a multitude of institutions, participation in choosing leaders at the local and national level must be afforded to all Afghan communities and citizens.

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⁹ Interview with Gulbuddin Hekmatyar in Larson, Anna, and Alexander Ramsbotham, eds. 2018. *Incremental Peace in Afghanistan. Accord*. Issue 27. June. London: Conciliation Resources.