

# Addressing Constitutional Issues in Intra-Afghan Negotiations: Process Options and Issues for Consideration

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## *Afghan Peace Process Issues Paper*

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By Alex Thier and Scott Worden

**Summary:** Parties to the Afghan conflict have suggested that a constitutional review may be necessary for a successful peace process that results in a legitimate and sustainable peace. Many want to keep the existing Afghan constitution virtually unchanged, while others reject the 2004 document as either illegitimate or unworkable, potentially presenting a difficult hurdle at the outset of Afghanistan peace negotiations (APN). Agreeing on a reform process, let alone on challenging substantive issues, will not be easy. The process of reform and the substantive issues are interrelated, as process decisions are likely to affect outcomes, and Afghan actors are already keenly aware of this. Therefore, an in-depth understanding of the potential and pitfalls of constitutional reform in the Afghan context will be essential for the negotiation of a durable peace framework.

This memo addresses several threshold questions and key considerations that the parties participating in and facilitating intra-Afghan negotiations will need to consider. The numerous Afghan and comparative experiences with constitution-making and reform amid peace processes yield important lessons, but there is no simple road map to apply to the unique set of circumstances and actors comprising the APN. Every important choice has trade-offs and will likely demand compromise.

Some of the big overall trade-offs that impact post-conflict peace and constitution-making are:<sup>1</sup>

- **Speed versus Deliberateness:** Faster processes can seize momentum but are likely to leave gaps and fail to build societal buy-in. Slower processes may lose momentum and elite consensus.

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<sup>1</sup> There is an excellent discussion of these trade-offs and comparative cases in Bell, Christine, and Kimana Zulueta-Fülscher. 2016. *Sequencing Peace Agreements and Constitutions in the Political Settlement Process*. International IDEA.

Ultimately, most successful constitutional reform processes undertaken in connection with a peace process take considerable time and public engagement.

- **Starting Big versus Starting Small:** Processes that try to address major issues up front may give parties the incentive they need to make difficult compromises, but may fail to find consensus if too many issues are on the table too soon. Starting with smaller issues can facilitate quick wins, but risk making hard issues even harder as stopgap fixes start to fray.
- **Specificity versus Ambiguity:** Ironing out specific details can give stakeholders needed clarity, but risk introducing friction points. Leaving ambiguity or fundamental gaps may enable difficult processes to move forward but can leave parties insecure or create land mines in the future.
- **Permanence versus Temporariness:** If an agreement is achieved but is temporary (i.e., expires or can be amended) it can create opportunity for further revision if needed, even as it risks unraveling. Permanent agreements can provide surety, but also rigidity, and will take longer to reach.
- **Broad Participation versus Restricted Process:** Participation can be critical for popular buy-in and sustainability, but intensive closed-door processes may be required to achieve elite consensus and manage difficult compromises. Popular or majoritarian views may also run counter to (often unaccountable) power holders' interests or impede cessation of violence. Lack of participation may facilitate unsustainable consensus among elites and miss the opportunity for social pressure to produce better outcomes.

## Key Questions for the Intra-Afghan Negotiations

These trade-offs factor into the following key issues for deliberation and decision in designing a successful process:

### **Is an agreement to reform the constitution necessary for a cessation of hostilities and/or a peace agreement with the Taliban?**

The Taliban have expressed the view in previous dialogues and public statements that the current Afghan constitution is illegitimate because it was crafted without them and under “foreign occupation.” Therefore, they have suggested that issuing a new Afghan constitution (rather than amending the 2004 constitution) will be required. However, they have not stated clearly what this means in practice for intra-Afghan negotiations, and whether codifying some of their demands on process and/or substance will be preconditions for a cease-fire or a framework agreement.

For those Afghans who have been part of the Bonn coalition, there is considerable concern that opening the constitution to amendment threatens the loss of coveted rights and freedoms and the “republic”—a democratic state in which legitimacy is derived from the consent of the governed and citizens choose their leaders through universal suffrage. While some have long advocated for amendment of the 2004 constitution, women’s equal rights to education and work, media freedom, religious tolerance (especially for Shiites) and popular election of leaders are often expressed as redlines. Therefore, any agreement to reform the constitution will likely require strong safeguards, particularly those basic civil and political rights enumerated in Chapter 2 of the 2004 document.

**If constitutional reform is undertaken, what should be the starting point and process of revisions?**

For their part, the Taliban never formally promulgated a constitution, but a 1998 draft and later revisions may give a rough guide to some of their preferences. This draft constitution does not have as strong a basis in Afghan law or tradition, allocates essentially all power to an Amir and was never ratified. It would be a radical starting point for most Afghans.

If parties cannot agree to amending the 2004 constitution, reverting to 1964 or using the Taliban draft, an interim constitution could be created. This could be done by simplifying the 2004 version by defining the essential functions of the state and rights and duties of the people but leaving other key questions undecided for a future drafting process. A similar approach was taken in Bonn (updating the 1964 version with some key changes). Such a choice could overcome a near-term obstacle in talks. At the same time, such an approach would require hard decisions about the contents of that document and would create unknown risks of leaving tectonic political questions to a future moment which may be more or less propitious for their resolution.

Due to the political implications of choosing the starting point, there are important semantic considerations. “Amendment” may be seen as ceding legitimacy to the current document that the Taliban reject. “Drafting” implies a back-to-the-beginning process that could more easily erode the social gains made since 2001. “Reform” may be a neutral choice.

**What is the sequencing and timeline of constitutional reform in relation to the Afghanistan peace negotiations?**

The sequencing of elements of the constitutional dialogue and reform is a key issue for any peace process as there are numerous options for the pacing, order, and nesting of the various steps. For example, depending on the positions of the parties and the likely depth of changes, constitutional reform could be one step among many to be agreed in the creation of a framework agreement. Alternatively, if the most challenging aspects of the negotiation will only be resolved in a constitutional outcome, it could be the centerpiece of the peace process once preliminary issues (e.g., prisoner exchanges) are agreed. These more challenging issues could be addressed during an agreed interim or transitional period. The key question is what (at various stages) will guarantee to parties the confidence they need to move forward?

A “thin” framework agreement could enunciate basic principles for future talks—such as maintaining the Islamic nature of the state, ensuring fair ethnic and geographic representation in government and protecting the rights of women—but put off decisions on both process (how the reform will be undertaken) and substance until later in the process. This would create distance between the violence and negotiation on fundamental issues (if the Taliban can be convinced to accept a permanent cease-fire without clarity on longer-term political issues). Alternatively, questions of who will reform the constitution and under what rules and principles may prove so important to the parties that they need to be decided within an initial agreement.

A range of comparative examples exist for each option. For example, the 2006 Nepal Comprehensive Peace Accord led to interim constitution drafting, consultation and eventual adoption of a full new constitution and political settlement by a new National Assembly. In Bosnia and El Salvador, the peace agreements focused on cease-fires, and combatant demobilization and integration, and left deeper political reform to a slower constitutional process (though in Bosnia, the parties agreed on broad

outlines of these issues before adhering to a cease-fire). In Kenya, a 2007 brokered unity government following significant election violence led to a constitutional reform process that ended in 2010. In Colombia, the 2012 five-point agreement committed all parties to a peace resolution in step-by-step negotiations that culminated in a comprehensive agreement and new “Peace Constitution” in 2016, which incorporated the peace agreement into the existing 1991 constitution.

It will be important to consider how a constitutional reform process meshes with other time frames in a peace agreement or related agreements. For example, does constitutional reform have to be complete for final troop withdrawal under the U.S.-Taliban agreement? Does it have to be complete during a defined transitional period, for example, the term of a transitional government? The Bonn Agreement formed an Interim Authority for six months, followed by a Transitional Authority created at an Emergency *Loya Jirga*, that was valid for a maximum of two years before free and fair elections. A Constitutional *Loya Jirga* was to be held 18 months after establishment of the Transitional Authority, and a Constitutional Commission established two months after the creation of the Transitional Authority. The time line within an APN agreement could be milestones-based (e.g., the approval of a constitution by a newly elected Parliament, a *loya jirga* or a referendum) rather than calendar-based, but deadlines likely help drive progress—even if some are missed, as is common in constitution-drafting exercises around the world.

The Afghan government has expressed preference to agree to a cease-fire, keep the current constitution in place and negotiate changes under the current amendment procedures in the 2004 constitution. The Taliban have expressed preference for a more “Islamic” government and constitution and will likely demand a system that enshrines power for them in executive and judicial spheres in a way the 2004 constitution cannot guarantee. Therefore, the Taliban are likely to demand interim arrangements that guarantee their authority as well as give voice to fundamental principles of their movement. Put another way, the government controls political power, and the Taliban control levels of violence; each will want the other to make the first concession.

### **How are key decisions made, and by whom, in a constitutional reform process?**

Assuming aspects of a constitutional reform process are going to be part of a framework agreement, it is important to consider the level of detail and rules to be articulated. The agreement may describe the body or bodies that will be responsible for the constitutional reform process. For example, the Bonn Agreement called for the establishment of a Constitutional Commission (named later by decree) and a Constitutional *Loya Jirga* (also formulated later by decree). The makeup of these bodies, who makes the appointments, and their rules of procedure will all be political issues to be negotiated at some point. If the APN takes place over a long period, appointing a subset of negotiators for each side during talks, or even a commission, can be one way to address contentious political differences in parallel with talks on other significant issues like security.

The role of broader consultations will also be an important factor in their framework. Transparent public consultations prior to a detailed peace agreement or during a constitutional reform process may help in the creation of a durable political settlement. Is there a way to construct these that creates momentum, rather than obstacles, for peace? There may also be an important role for international expertise to inform the options all parties are considering, and given recent history careful consideration should be given to which entities would be best suited to provide such support.

How and when a reformed constitution will be ratified is also a critical consideration. Like consultation, this may provide an ultimate check on the process, ensuring that an inclusive approach will be required to keep wider constituencies on board. The *loya jirga* mechanism will undoubtedly be proposed given its prominence in Afghan tradition. However, parties will be wary of the rules for constituting a *loya jirga*, given past attempts to use it as a rubber stamp. The option of a constitutional referendum has also been tried in many places. If successful, this provides an extra layer of popular legitimacy, but such referendums have often met with failure at the end of a long process (e.g., in Colombia in 2016) threatening the entire deal or demonstrating deep divisions.

How disagreements and uncertainties will be resolved is an important point for any constitutional reform arrangement and constitutional implementation. There will inevitably be issues that are unexpected, forgotten or misinterpreted. There must be clear mechanisms to resolve gaps or disagreements. Such decision rules (majority, supermajority, unanimity) should be articulated for the executive authority that will govern during any interim arrangement. To this end, some early agreement on the composition of a Constitutional Reform Commission could be beneficial to allow parties to judge the likely fairness and inclusiveness of the body.

### **Should there be pre-agreed or unamendable principles for the constitution, and how are those negotiated?**

The parties have come into the negotiations with strong views on “redlines” or principles that have to be part of any political settlement and, therefore, embedded in an eventual constitution. It will be important to clarify green and yellow lines as well, so parties can quickly identify areas of commonality and potential compromise. Where these can be agreed, it strengthens the basis of a shared vision for the future and national unity. Where they conflict, the entire project may rest upon their resolution.

For example, the South African Interim Constitution of 1993 agreed 34 constitutional “principles” that the final constitution had to comply with. The Nepal Interim Constitution of 2007 forbade amendments that would “fall below the minimum standards of accepted international human rights and humanitarian laws.” Article 149 of the 2004 Afghan Constitution prohibits amendment of the “principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism” and that “amending fundamental rights of the people shall be permitted only to improve them.”

Negotiators, stakeholders, and facilitators in the Afghan process will have a challenging calculus in deciding if and what principles should be included in a framework agreement. The momentum and focus of the early process may enable some basic matters to be agreed, taking pressure off the longer term and enabling progress on other elements of a deal. However, a gulf of expectations between the various parties combined with recent and ongoing violence and a lack of trust may make agreeing on basic principles, like elections and democratic institutions, basic rights, the role of Sharia and religious authorities, or decentralization exceedingly difficult. The primary unit of analysis should perhaps be the long-term viability of the process, pushing to resolve those issues that parties express are redlines for a framework agreement, but without pushing for binding decisions that won't be politically tenable over time.

There may be several principles all parties can more easily agree to that have existed for many decades in Afghan national thought and constitutions: e.g., the sovereign and nonaligned nature of the Afghan state, Islam as a basis for law, the *loya jirga* as the embodiment of national consensus and the plurality

of ethnicity and language. There will also be principles that are contentious: e.g., a popular basis for sovereignty and legitimacy, human rights according to international standards, Sharia as the source of all law and ulema as the sole legitimate interpreters of Sharia. Given the prominence of the Taliban's demand that Sharia be the highest source of law in Afghanistan, constitutional interpretation will also have a religious component. What will be the relative powers of secular and religious authorities in interpreting religious issues in the constitution, and how will those deciders be selected?

It will be critical to identify possible compromise language and approaches to each of these issues in order to make progress in the peace talks.

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**About the Authors:** Alex Thier is the co-director of the Task Force on U.S. Strategy to Support Democracy and Counter Authoritarianism, a senior fellow at Freedom House, and a senior adviser at the Center for Strategic and International Studies (CSIS). From 2016 to 2019, he served as executive director of the Overseas Development Institute in London. Alex served at the United States Agency for International Development (USAID) as assistant to the administrator of Afghanistan and Pakistan affairs from 2010 through 2014, and then as assistant to the administrator and chief of policy, planning and learning. Alex worked with the United States Institute of Peace (USIP) as a senior rule-of-law adviser and director of programs on Afghanistan, Pakistan and post-conflict constitution-making and was a legal adviser to the Afghan constitutional and judicial reform commissions from 2002 to 2004.

Scott Worden is director of Afghanistan and Central Asia Programs at the United States Institute of Peace. He has an extensive background in reconstruction, development, democracy and governance and policy, among others, as well as extensive regional expertise on Afghanistan and Pakistan. Prior to joining USIP, he was director of the Lessons Learned Program at the office of the Special Inspector General for Afghanistan Reconstruction (SIGAR) and served as acting director of policy as well as a senior policy adviser for the Office of Afghanistan and Pakistan Affairs at the United States Agency for International Development (USAID). In his time at USIP, Scott directed rule-of-law development programs and served as a United Nations-appointed electoral complaints commissioner for the 2009 Afghanistan elections and also advised the U.N. on elections from 2005 to 2006. Scott has a decade of experience working on Afghanistan issues and in the field.

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