

Constitutional Review Under a Peace Agreement

Afghan Peace Process Issues Paper

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Summary: Most, if not all, of the key Afghan actors agree that a review of the 2004 constitution will be part of any successful intra-Afghan settlement. Neither the Afghan government nor the Afghan groups affiliated with it nor the Taliban have publicly offered detailed visions of what the outcome of such a review should be. One can identify broad truisms, for example, that the Afghan government will likely prefer to change as little of the current constitution as possible, many opposition leaders would like less centralization, and the Taliban object at least as much to their exclusion from the 2004 process as to any particular provision of the document it produced. Observers sometimes summarize these positions by observing that, if the parties can actually get to the table, not much substance in the actual constitution will need to change. This conclusion obscures potentially vast areas of disagreement. Based on a variety of interviews, dialogues and desk research on how various Afghan leaders view the key issues at stake in a potential constitutional review, this paper identifies some broad areas of agreement and disagreement the parties will likely need to address as the talks progress into a substantive agenda.

Afghan Government Perspectives

Some general positions are readily identifiable in the Afghan government's public and private statements, which express a desire to change as little in the current constitution as possible.

- The government tends to express a strong preference to take up any changes through the current charter's amendment process, fearing an enduring legitimacy gap if a new constitutional system were created out of whole cloth. In his December 2018 Geneva speech (one of his primary statements on the potential substance of a peace agreement), Afghan President Ashraf Ghani's stated requirement was for "The Constitution [to be] accepted, or amendments

proposed through the constitutional provision.” This has at least three advantages for the government: using the current mechanism helps legitimize the current system, an amended constitution would probably change less than a rewritten one and most constitutional delegates under the current system would be elected officials—which, in turn, would probably limit Taliban representation.

- With regard to substantive changes, Ghani’s major statements on the subject have emphasized the same basic redlines. At the second Kabul Process Conference in the Afghan capital on February 28, 2018, Ghani’s speech, which included a forward-leaning peace offer and largely rebooted the peace process as we currently know it, listed his redlines as the Islamic nature of the state, the republic as the form of government and the basic rights as laid out in the 2004 constitution. In Geneva, he elaborated the latter redline: “the constitutional rights and obligations of all citizens, especially women, [must be] ensured.”
- In an accompanying document from Geneva, Ghani also appeared to cast doubt on decentralization, saying Afghanistan cannot be a loose confederation like that created by the 1879 Treaty of Gandamak. Ghani’s views on the many potential alternatives between the current centralized system and a “loose confederation” are difficult to discern. At the least, it seems unlikely that the republic side will raise decentralization issues during the early months of negotiations.
- Extrapolating lightly, it seems likely that the current government favors a strong presidency; a centralized state; the preservation of basic rights, especially for women and that amendments be made according to the mechanism laid out in the current constitution, while opposing religious checks on elected leaders.

Divergent Views Within the Islamic Republic

The Islamic republic, like any state and the society it governs, includes diverse stakeholders with diverse views. These defy simple or sweeping characterization, but a viable peace agreement must enjoy support from a wide constituency on the republic side. Based on discussions in recent years with a range of nongovernmental Pashtun figures, northern and ethnic minority leaders, and civil society representatives, one might sketch out several likely positions in future negotiations:

- Each of these groups broadly argues for preserving a republican system of government and amending the current constitution rather than rewriting it. Some, including top figures from the Karzai administration and various civil society leaders, nonetheless have said that it would be acceptable to reissue a “new” constitution as long as it preserved the most important substance of the current document. When asked what substance is most important to preserve, these leaders usually specify democratic institutions and individual rights.

- Most of these leaders argue that the constitution is already strong with regard to Islam and are unenthusiastic about Taliban proposals to strengthen the language on Sharia. Some female leaders have been emphatic that the Taliban would immediately abuse such language. At the same time, some traditionally conservative leaders would likely be open to more overtly religious provisions.
- Most Pashtun leaders back a strong central government. Hizb-i-Islami Gulbuddin (HIG) leaders, for example, said that devolution is impossible in Afghanistan (though some anticipate that HIG will, in the end, seek a degree of local autonomy in areas where it is politically strong). Many ethnic minority leaders, by contrast, prefer to decentralize (e.g., by increasing the power of provincial governments or adjusting the degree of centralized control of security forces) and/or to disperse central executive power (e.g., by empowering a CEO or the vice presidents, strengthening ethnic quotas or instituting a parliamentary system with a prime minister).
- Ironically, though Taliban leaders also advocate a strong central government, they could conceivably converge with many ethnic minority leaders on a parliamentary system for theological reasons; more on this is below. Former Afghan President Hamid Karzai also has said at various times that the current presidential system should be negotiable.
- Nearly all these stakeholders profess that women's rights are nonnegotiable, though it is unclear how positions might change during negotiations. Karzai has listed women's rights first on the list of what must be protected, Tajik and Hazara leaders frequently stress that women cannot return to the 1990s and civil society leaders almost always place women's rights at or near the top of their list of concerns. Many or most from civil society would like to see any future constitution include stronger mechanisms to protect the gains made in securing women's rights, for example, a more empowered Afghan Independent Human Rights Commission.
- Proposals range on how to include actual Taliban leaders in government. Many suggest creating a "Council of State Elders" to create a nonthreatening role for the Taliban's supreme leader, Haibatullah Akhundzada, and/or his deputies. A variant that some offer would be an appointed, and more empowered, upper house of parliament, noting that the 2004 constitution drafters had already considered this to ensure a role for qualified people.

Taliban Perspectives

The Taliban also contain diverse views. Many leaders almost certainly favor a restoration of their pre-2001 "Islamic Emirate" regime or some version of it, especially if they one day prove capable of retaking the country militarily—which many Taliban believe they can do. This implies that many would favor supreme power for a religious leader, clerical rather than democratic rule and significant abrogation of the rights enumerated in the 2004 constitution.

Other Taliban leaders, generally from a more politically oriented strain that includes the Doha-based political commission, appear more open to compromise on Afghanistan's political system. Most researchers inevitably have disproportionate access to this cohort, which probably skews the range of Taliban views that reaches Western observers. This paper, nonetheless, presents a version of this cohort's likely views not because they necessarily predominate in internal Taliban discussions, but because this group will probably be responsible for any compromise the Taliban eventually make.

- Many Taliban members and affiliates acknowledge that much of the substance of the current constitution is acceptable. This includes institutions of democracy, which they note exist in Muslim countries all over the world. In this general vein, the Taliban statement at the 2016 Pugwash conference said, "a constitution is an inevitable need of every country," and that it must "[balance] power among the three major pillars of the government." Though they avoid endorsing a democratic system in public, some credible figures have specified in private that, after a transitional period led by an interim government, future Afghan governments should gain power through elections.
- Few Taliban political leaders still advocate—at least in public—for the literal return of an Islamic emirate, and most say that such a system today would not be viable. In particular, many Taliban associates say it is highly unlikely the group would seek a governmental position for an *Emir ul Momineen*.
- Taliban figures are inconsistent on the two points above, however. Jalaluddin Shinwari, a well-connected former Taliban regime attorney general, in 2019 told The New York Times that "the Taliban will not accept elections ... [they] are telling Americans: 'You accept our Emirate. Return it to us the way you took it.'"
- A 2016 study of 16 Taliban leadership figures by Borhan Osman and Anand Gopal (commissioned by New York University's Center for International Cooperation) found that most did not believe all of the current Afghan constitution must be scrapped, but that its Islamic legitimacy is linked to a) whether it is fairly and consistently applied, and b) whether it governs a state that is truly sovereign. They also found that most Taliban do not reject elections in principle, though their views depend heavily on what outcome elections deliver.
- Taliban political thinkers are fairly consistent that a new constitution must be issued, even if it closely resembles the current one. At the Moscow conference in February 2019, former Taliban lead negotiator Sher Abbas Stanekzai said: "The current constitution of Kabul Administration is not reliable, because it has been copied from the West and [imposed] under the shadow of occupation ... its provisions are vague and contradictory ... in its present version [it] is a major obstacle to peace." Some Taliban concede that a new but similar constitution would be a "rebranding" exercise; at the same time, many argue strongly that the group's leadership will not compromise on this issue, or simply accept the current constitution as HIG did in 2016.

- By extension, most Taliban leaders also reject changes to the current constitution's amendment process, because adhering to it would mean acknowledging the legitimacy of—or even reaffirming—the 2004 charter and the system it governs. They likely also recognize that the current process would disadvantage them, not least because most constitutional delegates would be elected officials. Some Taliban, however, acknowledge that many basic mechanisms of the current amendment process—a drafting commission and a *loya jirga*—would probably be necessary. The Taliban touched briefly on a prospective review process at the 2012 Track 2 dialogue in Chantilly, France, one of their first public appearances since losing power in 2001, saying “the [new] constitution shall be written by Afghan scholars in a free atmosphere and will then be presented to the nation for approval.”
- In 1998, an assembly of Taliban elders drafted a constitution for the Islamic emirate, though it was never ratified. The document gives near-absolute power to an emir, who must be a male Hanafi. Below him, it establishes a prime minister and unicameral “Islamic council.” It states that all Afghans “have equal rights and duties before the law” and enshrines a range of freedoms and protections, though most are caveated with “in accordance with Sharia” or similar. It establishes mandatory military service and primary education, and essentially sidesteps the question of girls’ education. It bears mention that the Osman/Gopal interviewees claimed this was always meant to be a transitional document. Though it may offer some window into the group’s views, the draft is not authoritative. Since at least 2010, it has seemingly disappeared from Taliban discourse.
- Taliban members tend to point out the same few substantive elements of the constitution that would likely be points of contention. One is to strengthen the up-front provision that no law shall contradict Sharia; the draft Taliban constitution included the stronger “Sharia is the only source of lawmaking in the country,” with numerous additional references to the supremacy of Sharia. This is a common point of debate in constitution-drafting processes across the Islamic world. The group may insist on adding a clause that Hanafi jurisprudence shall be the means of adjudicating anything not covered in the constitution, which would meet particular resistance from Afghanistan’s Shia population and advocates of minority rights protection more generally.
- Other items that Taliban figures commonly cite are provisions that they view as directly contradicting precepts of Sharia. One such provision is to reimpose *hudood*, or corporal punishment, for specific offenses.
- Another, cutting to the heart of Taliban views on democracy, is that the overall leader of the country (though not necessarily others) must be chosen by what the Quran calls the *ahl al-hall wal-aqd*—in essence, a select group of learned elites. Taliban figures argue that the underlying principle is that not every member of society should have equal control over such a weighty decision as, say, the country’s most accomplished religious scholars.

- Along these lines, Taliban figures sometimes elaborate that a parliamentary system, or even the U.S. Electoral College, meet this requirement; more hardline members might insist on (for example) senior ulama selecting the president. This same principle could incentivize the Taliban to advocate on behalf of a more powerful appointed upper house of parliament. Though not a Taliban figure, the prominent Deobandi scholar Muhammad Taqi Usmani wrote in a 2016 book that “the advisory council, parliament, or assembly could be taken as constituting *ahl al-hall wal-aqd* ... In addition, it appears that the Holy Shariah has left scope for it to be elected directly and on a majority basis, since there is no text that expressly forbids so.”
- On women’s and cultural freedoms, nearly all Taliban assert that the group has evolved from its positions in the 1990s, but will hold firm on restrictions on co-ed schools, the portrayal of women and relationships on TV, and women becoming president or members of the supreme court. This is a potentially serious dilemma—the Taliban may come to believe they have bent over backward on this issue, but the restrictions they still demand would be reprehensible to many others.
- On rights more generally, some Taliban say that the notion of “human rights” is Western, and/or in tension with Sharia, even if they do not necessarily favor a draconian alternative. This could be another especially difficult sticking point, since other Afghans are quick to point out that the current constitution specifically forbids amendments that restrict individual rights.
- The Taliban, like many Pashtun elites and most global Islamist movements, are likely to be strong “centralizers.” In private, former Taliban members close to the group have said the Taliban will not tolerate “parallel” governments or security forces, including their own. In the context of peace, they have argued that the entire Taliban fighting force and shadow governance apparatus must fold into the larger Afghan government, military, and police.
- The Taliban’s overarching constitutional demand is for a more “Islamic” system. This could touch all elements of a constitutional review to include specific religious checks on secular political power; indeed, many Taliban in private cite the Iranian system as a partial model. Extrapolating, the Taliban could plausibly insist on (for example) a body akin to the Guardian Council, with Taliban clerics assuming a major role (both nationally and locally) in Afghanistan’s judiciary, a religious “supreme court” either parallel or superior to the current one and/or formal legal status for Hanafi jurisprudence.

Ratification

A final crucial issue is ratification. It is difficult to glean the parties’ views on how to ratify constitutional changes, though both sides tend to say that some form of nationwide *loya jirga* would be involved. An immediate dilemma is that the Taliban probably will demand that a future “legitimate” government, rather than the current one, manage the ratification—but this raises the question of what document governs the installation of the future government in the first place. If ratification occurs under the

current constitution, representatives must be included from district councils that have never been elected—meaning it will be almost impossible to follow the rules literally.

Reaching Agreement

Many of these positions are difficult to reconcile. Any successful constitutional negotiation will require flexibility and creative thinking from all sides, on issues much more consequential than those the republic and the Taliban have negotiated to date. If an agreement emerges on the constitution, it will likely hinge on preserving the core rights and democratic institutions of the current system, while allowing the Taliban to credibly claim that they have a) replaced what they consider the system of the U.S. occupation era with something new and independent, and b) established a more Islamic system than they consider the current one to be. As with so many peace negotiations, however, the real key to such a compromise may be the eventual emergence of genuine, mutual political determination to end the war. If such will exists, the parties' positions are in tension but not hopelessly contradictory. In its absence, talks will likely stall, and war continue.

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