

Lessons from the 1931 Constitution of Nadir Khan: Religious Inclusion and Reform

Afghan Peace Process Issues Paper

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Summary: A little less than a century ago, Afghans made peace among themselves to end a war that threatened to unravel the Afghan state that had been established by Abdur Rahman Khan in 1880 and maintained by his descendants. Central to this peace was the constitution of 1931, which reestablished the Afghan state in new terms, many of which were religious. Until the democratic reformation of 1964, this document would facilitate stability, modernization and reform through various mechanisms of inclusion and accommodation. Despite its exceptional longevity, the 1931 constitution has received little public attention, overshadowed by the 1964 constitution, which served as the basis for the 2004 constitution. In both process and substance, the 1931 constitution accommodated key parties and ideas, especially those of the religious elite that had challenged previous Afghan governments. The document did so by strategically balancing reform against conservative religious interests while balancing statism against decentralization. These two elements of the 1931 constitution allowed Nadir Khan and his coalition to coordinate the interests of important stakeholders, such as the ulema (clerics) and tribal notables, to create a long-lasting peace. Together, issue deferral, inclusive institution formation and mechanisms to balance interests allowed for flexible choices that encouraged constitutional longevity.

Constitutional Coordination and the Afghan Case

Coordination theorists argue that successful constitutions achieve and maintain a “coordination equilibrium,” an outcome wherein actors are better off cooperating rather than acting alone.¹ Constitutional scholars such as Gillian K. Hadfield and Barry R. Weingast consider constitutional equilibrium to be a key component of successful coordination, as constitutions that are long-lived effectively coordinate parties that could otherwise resist the legal and political order.² This approach informs Shamshad Pasarlay’s work on the 1931 constitution of Afghanistan. Pasarlay argues that constitutions with longevity in Afghan history have done little more than enable coordination, or intra-elite negotiation, by bringing all major stakeholders to the negotiation table, deferring judgment on controversial issues and ensuring that the government did not exercise power by interpreting vague constitutional questions in cases that would offend major stakeholders.³ In particular, the 1931 constitution enabled a harmonious relationship between modernists, traditional religious leaders (ulema), tribes and the monarchy, in effect coordinating relevant elites to achieve an equilibrium wherein each group gained more from abiding by the constitutional order than from challenging it.⁴ Coordination is thus a combination of accommodation, through concessions and power-sharing, and inclusion, by making room for key stakeholders to take part in the process of negotiation.

Some scholars, such as Louis Dupree and Thomas Barfield, have read the document differently. Dupree wrote that the 1931 constitution “embodied a hodgepodge of unworkable elements” and created an illusion of democracy while vesting power in a monarchical oligarchy.⁵ Barfield argued that the constitution “was effusive in its praise for all things Islamic and gave supremacy to the Sunni Hanafi school in legal disputes,” which, in his view, helped to keep Afghanistan behind the rest of the Muslim world in terms of modernization.⁶ It is true that this constitution praised all things Islamic and included a mix of elements: this is precisely the strength of the constitution that Pasarlay identified as coordination.

A Brief History of Afghan Constitutionalism

In May 1919, a little more than six months after the end of World War I, Afghans began their third and final war against the British Indian Empire. The war was over in less than a month, given the empire’s

¹ Hadfield, Gillian K., and Barry R. Weingast. 2013. “Constitutions as Coordinating Devices.” USC CLEO Research Paper No. C11-20, USC Law Legal Studies Paper No. 11-28 (September 1); Kuflik, Arthur. 1982. “Coordination, Equilibrium and Rational Choice.” *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 42, no. 3: 333-48. Accessed December 9, 2020.

² Hadfield and Weingast, “Constitutions as Coordinating Devices,” 2; Hadfield and Weingast, “Constitutions as Coordinating Devices,” 39.

³ Pasarlay, Shamshad. 2018. “The Limits of Constitutional Deferral: Lessons from the History of the 2004 Constitution of Afghanistan.” *Pacific Rim Law & Policy Journal* 27, no. 3.

⁴ Pasarlay, “The Limits of Constitutional Deferral.”

⁵ Dupree, Louis. 1978. *Afghanistan*. Princeton, New Jersey: Princeton University Press, 465.

⁶ Thomas, Barfield. 2010. *Afghanistan: A Cultural and Political History*. Princeton, New Jersey: Princeton University Press, 200.

financial condition.⁷ Afghan constitutionalists under the leadership of King Amanullah Khan, public intellectuals like Mahmud Tarzi, and generals such as Nadir Khan won Afghanistan sovereignty and began the construction of an independent Afghan state. The constitution created by this group, known as the *Nizamnamah-ye-Asasi-e-Dawlat-e-Aliyah-e-Afghanistan*, was drafted in 1922-1923 by a group of constitutionalists and progressive notables, including progressive religious scholars.⁸ Extensive use of Islamic symbols and language, including the declaration of *jihad* against the British and, more generally, the king's pan-Islamic leanings, had gained Amanullah Khan the support of the ulema.⁹

The 1923 constitution formed a cabinet for the king known as the *Shura-e-Waziran* and created a council of the state known as the *Shura-e-Dawlat*.¹⁰ Constitutionalists demanded a representative democracy, but this never materialized. Islam was laid out as the official religion and protections for minorities were provided (Arts. 2, 8 and 15). The king would rule in accordance with Sharia (Art. 4) while upholding and promoting the implementation of Sharia laws (Art. 6). However, in practice, laws were developed and passed by the king, the state council and the council of ministers, none of which included members of the ulema or qazis (religious judges).

The Khost rebellion of 1924 and the revolt against Amanullah Khan in 1929 upended the Afghan constitution of 1923. The Khost rebellion began as a protest over a new military draft and a progressive tax, both of which angered many religious and tribal elites. Mullahs (religious leaders) in the east treated these policies as heretical and the rebellion quickly spread.¹¹ A year of fighting followed that soured the popular view of Amanullah Khan as a national hero of independence. After Amanullah Khan put down the rebellion, he took a trip to Europe in 1926-1927. Upon his return, in front of an audience of about 1,000 notables, he introduced proposals to democratize Afghanistan, secularize the government, make primary education compulsory, enforce monogamy and emancipate women. This tribal assembly, with the backing of religious leaders from across the country, rejected these proposals. Amanullah Khan reconvened a smaller *jirga* filled with about 100 of his supporters that passed his amendments.¹² This led directly to a violent insurrection as different factions across the country, including tribal elites and the ulema, rose against the monarch's reforms that had passed without popular support or elite acquiescence. Habibullah Kalakani, known as Bacha i Saqao, took the throne in Kabul in 1929 and ruled

⁷ Dupree, *Afghanistan*, 443.

⁸ Scholars, such as Senzil K. Nawid in *Religious Response to Social Change in Afghanistan, 1919-29: King Aman-Allah and the Afghan Ulama*, have written extensively on this topic.

⁹ Nawid, Senzil K. 1999. *Religious Response to Social Change in Afghanistan 1919-29: King Aman-Allah and the Afghan Ulama*. Costa Mesa, California: Mazda Publishers.

¹⁰ Emadi, Hafizullah. 2008. "Establishment of Afghanistan's Parliament and the Role of Women Parliamentarians Retrospect and Prospects." *Internationales Asienforum* 39, no. 1-2: 5-19.

¹¹ Mukhopadhyay, Dipali. 2010. "Ambition and Retreat: State-building in Afghanistan and the Persistence of Informal Power." In *Contested Sovereignties: Government and Democracy in Middle Eastern and European Perspectives*, edited by Elisabeth Ozdalga and Sune Persson, 20. Istanbul: I.B. Tauris.

¹² Dupree, *Afghanistan*, 464.

for nearly a year. Kalakani titled himself *Khadimi-i-din-i-rasululah*, or “servant of the prophet’s religion,” which reflects the religious character of the revolt against the reformist monarch.¹³

Though Nadir Khan was once Amanullah Khan’s minister of war and a distant member of the monarch’s family through marriage, for years he had opposed the speed at which the king had tried to modernize Afghanistan.¹⁴ His leadership played a significant role in creating an enduring political order as he had seen firsthand the consequences of rushing into development under Amanullah Khan’s rule. Nadir Khan parted ways with Amanullah Khan in 1926 and, during the civil war in 1929, led a force of militias gathered from across Afghanistan, largely from eastern Pashtun tribes. Nadir Khan had refused to respond violently to the Khost rebellion in 1926, which led to his exile. This response gained him unique goodwill as a member of the monarchy who was sympathetic to the concerns of the tribes and ulema, and who did not view violence as the best response to political dissension. His leadership was an asset that would lend the constitution legitimacy and goodwill. Nadir Khan’s military force sought to restore the institution of the monarchy. Tribes across the border, such as the Mehsud and Waziri, lent their support as they sought a strong Afghan state to advocate for cross-border Pashtun interests.¹⁵ Thus, although Nadir Khan opposed Amanullah Khan’s speed as a modernizer, this campaign’s goals were to defeat Kalakani and restore the monarchy under Nadir Khan, rather than to push back modernization entirely. Some forces were fighting against modernization wholesale. As early as 1923, many ulema had presented the legal reforms of the *Nizamnama* as antithetical to Islam, and their agitation fed into the Khost rebellion. This same attitude within the religious elite would play a pivotal role in toppling Amanullah Khan in 1929.

Despite the widespread religious opposition to Amanullah Khan, the winning coalition of Nadir Khan was royalist and moderate compared to the ulema and Kalakani. That a royalist insider won the war undermines the myth that Nadir Khan’s rise to power — and his subsequent constitutional order — resulted from a revolt against modernity. The civil war began as ulema and tribes fought against monarchical reform, but the war ended with a royalist restoration. Nadir Khan and his forces did not fight against reform itself but against Amanullah Khan’s approach. Nadir Khan and his coalition were dedicated to gradual change more so than religious conservatism, yet they took many steps after their rise to power to accommodate the religious elite that had toppled Amanullah Khan.

Nadir Khan’s Accommodationist Coordination

¹³ Dupree, *Afghanistan*, 458.

¹⁴ Mukhopadhyay, “Ambition and Retreat,” 26.

¹⁵ It is worth noting that the tribes that supported Nadir Khan — almost all of them — were brutally slaughtered or harmed under Abdur Rahman Khan’s rule. The Hazaras and Ghilzai were each targeted by Abdur Rahman Khan. Other elements of Nadir Khan’s forces, such as the Waziris and Mehsuds, sought a stronger Afghan state to advocate for their tribal members still under British rule across the Durand Line. The same tribes that were alienated by Abdur Rahman Khan and his deals with the British in the 1890s would in 1931 become the very force that restored the monarchy that had 40 years earlier slaughtered or alienated them.

In 1930, Nadir Khan gathered a *loya jirga* of nearly 300 notables. This assembly granted him the title of king of Afghanistan and the notables selected 105 of its members to serve in a national council. This council approved the constitution in October 1931.¹⁶ The constitution was based on the constitution of 1923, albeit with major modifications, and contained 110 articles in 16 sections. Several scholars have noted that Nadir Khan's constitution can be considered both accommodationist and gradualist.¹⁷ The constitutional accommodationism satisfied the conservative forces and religious elite even as it created a powerful state that had the potential to pursue modernization at a slower pace.

The language of the constitution was heavily religious overall: Islam featured prominently in everything from state oaths to multiple repugnancy clauses, which specified that laws “must not be in contradiction with the teachings of Islam.” Alongside the religious language, the constitution also ceded real power to the clerical class. Mohammad Hashim Kamali has argued that, unlike in the 1923 constitution, sovereignty was vested in both the monarch and the ulema in 1931.¹⁸ Islam in the 1923 constitution was the religion of the state but also secondary to statutory law, while, in the 1931 constitution, Islam was an alternative to statutory law and set the limits thereof. Multiple repugnancy clauses and other religious clauses prioritized Sharia and Islam in lawmaking and juridical practices; for example, a clause in Article 65 states that “[articles passed by the assembly] must not contravene the prescriptions of the religion of Islam.” This reverence for Islam did create conflicts; if one party in a court case was dissatisfied, they could take the case to another court and seek to overturn the previous court's decision. While a pluralistic legal system could satisfy both liberal and conservative factions in the short term, it also created new controversies between the secular and religious legal systems and risked the legitimacy of both in the long term.

Constitutional articles, such as Article 22, placed all schools in Afghanistan under government supervision to ensure that “education and teaching is not contrary to Islamic views and precepts, and is in accordance with scientific, artistic and scientific interests.”¹⁹ These two elements in Article 22 — the state's control over all schools and the promise that the state would use this control to ensure that teaching was not contrary to Islamic views and precepts — typify the constitution's approach to state power and concession. A single article put forward an important reform even as it conceded ongoing deference to Islam.

Beyond these constitutional concessions, important positions in Nadir Khan's cabinet, such as the position of minister of justice, were given to religious conservatives, which placed the judiciary in the

¹⁶ Dupree, *Afghanistan*, 463.

¹⁷ Amin Saikal and Dipali Mukhopadhyay have described Nadir Khan's constitution as accommodationist. Saikal and Mukhopadhyay wrote that Nadir Khan favored a “gradual process of change and development, based on peaceful coexistence with conservative forces.” See Barnett R. Rubin, “Lineages of the State in Afghanistan” for a more general characterization of the Musahiban dynasty along these lines.

¹⁸ Kamali, Mohammad Hashim. 1985. *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary*. Leiden, Netherlands: E.J. Brill.

¹⁹ Afghan Constitution of 1931, Article 22.

hands of conservatives for a generation.²⁰ Meanwhile, penal and civil codes remained in line with Sharia codes as developed by Abdur Rahman Khan — although inspired by British-codified Mughal law and developed with French legal influences, they remained solidly grounded in Sharia. Additionally, Sharia was given priority in cases concerning property, warrant law and court secrecy. These concessions won religious support while leaving room for policies to later develop that could bring about reform.

For a time, these decisions empowered the conservative ulema; yet by the 1940s, most of the progress that had been made under Amanullah Khan was restored. The concessions to the religious right were not permanent, they were temporary, pragmatic and at times symbolic. For example, as Mary Bradley Watkins reported, “in 1939 the Ministry of Education under Prince Naim created a High School for girls, called for several years a ‘Nursing School’ to prevent any social disturbance.”²¹ The Musahabin elite was aware of the risks of reforming too quickly or without caution. Symbolic concessions such as the renaming of a girls school represented a subtle but important nod to the preferences of society’s more conservative elements. Through these accommodations, some political and legal (granting the ulema the judiciary) and some symbolic (the naming of a girls school), the state satisfied conservative forces without foreclosing the possibility of future liberalization concerning women’s rights, crime and punishment and social and economic development.²²

Furthermore, the government promoted gradual evolution within the Hanafi legal structure by creating a network of national madrassas and, later, Sharia faculties within the national university system. The ulema that came out of these institutions were generally more liberal than the ulema that existed independent of the state in the 1930s. And, overwhelmingly, they did not resist reforms such as the official endorsement of the removing of the veil in the late 1950s. Although there were riots in Kandahar and some mullahs objected to the reforms, the vast majority of the ulema did not stand in the way of the state’s reform, regarding veiling specifically.²³ This was a significant development, as it showed that the unified resistance of the ulema to reforms regarding women that existed under Amanullah Khan had dissolved by the 1950s. One might have expected widespread resistance to the state’s reforms, but as it stood, militant resistance with ulema support erupted only in Kandahar. In times of political strife, significant religious figures, such as Sibghatullah Mojadidi, could write letters to the prime minister directly on issues sensitive to the ulema, which allowed their views to be communicated to the highest levels of leadership.²⁴

²⁰ Barfield, *Afghanistan*, 200.

²¹ Watkins, Mary Bradley. 1963. *Afghanistan: Land In Transition*. Princeton, New Jersey: D. Van Nostrand Co., 172.

²² Professor Clark Lombardi, director of Islamic Legal Studies and professor of law at University of Washington’s School of Law, email conversation with authors, August 26, 2020. This technique of liberalization through control over education has been covered by other writers such as Senzil K. Nawid and Vartan Gregorian.

²³ Esposito, John, and Emad El-Din Shahin, eds. 2016. “The Dynamics of Islam in Politics.” In *The Oxford Handbook of Islam and Politics*. Oxford University Press, 462.

²⁴ Kakar, Palwasha L., and Schiwal, Julia. Unpublished interview with Dr. Najibullah Mojadidi, former senior advisor to the-President of the Islamic Republic of Afghanistan and former Afghan ambassador to the U.A.E., March 3, 2021.

Contentious issues that had caused such chaos in the previous decade were set aside by the constitution's drafters this time around. Ulema did not hold power solely because of their clerical status; rather, their power lay in the tribal militias that they could stir into action. Tribal forces were the military power that, at the behest and with the support of the ulema, could overthrow the state. As such, the monarchy's deferral on questions of taxation, conscription and the press represented an accommodation of the religious and tribal elite that had opposed Amanullah Khan's tax and conscription laws a decade earlier. These issues were all to be regulated in accordance with "special laws," in effect, leaving them to ongoing negotiations that could include parties not present in the group of the 100 or so notables that approved the constitution.

The most significant concession to non-state elites was the provision that provincial administration would be governed by decentralization and the division of functions and responsibilities, in Article 102. The text reads: "Provincial administration is based on three fundamental rules: 1) decentralization of authority; 2) the divisions of functions; 3) clear determination of responsibilities." Decentralization was established as a principle, not a formal regulation, the advantage of which was a deferral of the specifics alongside an elevation of the principles that would guide future intra-elite negotiation. In Article 104, the constitution also guaranteed the state the right to intervene in the face of signs of revolt. Thus, state power was assured alongside a guarantee of provincial independence. The ulema were also favored by this decision, since less centralized control over the provinces meant more of a role for them — state decentralization favored both the tribal and religious elite, beyond the "enclave" of Kabul.

Economic reforms also acted as means to accommodate the tribal and religious elite. Articles 45 and 46, for example, gave the state the power to reform the Afghan economy, which had been lurching from one crisis to the next since independence.²⁵ Article 45 gave the parliament, the *shura-ye melli*, power over the organization of companies, public and private, while Article 46 gave it the power to approve the granting of commercial and industrial privileges. This led to the creation of a key accommodationist element of the new order of Nadir Khan, known as the *Sherkat* (company) system, wherein the Afghan government would control 45-50 percent of a company's stock and direct many business activities.²⁶ This move provided the state with income from the private sector rather than from a tax upon the tribal and religious elite, compensating for the abolition of Amanullah Khan's unpopular progressive tax.²⁷ Barnett R. Rubin has termed this an "enclave" state-building strategy, one that favored the creation of a Kabul-centered, export-oriented market to gain state revenue, foregoing Amanullah Khan's reliance on nationwide taxes on livestock and agriculture.²⁸ The turn to financing the state through the export market rather than agriculture was an example of intra-elite negotiation by economic accommodation;

²⁵ Though independent Afghanistan was guaranteed an annual subsidy of ₹140,000 from the British, the treasury had been depleted in the war and the needs of the state exceeded this subsidy, furthermore, the back payments owed to Habibullah Khan, amounting to ₹4,400,000 were made void upon his death.

²⁶ Dupree, *Afghanistan*, 472.

²⁷ As an example of the drastic nature of the change, in 1926, direct taxes on agriculture and livestock accounted for 62.5% of Amanullah Khan's domestic revenue, but in 1953 counted for less than 20%.

²⁸ Rubin, Barnett R. 1988. "Lineages of the State in Afghanistan." *Asian Survey* 28, no. 11: 1,200.

this change bought conservative elites and tribal forces opposed to Amanullah Khan's tax reforms on board with Nadir Khan's economic program.

The 1931 constitution led to three decades wherein conflicts were largely resolved peacefully. The state's capacity to produce lasting social, political or economic change relied on a strategy that prioritized nonconfrontation with the religious, and especially conservative, elite. Still, this strategy did not foreclose violence on the part of the state or non-state actors. In the late 1950s, Afghan Prime Minister Mohammed Daoud Khan encouraged many women in the royal family to unveil themselves.²⁹ In 1959, he went further and declared women's emancipation, which at the time meant unveiling and expanding the number of women in the labor force. Though unveiling remained optional, many conservatives were angered. Soon after, in Kandahar, riots broke out in opposition to the reform. Mohammed Daoud Khan violently crushed them, resulting in hundreds of deaths. His regime's desire to reform came into tension with the long-held strategy of cautious development. Reforms almost always angered someone, and when the reform was sensitive, this anger could turn violent; but, given decades of government consolidation, that violence did not threaten state collapse as it might have had reforms been pushed through in the 1930s. The short-term sharing of power with the religious elite led to the long-term stability of the reformist state by providing both economic and political power to the religious elite in such a way as to make resistance to the state worth less than peaceful coexistence with it. The cost of this stability was the willingness to balance short-term power sharing against the long-term possibility of stability and reform.

A Comparative View: 2004 and 1931

The 2004 constitution has inherited several advantages of the 1931 document but has its own unique flaws, as the 1931 document did. The 2004 constitution-drafting process was the most consultative in Afghan history. It included many conservative ulema and concessions were made in the constitution that could be seen as in line with some Taliban views. The 2004 constitution reached a balance with the conservative clerical class by including clear clauses on Islam as the state religion and a repugnancy clause on the limiting role of "Islamic tenants and provisions." Even reference to Hanafi jurisprudence made its way into the 2004 constitution. However, this balance and accommodation were undermined by the exclusion of the Taliban from the constitution-drafting process; this exclusion was largely due to Western pressure. This exclusion may help explain why the Taliban continue to challenge the state through violence.

The 1931 document was drafted and ratified by a politically diverse coalition of tribal leaders, former members of the government and ulema. Concessions, positions and power were given to the tribes and ulema, which bought the support of some of those not represented at the drafting. Unofficial policies, like those from the Musahiban's period of cautious reform, can facilitate progressive change over time. The most important elements are inclusion and consultation. In 1931, the constitution provided inclusion in two structural ways: first, Islam's role in the judicial structure let the ulema weigh in on matters of justice through their pre-established clerical networks — but no formal religious council was established. Second, the principle of decentralization maintained the influence of rural networks of

²⁹ Esposito and Shahin, "The Dynamics of Islam in Politics," 462.

religious and tribal leaders that existed outside of the formal state. Ulema and tribal leaders maintained their customary authority, and the state was prohibited from challenging this authority.

The Taliban are pushing for something different than the current constitution. They want Hanafi jurisprudence to be the primary source of legislation, not a limiting factor or preferred guideline. In the Taliban's draft constitution of 1998, Hanafi jurisprudence was established as the official set of religious guidelines in Article 4, and Islam as the only allowed source of lawmaking, according to Article 5. That document also empowered the ulema to determine the emir, Cabinet and important legislative decisions through the mechanism of the Shura Council. Paradoxically, the Taliban draft constitution resembles most closely the communist constitution of 1976, in that both constitutions provide for a council that elects the leader, even as that leader appoints the council. While the current Taliban leadership has not formally introduced these positions as their own, the elements of this draft document suggest a radical shift in the role ulema would be afforded from that outlined in any past Afghan constitution.

The 1931 constitution's longevity suggests that successful Afghan constitutions are those that are at least minimally acceptable to every stakeholder and pair inclusion with a gradualist development policy. The 1931 document offered concessions or deferred on the controversial issues of the decade prior while leaving room for power-sharing, customary influence via appointments, and informal, deconcentrated forms of governance. The 2004 document did offer religious concessions but paired these concessions with exclusion of the Taliban. In 1931, following the creation of the new constitutional order, the civil war ended. In contrast, in 2004, the civil war entered a new phase. This meant that a key party, the Taliban, was absent during the foundation of the modern Afghan state, all but ensuring that the war continued. In 1931, concessions and inclusion were tied into one document, while in 2004, concessions came with political exclusion, which over time led to more violence as the Taliban grew in strength.

Two central elements of the 1931 constitution that facilitated arrival at a coordinated equilibrium were deferral and the repugnancy clauses. The 1931 process neither held the largest *loya jirga* to ratify the constitution nor did the process reach into the grassroots — yet this constitution nevertheless gained the support of the tribal leaders, mullahs and other dissatisfied segments of the population. The 1931 document offered concessions or deferred the controversial issues of the decade prior. It should be noted that the amendments made in 1926 were maintained in the 1931 document, which carried over some accommodationist reforms. One of these amendments identified Hanafi Islam as the official jurisprudence of Afghanistan. The 1931 document was drafted a little over three and a half years after the 1926 amendments were put in practice, and, in some sense, it was an extension of those reforms. The concessions and deferrals of the 1931 constitution satisfied those who had helped topple Amanullah Khan two years before. Simultaneously, the document included many provisions that would become key to the modernization that Afghanistan underwent over the next 30 years, such as education reform, economic growth and progress regarding women's rights.

With respect to the repugnancy clauses, these could set the groundwork for a consultative and inclusive process, as they define the limits within which laws can be made. The Taliban, in their 1998 draft constitution, relied heavily on repugnancy clauses. But a repugnancy clause without inclusion does not offer an opportunity for excluded parties to voice their views on what is legally acceptable or not.

Inclusion is necessary for these clauses to have political clout. While the 2004 document was the product of an unprecedented consultative process and it did offer religious concessions, it bowed to the Western requirement of Taliban exclusion.

The conflicted nature of the new order was compounded by the fact of ongoing foreign involvement in Afghan state-building. Ultimately, the Taliban came to view the 2004 constitution as a foreign imposition and so, inherently, illegitimate, whatever its references may be to Islam and Islamic law. And, of course, the contemporary Afghan government could not use force indiscriminately (or even on its own terms) in the ways that the 1931 government, which did not have to contend with input from the international community as we know it today, could. The 1931 constitution had the implicit advantage of being decidedly Afghan in content, character and creation — the 2004 document is also Afghan, but was produced under the auspices of an ongoing foreign intervention, a fact that serves the Taliban narrative about its foreignness.

Today, as was the case a century ago, there are forces willing to commit acts of violence to restore a so-called traditional society as they confront the remarkable change that has marked Afghan social and political life since 2001. The clock cannot be turned back, and there is reason to believe that Afghan citizens, republican elites and their international supporters will resist a negotiated outcome that threatens the gains made with respect to human rights and political participation. Yet, Nadir Khan's 1931 political order shows that peace and progress can coexist. The choice need not be between good governance or accommodationist concessions but rather between hyper-accelerated efforts at modernization which result in militant resistance to the state (1923) and a cautious, coordinated and gradual decades-long effort to balance the need for progress against the risk of a revolt (1931). The long-term stability of Nadir Khan's constitution shows that there is nothing natural, permanent or unchangeable about the relationship between the urban, political elite, and the rural, conservative elite. What brings these forces into symbiosis with one another is caution, engagement and an awareness of the long-term benefits of mutual, short-term accommodation.

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