

## PART VI

### MIDDLE EAST AND CENTRAL ASIA



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# Big Tent, Small Tent

## The Making of a Constitution in Afghanistan<sup>1</sup>

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In late 2003, Afghanistan experienced a moment of hope for renewal and reconciliation after decades of turmoil and devastation. Thirty years earlier, a coup had upended a nascent democratic order, setting off a series of invasions, regime changes, and civil wars that would kill 10 percent of the population, send a third of Afghanistan's people into exile, and destroy the infrastructure and economy of this already least-developed nation. In December 2003, Afghanistan convened a *loya jirga*,<sup>2</sup> or grand national assembly, to revise and ratify a new constitution. The goal of this process and the document it would produce was to forge a new and lasting political compact that would end the cycle of destruction and create a foundation of rights and institutions to support the reemergence of Afghan nationhood and statehood.

Finding stability in Afghanistan requires its people and political leaders to overcome deep divisions that led to three decades of war and political turmoil.<sup>3</sup> There are numerous cleavages in Afghan society, including

those centered on urban-rural, modern-traditional, and ethnic distinctions, as well as on divergent views on the role of Islam in politics. These cleavages have fueled—and have been further exacerbated by—recent conflicts. Moreover, in the course of thirty years, Afghanistan changed from a constitutional monarchy to a republic, to a communist dictatorship under Soviet occupation, to a failed and fractured state engaged in devastating civil war, to the home of a fundamentalist and obscurantist theocracy which thrived, in part, upon the largesse of a global terrorist confederation's leaders and revenue from the world's largest opium crop. These cleavages and the legacy of political upheaval continue to manifest themselves in the ongoing peace process.<sup>4</sup>

The attacks on the World Trade Center and the Pentagon on September 11, 2001, marked the start of a new political situation for Afghanistan. A U.S.-led military campaign in the country led to the collapse of the Taliban regime that had provided safe haven

to al Qaeda's leaders, the entry of Northern Alliance forces into Kabul, and eventually a transitional accord, the Bonn Agreement, signed in Bonn, Germany, in December 2001.<sup>5</sup> The political transition process that is still underway presents a great challenge and opportunity to the people of Afghanistan.

A key feature of the Bonn Agreement was a timetable for the creation of a new Afghan constitution. The culmination of the constitution-making process set in motion by that agreement was the December 2003 Constitutional Loya Jirga (CLJ).<sup>6</sup> For twenty-one days that December, over 500 Afghan men and women from every province, ethnic group, social class, political affiliation, and religious sect fought vigorously for their vision of Afghanistan's future. Elected leaders, human rights activists, and tribal leaders gathered in the vast white tent to negotiate compromises on power sharing, minority rights, and the role of Islam in the state. Meanwhile, much of the deal making went on among government officials, notorious warlords, and foreign power brokers in the small VIP tent off to the side. But unlike the struggles among the Taliban, warlords, drug traffickers, and international military forces still raging in many parts of the country, the Afghans in the tents were fighting over words, ideas, and amendments. By January 4, 2004, after several walkouts, a majority of delegates ratified the new constitution.<sup>7</sup>

The passage of a notionally democratic constitution was a triumph for war-ravaged Afghanistan. However, creating a new constitution for the country was a necessary but insufficient step in establishing democracy and the rule of law. Constitutions are little more than pieces of paper without a network of institutions and cultural values to support them. Post-Taliban Afghanistan lacks such a network. On paper, the new constitution creates a good foundation for political progress, but opportunities to build legitimacy for the future state were missed during the

constitution-making process. A combination of secrecy, haste, insecurity, and intimidation made the process inaccessible to the public and also limited open, honest debate. The United States and United Nations could have fostered an environment of democratic openness; instead, much of their political influence on the process reinforced the tendency of Afghan power brokers to maneuver out of the public eye.

This chapter begins by examining Afghanistan's historical experience with constitution-making processes, focusing on Afghanistan's 1964 constitution, which served as the basis for today's constitution. The chapter then analyzes Afghanistan's constitution-making process from 2002 to 2004 and examines the key elements of the process—drafting the new constitution, consulting public opinion, choosing representatives for the CLJ, and ratifying the new constitution—as well as analyzing key substantive aspects of the new constitution. The chapter concludes by evaluating the prospects for implementation of the 2004 constitution and assessing the contribution of the constitution-making process to peace building and reconciliation in Afghanistan.

## Afghan Constitutional History

### *The First Eighty Years*

Afghanistan has had both too much and too little experience with constitutions in the past eighty years. Since 1923, when King Amanullah promulgated Afghanistan's first constitution, Afghanistan has had eight constitutions but little opportunity to actually implement some of the fundamental aspects of these documents.<sup>8</sup> The first two constitutions, in 1923 and 1931, were established by the monarchy after periods of turmoil—the final battle for independence from Great Britain and the revolt of 1929 that deposed King Amanullah, respectively.<sup>9</sup> These consti-

tutions were created without a great deal of public participation, although tribal leaders were brought together to anoint their passage. Both constitutions kept almost all state power in the hands of the monarchy, with little room for democratic representation or popular participation in public affairs. They did include political reforms—especially the 1923 constitution—but the lack of popular involvement in and approval of a far-reaching reform process initiated in 1923 is a primary reason for the 1929 uprising that caused the fall of the monarch.<sup>10</sup>

In 1963, after over thirty years of relative stability and slow but steady economic and political development, King Zahir Shah, who had been on the throne for three decades, called for the drafting of a new constitution.<sup>11</sup> The preceding period of economic and social modernization, led by the prime minister and first cousin to the king, Mohammad Daoud, set the stage for political modernization in 1963, when Daoud stepped down amid a political crisis with Pakistan. The king, retaking the reins of power, mandated a constitutional process that would significantly alter Afghanistan's political system. The resulting constitution, which introduced a far greater degree of democratic participation, was drafted over an eighteen-month period after wide-ranging consultations with all sectors of society.<sup>12</sup> The constitution provided for a popularly elected and independent parliament, elected city councils, and provincial advisory councils. Once this constitution was ratified by a *loya jirga* in 1964, the era known as the new democracy began.<sup>13</sup> Two parliamentary elections were held, and the country began to experience democratic government.<sup>14</sup>

Between 1965 and 1973, however, the Afghan parliament, or Shura, suffered from inaction and deadlock. Although the new constitution allowed for the eventual creation of political parties, the law authorizing them was never passed, and so individual Shura members were elected independently

in each district of the country.<sup>15</sup> This lack of parties meant that there was no hierarchy of leadership in the Shura, no one to organize delegates and bring them in line. Lack of organization, combined with the newness of authority in the hands of elected representatives, meant that the Shura struggled to accomplish anything. This fragile system could not withstand the intense political pressures and social conflict brought by the Cold War and modernization, and it collapsed.

The end of Afghanistan's short experiment with democracy came abruptly in 1973, when Mohammad Daoud, who had stepped aside in 1963, took power by a coup.<sup>16</sup> The 1964 constitution was suspended, and Afghanistan was declared a republic. A new constitution was prepared without wide consultation and promulgated in 1977. By this time, however, the government was in turmoil, and Daoud was overthrown in 1978 by a communist-led coup.<sup>17</sup> The constitution was once again suspended, and a new constitution was put in place in 1980 by Babrak Karmal, whom the Soviets installed upon their invasion in late 1979.<sup>18</sup> A brutal war ensued during the Soviet occupation, pitting an unpopular dictatorship and the Soviet military against rebel mujahideen forces. In an attempt to gain legitimacy after years of conflict, the government of President Mohammad Najibullah, who succeeded Babrak Karmal, introduced another constitution in 1987. This document was quickly replaced in 1990 after the Soviet withdrawal. In both the 1987 and 1990 processes, Najibullah convened *loya jirgas* of party loyalists to give the new documents the patina of widespread support and reliance on traditional Afghan political mechanisms. The Najibullah government then collapsed in early 1992, and the interim mujahideen government proposed a new constitution. However, fighting quickly broke out among the elements of the government in 1992, and the ensuing civil war destroyed the capital and the government. Afghanistan effectively

broke into fiefdoms during this period, each ruled by clutches of competing warlords and commanders. The Taliban arose amidst the chaos of this failed state, slowly consolidating their hold on different regions: the west in 1995, Kabul and the east in 1996, and much of the north by 1998. The Taliban government did not create a new constitution *per se*, but did pass numerous laws and edicts concerning the structure of government and rights and duties of citizens.<sup>19</sup>

Overall, Afghanistan's record of legitimate constitution making and implementation is weak. The 1964 process was in many ways a model for its time, but a destabilizing backdrop of domestic intransigence and geopolitical competition obstructed the deep social and political changes the process was meant to catalyze. A constitution itself is but a piece of paper, reflecting decisions made by the political leadership. If that leadership does not have the power or the desire to implement the basic law, as has generally been the case in Afghanistan, then the constitution has little meaning. Afghans were promised many basic rights in their constitutions—freedom of speech, freedom of assembly, freedom from torture, freedom from discrimination—but when those freedoms were violated, the courts and police did not enforce them or punish the transgressors.<sup>20</sup> At the same time, when important changes are introduced, they require both some popular support and some time to take root. The legislators elected in 1965 played politics like *buzkashi*,<sup>21</sup> unable to act cohesively with allies and unwilling to make short-term sacrifices for long-term gains. The political representatives may have been able to work out these problems through practice, but they were not given the opportunity.

### *The 1964 Constitution*

The 1964 constitution is the touchstone for the birth of democracy in Afghanistan. This

constitution was intended to move Afghanistan into an era of greater citizen participation and more representative and accountable government. As the creation of the 2004 constitution followed the 1963–64 constitutional process quite closely in both substance and process, the key points of the latter are worth examining briefly here.

Upon retaking the reins of power in 1963, King Zahir Shah set out to modernize and democratize Afghanistan's political and legal system. He appointed a seven-man constitutional drafting committee, comprised of known reformers. For nearly a year, this committee met daily, developing and revising a draft document and seeking opinions from a wide range of Afghans and foreigners.<sup>22</sup> Following the input of a French adviser who the king had invited to Afghanistan, a joke circulated in the capital about the stability of the French model, with its fifteen constitutions since 1789.<sup>23</sup>

The committee presented its draft to the king in February 1964, and the king appointed a twenty-nine-member constitutional advisory commission to review the draft and make additional suggestions prior to the convening of the *loya jirga* that would ratify the constitution.<sup>24</sup> This advisory body broadened the political and ethnic representation in the drafting process and included two women.<sup>25</sup> The advisory body met with the drafting commission over a two-month period to hash through some of the most difficult questions in the draft, including the role of the king and the royal family in the political system.<sup>26</sup> The details of the revised draft approved by the constitutional advisory commission were made public and disseminated widely through government-controlled radio and print media.<sup>27</sup>

In the spring of 1964, the king issued a decree that called for a *loya jirga* to ratify the constitution and defined the composition of the body, including the parliament, the Supreme Court, the members of the constitu-



tional commissions, and another 210 members to be selected by indirect elections and appointed by the king.<sup>28</sup> Although the existing parliament and the body of electors for indirect elections in no way represented universal suffrage, the outcome of this selection process produced a body with a broad range of social, religious, ethnic, cultural, and political diversity. Only 6 of the 452 delegates were women, but their inclusion was seen as progressive at the time for Afghanistan.<sup>29</sup>

On September 9, 1964, the king made the opening address to the assembled *loya jirga*, laying the responsibility for guiding the future of the republic at their feet, and departed.<sup>30</sup> The debate in the *loya jirga* proved far more in-depth than observers expected, producing wide-ranging discussions on controversial issues. Opposition on certain issues was well informed, and written dissents were submitted during the debate, making this Afghanistan's first "literate *Loya Jirga*."<sup>31</sup> In the course of debate, the king personally met with some of the dissenters, mostly conservatives who objected to what they perceived as the secular nature of many of the articles.<sup>32</sup> In the end, the *loya jirga* debated and passed 128 articles in eleven days, making few significant substantive changes to the original draft, but engendering a feeling of participation and ownership among the delegates.<sup>33</sup>

The 1964 constitution wrought several considerable substantive changes in the Afghan political and legal system, including the role of the monarchy, the parliament, and *loya jirga*; the creation of a unified and independent judiciary; and the role of Islam in the legal system. First, the 1964 constitution provided for a constitutional monarchy, whereby the king had ultimate executive authority, such as the power to declare war, sign treaties, and dissolve parliament.<sup>34</sup> The prime minister administered the executive authority. The parliament had broad legislative and executive oversight powers concerning the budget, the ratification of treaties, and the approval

and dissolution of the cabinet.<sup>35</sup> In practice, the prime minister was responsible for the daily operation of the government, and the king did not abuse his considerable constitutional powers. However, keeping these powers in the hands of one unelected official did not help to introduce a political culture in the country that respected peaceful and constitutional transfer of power from one leader to another. The Afghan state under the 1964 constitution was completely centralized,<sup>36</sup> with all subdivisions of the state (provinces and districts) merely administrative in nature; provincial governors were appointed by the minister of the interior.

The role of the parliament—the Shura—in Afghanistan was strengthened in the 1964 constitution as the preeminent law-making and representational body. The Shura was acknowledged in the constitution as manifesting the "will of the people."<sup>37</sup> The 1964 constitution envisioned a bicameral legislature with a directly elected lower house of 214 members, the Wolesi Jirga (House of the People), and a smaller upper house of 84 members, the Meshrano Jirga (House of Elders).<sup>38</sup> The two-house structure was a way of allowing people to vote for geographic representation while providing for representation of Afghanistan's diversity. Due to the model's extremely short trial period, the modalities of power sharing between the two houses of the legislature and between the executive and the legislature were never fully explored.<sup>39</sup>

For the first time, the 1964 constitution also institutionalized the *loya jirga*<sup>40</sup>; well known in Afghan history as an ad hoc body that brings together the nation for critical decisions in times of crisis or political transition, it was given a formal place in the structure of government. Under the 1964 constitution, the *loya jirga* was composed of both houses of the legislature as well as the chairmen of each provincial assembly.<sup>41</sup> It was something of a superparliament, capable of standing in for a government dissolved by

the king and required to be formed to consider amendments to the constitution.<sup>42</sup>

The creation of a unified and independent judiciary was one of the most significant changes embodied in the 1964 constitution.<sup>43</sup> Previously, the judiciary had been divided between *sharia* courts, which were dominated by clerics, and state courts, which handled issues related to civil servants and government-owned lands. For the first time in Afghan history, unified government courts had jurisdiction over all subject matter. This unified judiciary was to be a fully independent and coequal branch of government, with the Supreme Court the highest judicial authority in the country.<sup>44</sup> The judiciary was charged with applying the laws and constitution of Afghanistan, and the court's jurisdiction was broadly worded, explicitly including litigation brought against the state.<sup>45</sup> The state was required to enforce all judgments, and the supremacy of the constitution and the laws of Afghanistan were made clear.

In reality, Afghanistan's judiciary, in the short time it had, achieved neither independence nor coherence. The judiciary faced four primary obstacles in its development. First, there were far too few qualified judges and lawyers to ensure the fair and even application of the law.<sup>46</sup> Second, local traditional practices for resolving disputes were entrenched, leaving little room for formal judicial power. In many cases, this meant that judges either supported the local practices, even when the practices were at odds with the law, or the judges became irrelevant. The third obstacle to independence was the preeminence of the king and the prime minister. The fourth obstacle was that the judiciary was made up principally of clerics who opposed the state's consolidation of the courts.

Finally, under the 1964 constitution, Islam was the state religion, and all laws the parliament passed were required not to contradict the basic principles of Islam.<sup>47</sup> In those cases

not covered by any state law, judges were to apply the basic principles of jurisprudence of the Hanafi school of *sharia*, in accordance with the limitations of the constitution.<sup>48</sup> This system allowed the elected representatives of the people to decide how to ensure that the laws of Afghanistan accorded with the principles of Islam, and as the parliament adopted comprehensive legal codes, the need for judges to apply their own private Islamic legal interpretations became less necessary or acceptable. Removing religiously justified legal discretion from clerics had been one of the chief motivations of the constitution's founding reformers, and through these measures, they achieved their goal.

### **The Constitution-Making Process of 2002–04**

The overall framework for Afghanistan's post-Taliban political transition, including interim government and legal arrangements and a timetable for constitution making, was agreed at a meeting among the main Afghan factions and international actors in Bonn, Germany, at the end of 2001. The subsequent process of creating a new constitution consisted of four distinct aspects: drafting the new constitution, conducting a public consultation process, choosing the representatives of the CLJ, and ratifying the new constitution at the CLJ. These several structural elements of the process are discussed below.

#### ***The Bonn Agreement***

A scramble to organize Afghanistan's post-Taliban political leadership accompanied the fast-moving military campaign in the late months of 2001. Despite widespread insistence on a broadly representative transitional process given the polarizing civil war of the 1990s, the militia groups comprising the Northern Alliance were already dominating



the political and security landscape, occupying Afghanistan's seat at the United Nations, and occupying Afghanistan's capital, Kabul, by November 2001. To help facilitate the process of forming a transitional government, UN secretary-general Kofi Annan reappointed Lakhdar Brahimi as his special representative to Afghanistan on October 3, 2001. Brahimi had served as special representative of the secretary-general (SRSG) to Afghanistan from 1997 to 1999 and was intimately familiar with the country's politics and players.

Representatives of the Northern Alliance and the former Afghan king held talks in Rome during this period, and on October 1, 2001, agreed to form a supreme council of national unity of Afghanistan. This council was supposed to meet to agree on convening a *loya jirga* to choose a new government. One critical faction, the non-Taliban Pushtun mujahideen, felt excluded from this agreement and held a gathering of 1,500 Pushtun tribal and religious leaders on October 24–25 to call for a *loya jirga* to establish the next government.

Events on the ground, however, quickly overtook the negotiations. The day after Kabul fell into the hands of the Northern Alliance, the UN Security Council passed Resolution 1378, affirming the United Nations' central role in supporting political transition efforts and calling for a new government that would be "broad-based, multi-ethnic and fully representative of all the Afghan people."<sup>49</sup> The resolution also encouraged member states to ensure the safety and security of the capital and an eventual transitional authority. This final appeal reflected a desire on the part of many Afghans and their international supporters to create an international security force that could provide the essential political space needed in Kabul to create a broad-based government.<sup>50</sup> The Northern Alliance quickly rejected proposals for a security force,

however, arguing that they would provide security themselves.

As the noose began to close on the Taliban in their home base of Kandahar, the intense diplomacy of the United Nations and United States persuaded key Afghan parties to meet to name an interim administration and chart the future political transition. The meeting began in Bonn on November 27 and included representatives of four main Afghan groupings: the Northern Alliance; the Rome Group, composed of family and supporters of the former king; the Peshawar Group, comprising Pushtun mujahideen, tribal, and religious leaders based in Pakistan; and the Cyprus Group, a mixture of factions with close ties to Iran. Numerous Afghan civil-society groups from inside and outside the country felt that these factions did not represent the Afghan people, and the Bonn Agreement itself acknowledges in its preamble that many groups were not "adequately represented" at the talks. Concerned Afghans outside the process organized a civil-society forum that took place near Bonn, in tandem with the political negotiations, to inject alternative voices into the process.

The official Bonn meeting initially evoked the failed peace talks held from 1992 to 1994 in places like Islamabad, Pakistan, and Ashkabad, Turkmenistan. Many of the same representatives had come together in that period with UN mediation, inking flowery agreements, and swearing on Korans to abide by them. Each of these efforts had dissolved almost instantly. In his opening remarks in Bonn, Lakhdar Brahimi, the conference chairman, warned the delegates that "you must not allow the mistakes of the past to be repeated, particularly those of 1992."<sup>51</sup> The situation in Afghanistan was quite different in 2001, however, and the international players with the power to twist arms to make agreements and keep them on track were again interested in the country, having seen

what international abandonment of Afghanistan in the 1990s had wrought.

The Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, otherwise known as the Bonn Agreement, was signed on December 5, 2001. In the end, the Bonn talks were dominated by the Panjshiri Tajik faction of the Northern Alliance, the Shura-i-Nizar. With undisputed control of the capital, the strongest military, and a strong battlefield alliance with the United States, they could successfully insist on key positions in the new government. In exchange, they agreed to a relatively unaffiliated Pushtun tribal leader, Hamid Karzai, as head of the interim administration; a limited international security force in Kabul; and a transition process that would lead to the creation of a new constitution and elections in just thirty months.

The scope and timetable of the Bonn Agreement were very ambitious. The agreement laid out the powers of an interim authority, which would be replaced by a transitional government selected by an Emergency Loya Jirga within six months. These successive administrations were to be responsible for shepherding the reconstruction process and unifying Afghanistan's political and military institutions. The agreement, however, did not detail how and when disarmament and integration of military forces must occur, or what the powers of the Emergency Loya Jirga should be. Nor did it clearly lay out or guarantee penalties for transgressions. The lack of detail was understandable in an agreement produced in a short time under intense pressure. The agreement represented a decision to push difficult questions into the transition process, rather than resolve them up front; it established a series of milestones to which the parties could eventually be held when the time was ripe. Thus, the Bonn Agreement set two simultaneous processes in motion: a state-building process and a peace

process. The state-building process would be the vehicle for reconstruction, forming long-term security arrangements, and developing national unity. The peace process would aim to achieve order among the factions, allowing them to lessen their enmity while acknowledging, if implicitly, their *de facto* control of the country. The Bonn Agreement envisioned that the state and political processes, such as a constitutional process and elections, would slowly draw sovereign authority back to the government and people, and diminish the rule of the gun.

As part of the state-building process, the Bonn Agreement provided for the drafting of a new constitution, to be approved by the CLJ, which would convene just two years after Bonn.<sup>52</sup> Until the adoption of a new constitution, the 1964 constitution would be in force, but without a king or legislature, thus excluding a substantial portion of the meaningful provisions of that instrument.<sup>53</sup> The Bonn Agreement also allowed for the operation of existing laws that did not contradict the provisions of the agreement or the 1964 constitution. While sensible, this provision was practically unenforceable, due to both the enormous number of laws created by multiple, mutually antithetical regimes over thirty years and a general inability to enforce laws throughout the country. However, the chairman of the interim and transitional administrations was given the power to make law by decree with the agreement of his cabinet, which simplified the resolution of pressing legal issues.<sup>54</sup>

The final critical aspect of the Bonn Agreement was the selection of the interim cabinet. In Afghanistan, confidence in peaceful transitions of power was understandably low, and thus, the composition of the interim administration also defined, to many, the future composition of the Afghan government. The division of posts was widely viewed to be extremely lopsided, with the Panjshiri faction of the Northern Alliance claiming the

three most powerful ministerial posts: defense, interior, and foreign affairs. The selection of Hamid Karzai, head of the Pushtun Popalzai tribe, as chairman, and the agreement to allow the return of the former king, were attempts to reduce Pushtun alienation from the interim administration. The potential power of the chairman and that of the former king were far less concrete, however, than the very real power that the Northern Alliance Panjshiri triumvirate exerted over Kabul and Afghanistan's foreign relations. Not only the less well represented non-Northern Alliance groups complained that "injustices have been committed in the distribution of ministries,"<sup>55</sup> powerful members of the Northern Alliance, such as Rashid Dostum and Ismael Khan, decried the outcome as unfair and even humiliating.<sup>56</sup> This sense of exclusion would undermine support for the transitional administration and foment widespread discontent.

### *Drafting a New Constitution*<sup>57</sup>

Hamid Karzai, president of the Afghan transitional administration (ATA) anointed by the Emergency Loya Jirga, appointed a nine-member constitutional drafting commission by decree on October 5, 2002.<sup>58</sup> The commission was chaired by Vice-President Niamatullah Shahrani, an ethnic Uzbek and religious scholar from Badakhshan province. Shahrani's deputy was Professor Abdul Salam Azimi, former rector of Kabul University and a professor of the *sharia* faculty there.<sup>59</sup> Shahrani had been Azimi's student and they shared a close bond.<sup>60</sup> The remaining members were mostly lawyers and legal scholars, including two women, none of whom were powerful players in political or military affairs.<sup>61</sup> Although most of the members had a legal background in secular or religious law, none was a constitutional expert per se.

The ailing former king, Zahir Shah, who had been given the honorific title of Father

of the Nation during the Emergency Loya Jirga in June 2002, officially inaugurated the drafting commission in November 2002. The commission struggled to compose itself, as it lacked organization and a competent secretariat, and suffered from considerable rancor among its members. This discord emerged from a mixture of tension over control of the commission's work and the draft of the constitution, and political disagreement about the roles of Islam and the king in the new draft.

The United Nations Assistance Mission for Afghanistan (UNAMA), which bore primary responsibility among international actors for aiding the commission, failed to direct sufficient resources toward the commission for months.<sup>62</sup> Six months after Karzai's decree, the commission was in disarray, and virtually no progress had been made on producing a decent draft of the constitution, or canvassing the political aims of the powerful or the population. Instead, the commission had broken into two camps, each creating a different draft. While these drafts had some substantive differences along liberal versus conservative lines, the primary disagreement was over the perceived exclusion of several commission members from the drafting process, which remained largely in the hands of Professor Azimi. Meanwhile, a French adviser, Guy Carcassone, provided to Karzai by the French government, created another separate draft. Other foreign advisers provided by the United States, the United Nations, and the Swiss government made trips to visit with the commission members to discuss various aspects of the constitution.<sup>63</sup> These three drafts were the subject of rumor and confusion, compounded by the government's failure to release the eventual draft constitution produced by the commission.

With the prospect of another national *loya jirga* looming, serious international pressure was placed on both the ATA and UNAMA to move the process forward. On

March 10, 2003, the secretariat of the constitutional drafting commission released a document, *The Constitution Making Process in Afghanistan*, outlining the proposed activities and timeline of a new, larger constitutional commission that would undertake a public consultation process, amend the draft constitution produced by the drafting commission, and prepare for the CLJ to ratify the document.

The drafting commission conducted an intensive series of meetings in March. Chairman Shahrani submitted a draft constitution to President Karzai in early April, intended to serve “as a set of recommendations . . . on constitutional arrangements” to the full constitutional commission.<sup>64</sup> This draft constitution was largely based on the 1964 constitution, but had not been subjected to a careful technical review. As a result, certain aspects of the document lacked internal coherence, or were simply unclear.

The Karzai government appointed a new constitutional commission on April 26, consisting of thirty-five members from a broader political and ethnic spectrum and including six members of the drafting commission.<sup>65</sup> The membership of this new body was a mix of politicians and experts. The decree establishing the new commission outlined a public consultation process, and determined that the CLJ would be held in October 2003.

The new commission received much more support from the United Nations and other international sources, and it extensively reworked the draft constitution, following both a public consultation process as well as more input from foreign experts. The constitutional commission was somewhat wary of the substantive input from foreign experts, fearing the appearance of foreign influence on a critical aspect of Afghanistan’s political development. This meant that many of the most intensive substantive discussions involving foreign advisers happened in low-key gatherings, often outside the walls of the

constitutional commission offices. This substantive foreign technical advice had a meaningful impact on narrow issues, but did not ultimately shape decisions on the most significant questions. The real foreign influence was not channeled through legal experts, but directly exerted by high-level diplomats upon the palace and other influential leaders.

Concerns about the appearance of foreign interference did not, however, extend to foreign support for designing the procedural aspects of the constitution-making process, including the public consultation process as well as the elections and rules of procedure for the CLJ. The U.S. Agency for International Development (USAID) funded the Asia Foundation to provide foreign experts and support staff, managed through UNAMA, to work with the constitutional commission secretariat on these issues. The staff was responsible for staging the delegate elections, conducting public outreach, organizing the CLJ, and drafting many of the key documents involved, including the rules of procedure.

Following a public consultation process during June and July (discussed below), the constitutional commission had one month—August 2003—to agree to changes to the draft constitution. They divided up into several committees, breaking down chapters of the constitution for different committees to consider. The commission’s work took longer than the allotted month, and the enormous logistical undertaking required for the delegate selection process caused the government to delay the CLJ from October to December. Several issues were the subject of intensive debate within the constitutional commission, such as the choice between a presidential and a parliamentary system of government, the designation of national and official languages, and the question of whether there should be a constitutional court. The views of President Karzai and his inner circle were not yet clearly known on many of these issues,



and so some critical political information was missing from the commission's deliberations. Eventually, the commission's committees came together, and the entire draft was discussed and voted on in plenary.

The constitutional commission did not deliver the draft constitution to President Karzai until late September 2003. At this point, it was expected that the draft document would be released to the public to allow for a few months of debate and scrutiny before the CLJ convened. However, the constitutional commission's independence had never been clarified, and the presidential palace took control of the draft, preventing its publication and undertaking an executive review. Anxious to secure greater power for President Karzai and limit the possibility of alternative power centers, members of Karzai's cabinet and national security council redrafted key aspects of the constitution. The most significant modifications were the change in government from a semipresidential system, which was designed to promote ethnic power sharing, to a presidential system, as well as the elimination of a constitutional court. Both changes reflected a desire to narrow government control, which was in line with Karzai's wish to wield power effectively, and with the interest of the international community and the United States in particular in limiting the number of key interlocutors in the Afghan government. Despite growing public outcry at delays and a secretive process,<sup>66</sup> President Karzai did not release the draft constitution until November 3, just five weeks before the CLJ.

### *The Public Consultation Process*

From the very beginning, there were competing views about whether the constitutional process should be opened to public debate and wide participation within Afghan society. Some argued that the constitutional process had to be broadly inclusive to incorporate

diverse views and allow for popular political participation. Such a process, it was argued, would be perceived as more legitimate when interested parties felt that they had their say, even if there were tight controls on the outcome of the debate. Others in government and the international community argued, however, that stoking confrontational issues through public debate could be destabilizing or undermine progress in resolving sensitive issues. There was a perception that open discussion of a few controversial issues, such as the role of Islam, could cause moderate forces to lose ground on a host of other matters. This camp preferred to keep debate on controversial issues out of the public sphere. The latter view was held in particular by Jean Arnault, deputy special representative of the secretary-general and head of the political pillar in UNAMA.<sup>67</sup>

Ultimately, a middle-of-the-road approach was taken. Although the constitutional commission refused to release a draft of the constitution for public debate, a public education and consultation process was conducted for two months starting in June. Eight regional offices in Afghanistan and two each in Pakistan and Iran were opened by the constitutional commission secretariat to support this process. Members of the constitutional commission traveled to provincial capitals and refugee populations in Iran and Pakistan, holding meetings with preselected groups of community leaders, religious leaders, women, businessmen, academics, and professionals.<sup>68</sup> These meetings, as well as questionnaires that were circulated to the general public through newspapers and an outreach campaign, generally kept discussions to vague principles rather than eliciting concrete views on key questions. The meetings throughout the country were useful, however, in exposing the Kabul and foreign-based Afghan elite on the constitutional commission to the opinions of Afghans around the country. Several of the commission members reported ben-

efiting from these meetings, which demonstrated a greater appetite for accommodation and tolerance among the population than that which existed in elite political circles in Kabul.<sup>69</sup>

The constitutional commission also engaged in a public information effort that included television, radio, and print distribution of materials explaining the constitutional process and the Bonn Agreement, focusing on issues such as how a constitution could protect rights and prevent abuses of power. Independent civil-society networks held training sessions and consultations with a broad array of Afghans in an effort to contribute to the process from the outside.<sup>70</sup> Ultimately, tens of thousands of comments from the public were received and logged by the commission staff.

In the end, the public education and consultation process did more to advertise the process to the Afghan people and give the illusion of inclusion than to actually provide effective avenues for public input to the process. Most Afghans knew that a constitutional process was under way, but few knew what the substantive issues at stake were. Even those who submitted their opinions were unlikely to have been heard, for two reasons. First, as the results of these consultations were being collated and analyzed for a report, the power play among Afghan factions regarding the substance of the constitution was under way behind the scenes, unsullied by public involvement. Second, the report produced by the secretariat of the constitutional commission—which detailed the collection of 80,000 returned questionnaires and 6,000 additional written proposals, plus the results of 523 meetings—came too late to influence the drafting process and was not publicly distributed in advance of the CLJ, despite a decree requiring publication.<sup>71</sup> The report was eventually provided to the CLJ delegates, who were given copies only once the event was under way.<sup>72</sup> The constitutional

commission and UNAMA had been reluctant from the start to engage in a meaningful public debate, as each felt it would compromise their agenda and interfere with their efforts to arrive at an elite compromise among existing power holders. The eventual public consultation process and its effectiveness reflected, and suffered from, this unease.

### *Delegate Selection*

On July 15, 2003, a presidential decree was issued outlining the composition and selection process for the CLJ. There would be 500 delegates to the CLJ, as follows: 344 elected at the district level; 64 women elected by women at the provincial level; 42 delegates elected from refugee, internally displaced person (IDP), and minority communities; and 50 people (25 men, 25 women) appointed by President Karzai.<sup>73</sup> The composition of the body and the method of delegate selection were remarkably similar to the constitutional *loya jirga* called by King Zahir Shah in 1964.<sup>74</sup> Due to constraints imposed by funding, timing, security, and logistics, the delegates to the CLJ elected at the district level were not chosen in general elections, but rather were chosen by the roughly 15,000 community representatives who had elected the delegates to the Emergency Loya Jirga in 2002.<sup>75</sup> These community representatives, comprising forty to sixty persons from each of the approximately 360 districts in Afghanistan's thirty-two provinces, had come together as a result of an informal caucus process in 2002. Elections were held in Pakistan and Iran among Afghan refugee communities, and indirect elections in provinces and minority communities were held to select women and minorities. Similar to the 1964 process, the president was given about 10 percent of the seats to fill by appointment, to ensure that certain groups or individuals important to the process (in the government's eyes) were represented.



The elections proceeded through October and November without major security incidents. Gathering the 15,000 community representatives again in regional centers proved relatively easy. There were, however, reports of vote buying and intimidation in the election process.<sup>76</sup> Unlike the Emergency Loya Jirga elections in 2002, regional power brokers knew what to expect from the process and the importance of getting their representatives elected. Also, with fewer positions available compared to the 1,500 elected to the Emergency Loya Jirga, there was heightened competition for the seats. Ultimately, the CLJ delegate-selection process produced a highly diverse body of 502 delegates—two were added to account for the shifting number of provinces—representing every province and a wide range of views.<sup>77</sup>

### *The Constitutional Loya Jirga*

On the morning of December 14, 2003, the former king of Afghanistan, the ninety-year-old Zahir Shah, opened the CLJ, telling the delegates that the new constitution was theirs to alter, improve, and approve. That the former monarch, no matter how feeble, was endorsing a process that would almost certainly lead to an end to Afghanistan's royalty was significant. President Karzai then made a speech introducing his draft constitution and exhorting the delegates to approve the presidential system he envisioned. Due to existing divisions, Karzai warned that "Afghanistan needs one source of power in government."<sup>78</sup> Karzai also threatened that he would not run for election unless his proposed system was approved.

The CLJ's first task, to elect a leadership, was critical, as debate needed both to flourish and be controlled. Since there was no formal party hierarchy among the delegates, most representatives considered themselves and their voices to be equal. The Emergency Loya Jirga in 2002 had been a disaster in part

due to poor leadership. With a weak chair and vague rules of procedure, a few warlords were able to control the agenda and debate through intimidation.<sup>79</sup>

Sebaghatullah Mojadeddi, a moderate mujahideen leader with a powerful religious pedigree and close ties to Karzai, quickly emerged as the front-runner for chairman of the CLJ. At the same time, another candidate, Abdul Hafiz Mansoor, editor of the newspaper *Voice of the Holy Warriors* and known for his fiery opposition to the Karzai government, made a concerted bid for the chairmanship. Mansoor made a speech arguing that Karzai was trying to rig the debate to ensure that he would become Afghanistan's president. His rhetoric roused many passions but fewer votes, and Mojadeddi won the election handily.

Overall, the CLJ was a well-organized and civil affair, in contrast to its rough-and-tumble emergency predecessor. With only one-third the number of delegates and an emphasis on literacy in the selection process, the CLJ had established rules of procedure (albeit often flouted), a respected chair, a library, and subcommittees that undertook intensive debate. The scene inside the tent, however, was no garden party. Among the 502 delegates were warlords, tribal leaders, communist poets, and mullahs, many of whom had limited formal education and had never read a constitution before. The constitution had already been drafted for them by the unelected constitutional commission, and the delegates would only have two to three weeks to debate and ratify it. This whole scene played out against a backdrop of foreign military domination and an ongoing war in the countryside.

In the first days of the CLJ, the tent pulsed with excitement. There were meandering floor speeches about the conditions in home provinces while the delegates met old friends, read the draft constitution, and began to adopt positions. The commission secretariat finished the rules of procedure just days

before the meeting began, and no one really knew what the course of the debate would be. The rules—thirty-seven dense articles of parliamentary procedure—had been passed by presidential decree and gave tremendous authority to the CLJ chairman to control the debate, order of speakers, and other aspects of the process.<sup>80</sup> Karzai's people and representatives of the international community were openly saying that they expected the new constitution to be ratified within seven to ten days. But with 160 articles, a proposed new system of government, and 500-plus opinions in the tent, these expectations were misguided. Even if every delegate spoke only once, it would mean weeks of debate.

Outside input had been limited during the secretive drafting phase of the constitution, and many of the delegates were geared up for a full hearing. Some had ridden a donkey for days through snow-covered passes to be present. Others had risked murder by the Taliban for their participation. They had not come merely to smile and vote for the government's plan. Prior Afghan regimes had made (short) careers of underestimating rural leaders.

There was also a serious organized opposition to Karzai's last-minute modifications to the draft. The document was not the result of political consensus, and various groups were intent on fundamentally changing the structure envisioned by President Karzai and Zalmay Khalilzad, the powerful American ambassador to Kabul who wielded considerable influence over him. Khalilzad, an Afghan by birth, was a protégé of Paul Wolfowitz, then deputy secretary of defense; appeared to have the ear of U.S. Secretary of Defense Donald Rumsfeld as well; and had played an intensive behind-the-scenes role in Afghanistan since shortly after the U.S. invasion in October 2001. The Afghan government and the U.S. embassy both wanted power centered in a few hands in Kabul. A diverse opposition wanted power sharing

both among ethnic and political factions in Kabul and between Kabul and the regions. The outcome of this struggle could define politics for generations. An attempt to rally support for the government draft and strong-arm the opposition delayed the start of the CLJ, but to little effect.

On the third morning of the CLJ, a burst of rockets pounded Kabul in the early morning. Although they landed far from the tent, they were a stark reminder that the *loya jirga* was proceeding in a country still very much at war. As delegates geared up for the debate, the entity responsible for running the CLJ, the CLJ Secretariat, headed by Farooq Wardak, divulged the proposed format for the proceedings. The delegates would be broken up into ten subcommittees, each of which would debate the entire draft constitution. These subcommittees would elect representatives to a central committee, the reconciliation council, which would debate the views of the subcommittees and agree upon a draft by consensus. Ultimately, the draft would then be put to a vote. In the best light, this system would allow for each delegate to have a say and enable an in-depth debate unlikely in a plenary environment. One group of delegates, charging that this was a means for the government to suppress debate, wanted to vote on key issues in the plenary session first and threatened to boycott. By creating a hierarchy with a small committee deliberating in private at the top, this approach ultimately lent itself to control by a few powerful individuals.

The resulting power gambit was anything but subtle. Even though monitors and delegates believed that assignment to committees was supposed to be random, the head of the CLJ Secretariat agreed, at the suggestion of a mujahideen leader, to distribute the jihadi leadership (the heads of the mujahideen parties) and their supporters among the various committees. The die was cast. These men commanded their own private armies and

would not hesitate to use intimidation to ensure that their point of view dominated.

The subcommittee facilitators had planned to have elections to choose the representatives to the reconciliation council. These were undermined, however, by the jihadi leaders in each committee. When former president Burhanuddin Rabbani appeared in his assigned committee, supporters immediately stood up and said that, of course, Rabbani would be chair. When it was suggested that a vote be held, one man asked, "Who would dare oppose the great jihadi leader President Rabbani?" In that small group, no one would.<sup>81</sup>

The situation heightened the already deep tension in the tent. Many mujahideen viewed Afghanistan's urban elites as communists and infidels, people divided from their own culture and traditions; they blamed them for bringing the Soviets into Afghanistan, killing nearly one million people, and sending millions more into refugee exile. The mujahideen believed that their blood saved Afghanistan from the communists and the Taliban. The royalists and "dog washers"<sup>82</sup> who left the country to live in comfort in the West, they argued, have no right to rule now. Others, in turn, blamed the mujahideen for years of war, their extremism and incompetence for the chaos that followed and then the Taliban. To them, the jihadi leaders were warlords.

On the fourth day of the CLJ, Malali Joya, a twenty-five-year-old woman from the remote western province of Farah, brought the confrontation to a head. Taking the microphone during an open debate session, Joya unleashed a torrent of vitriol against the jihadi leaders:

Why do you not take all these criminals to one committee so that we see what they want for this nation? These were those who turned our country into the nucleus of national and international wars. . . . They should be taken to national and international court. If they are forgiven by our people, the barefooted Afghan people, our history will never forgive them.<sup>83</sup>

The room erupted in a mixture of applause and angry denunciations. In response, Abdul Rasool Sayyaf, a powerful, conservative mujahideen leader and militia commander, rose to say that impugning the reputation of the mujahideen, the true representatives of Islam, was criminal blasphemy. The CLJ chairman, Mojadeddi, called Joya an infidel and demanded that she be expelled from the proceedings, adding that, anyway, as a woman, her vote only counted for half of a man's. She received numerous death threats that day and had to remain under UN protection for the remainder of the convention, entering the tent with UN security guards.

On several occasions Mojadeddi ignored the rules of procedure to dispense with issues or viewpoints with which he disagreed. At one point, delegates collected more than 150 signatures for an amendment to remove the word *Islamic* from the proposed name of the country, Islamic Republic of Afghanistan. Although the petition accorded with the rules of procedure,<sup>84</sup> the chairman, a cleric, refused to allow a vote on the amendment, announcing that "people who suggest such things are infidels."<sup>85</sup>

Inside the subcommittees, a brave cadre of some of Afghanistan's most intelligent and active professionals facilitated the discussions. These men had to ensure that the warlords did not intimidate the participants and that the record would bear the true debate of the subcommittees. They made sure that delegates other than the subcommittee chairmen took minutes, so that the chair reflected rather than controlled the committee's message. Due to their deft and diplomatic facilitation, they managed to carry forward a meaningful debate, enforcing rules that allowed power brokers to be outvoted in their own subcommittees. However, despite these safeguards, several subcommittee leaders went into the reconciliation council attempting to push their own agendas. At one point, minutes of a subcommittee meeting

were brought in to counter the assertions of Sayyaf that his subcommittee had agreed to a stricter version of Islamic law than, in fact, it had.

Many of the delegates refused to attend the subcommittee meetings, and most of the serious politicking went on outside of these meetings. The real bargaining took place in several VIP tents on the grounds of the CLJ. No one was in these tents more than the American envoy, Zalmay Khalilzad, and the UN envoy, Lakhdar Brahimi. These two men were determined to bring about an agreement within a brief period of time that would support their key Afghan allies (President Karzai), provide enough incentives to keep opposition figures engaged in the political process, and stand up to international scrutiny on issues of human rights, women's rights, and democratic governance. Together, they exerted a tremendous amount of pressure to complete the deliberations quickly, for two reasons. First, they were concerned that if the debate went on for too long, consensus might unravel and the whole constitutional process would collapse. Second, international donors were balking at contributing more funding to keep the already costly process afloat. Given the strong factional interests at play and President Karzai's relative weakness, the mediating roles of both Brahimi and Khalilzad were, in the end, essential to achieving agreement on controversial issues. This approach, however, perpetuated the dominance of Afghan politics by a few (usually armed) power holders rather than by a majority of the Afghan population, or even a majority of the CLJ delegates.

During the course of the CLJ, several blocs of delegates formed. The eighty-nine women delegates banded together to ensure that women would be granted complete equality in the constitution. Their unity was so striking that they could secure a quota of sixty-eight seats in the lower house of the parliament, or over 25 percent. This require-

ment would immediately catapult Afghanistan from a country where women were not allowed to show their faces in public to a country near the top of the list in women's political participation.

The most significant bloc of delegates to emerge, however, was that of the Pushtuns. After feeling divided, disenfranchised, and unfairly targeted by the war on terror for the previous two years, Pushtuns began to unite as a group behind Karzai's agenda. The hot-button issue of presidentialism divided the delegates along ethnic lines, with Pushtuns supporting a presidential system that they believed meant Pushtun rule. In turn, some Tajiks, Uzbeks, and Hazaras—but not a unified bloc—supported a parliamentary system.

There were strong arguments on both sides, backed by a good deal of self-interest among the parties. Afghanistan's fragile political situation suggested that the government should be designed to maximize representation and stability as well as reduce the tendency toward conflict and the risk of capture by illegitimate means. Power sharing among political and ethnic groups remained a critical aspect of the resolution of Afghanistan's conflicts and the consolidation of peace. The attempt on President Karzai's life in Kandahar in September 2002 and the killing of three ministers between July 2002 and March 2004 all too clearly highlighted how any structure had to account for not only Afghanistan's possible political evolution but also the possibility of political violence. At the same time, Afghanistan's atomized political system needed serious centripetal forces to forge a nation and a state from the fragments.

The proparliamentary camp argued that a consociational system of government would enshrine power sharing by creating coalition executives or establishing consultation mechanisms among representatives of major ethnic groups. There was also a concern



about the accountability of the president. Trust in the electoral process is a fundamental feature underpinning a successful presidential system, because the authority of the executive over the government is tempered not so much by immediate obstacles—such as the need for legislative approval—but by the prospect of future losses at the polls. Bad policies or bad results elicit no immediate sanction, and so faith in future elections is essential to accountability. Given Afghans' limited experience with electoral politics and the fragility of the situation, this faith did not exist at the outset. The concentration of power in the hands of one person was also viewed as potentially dangerous in an unstable political situation, as it increased the rewards of illegitimate capture of the presidency, and thus increased the risk of this happening. Those supporting a presidential system countered that given the very atomized nature of Afghan political organization, it was likely that the legislature would be made up of multiple parties, with none gaining a clear majority. This could slow business in a presidential system and also lead to instability in a parliamentary system, which would likely be led by a fragile coalition.

The primary argument in favor of presidentialism, which resonated beyond Karzai's supporters, was the need for a strong executive to galvanize reconstruction and keep the military and various armed factions under control. The historical Afghan leaders who are revered, such as Abdul Rahman Khan—the country's monarch from 1880 to 1901, credited with creating the modern Afghan state—are lauded for their authoritarian use of state power to crush opposition and build the state apparatus, not for their inclusiveness and coalition building.<sup>86</sup> There was also a strong argument against a mixed system, based on fears that a president and prime minister from opposing camps would divide the government, making it ineffectual at best and potentially igniting armed conflict.<sup>87</sup>

In the end, the short-term interests in the consolidation of authority won out over long-term considerations of how to share power in a multiethnic divided society. It is not hard to see why this choice was made. The three sets of actors controlling the transition in Afghanistan—President Karzai and his supporters, the United Nations, and the United States—were all heavily invested in Karzai, and in the case of the latter two, were interested in managing their relations with Afghanistan through a single trusted figure. Their interests also dovetailed with those of a large number of delegates, whose interest in a diverse and representative government was somewhat curtailed by their fear of the factional politics and parties that had repeatedly torn Afghanistan asunder.

As the talks dragged on, the debate became more intense. Just as it seemed that a presidential system had a strong majority, ethnic leaders, such as Abdul Rashid Dostum, an Uzbek leader and militia commander, made strong statements in favor of a parliamentary system. Collateral issues, such as the designation of national languages, also began to roil the debate. At night, more rockets slammed into Kabul, and a UN guest-house was bombed. Rumors abounded that these were not Taliban actions, but threats from disgruntled warlords; however, it was not publicly known who actually perpetrated the attacks. Meanwhile, the United Nations threatened to stop paying the bills if the CLJ did not conclude soon.

After the ten working committees completed their review, the reconciliation committee began meeting to produce a new draft, and backroom politics started to crescendo. As the jihadi leaders began to realize that the issue of a parliamentary system was a lost cause, they set their sights on increasing the Islamic content of the constitution. As one delegate quipped, they began to press for the addition of the word *Islam* into every article, calling for an Islamic state, an Islamic legal

system, even an Islamic economy. Members of the international diplomatic corps became anxious, as their governments and organizations were concerned—perhaps above all else—that Afghanistan not have a fundamentalist Islamic government. For most Westerners, such an outcome would seem little different from the Taliban. So these diplomats, including Khalilzad, Brahimi, and the former UN official-turned-European Union ambassador Francesc Vendrell, privately laid out what they said were the red-lines that the constitution should not cross. The constitution could not enshrine *sharia* as the law of Afghanistan, though they could say that Afghanistan's laws should not be contrary to Islam. The jihadi leaders, exacting the price of their compromise from Karzai, pushed this to its limit.

Afghanistan is a firmly Islamic nation: Some 99 percent of its inhabitants are Muslim,<sup>88</sup> the legal system is heavily influenced by *sharia*,<sup>89</sup> and the political identity of a significant portion of the political leadership is rooted in Islam in some way. Moreover, Islam has had a prominent place in the constitutions of Afghanistan. In the 1964 constitution, Islam was the state religion, and state religious rites were to be performed according to the Hanafi school of Islamic interpretation. The king was required to be Muslim. The 1964 constitution also required that all laws passed by the parliament not contradict the basic principles of Islam.

In the new draft, the references to Islamic law were strengthened during the course of the CLJ. Rather than require that no law could be contrary to the principles of Islam, as in the 1964 constitution, the constitution as adopted by the CLJ requires that no law be contrary to the “beliefs and provisions” of Islam. The use of *provisions* in particular indicates something closer to reliance on the established Islamic *sharia*. This reliance on *sharia*, in turn, empowers the clergy.

In short, the CLJ produced a thoroughly Islamic constitution. References to Islam are incorporated into 14 of its 162 articles as well as the first line of the preamble. The first four articles clearly establish Islam as a fundamental political, legal, and religious basis for the state. The constitution creates an Islamic state, by, of, and for Muslims, with Islam as its official religion.<sup>90</sup> Political parties cannot have programs contrary to Islam, and the national education curriculum must be based, in part, on Islamic principles.<sup>91</sup> Despite clauses prohibiting discrimination, as well as accepting Afghanistan's international legal obligations, the president of the country must be Muslim. The constitution allows the practice of other religions, however, and shows greater tolerance toward Shia Islam than did previous constitutions.<sup>92</sup>

The question of who was to have the power to decide whether a law was sufficiently Islamic according to the standard of the constitution was a fundamental aspect of the debate over Islam in the CLJ. Article 121 of the constitution appears to give this power squarely to the Supreme Court, by providing that the “Supreme Court on the request of the Government or the Courts shall review the laws, legislative decrees, international treaties and international covenants for their compliance with the Constitution and provide their interpretation in accordance with the law.” Thus, the character of the Supreme Court would be extremely important to the outcome of the cases referred to it. At the time of the CLJ, the Supreme Court was headed by a deeply conservative cleric, Fazl Hady Shinwari, who proclaimed the Koran as his constitution. Shinwari was an ally of the conservative militia leader Sayyaf, and his leadership of the Supreme Court created the possibility that a small unelected group of fundamentalists would use the court to short-circuit the political process with an Islamic trump card.



The reconciliation council produced a draft of the new constitution on December 30, sixteen days into the CLJ. But once the document was printed and released to the floor, several members of the council, including former president Rabbani, charged that the agreed text had been altered. As Chairman Mojadeddi attempted to move the draft toward a vote, an uproar ensued, and the vote was scuttled. Mojadeddi and Rabbani, both leaders of jihadi parties, had an infamous rivalry that began to affect the proceedings. Mojadeddi, recalling his claim that Rabbani tried to shoot down his airplane in 1992 over Kabul, said that Rabbani's efforts were "devilily" intended to destroy the entire CLJ.<sup>93</sup>

The increasingly heated rhetoric came to a head as over 100 delegates announced they were walking out of the proceedings. Chairman Mojadeddi was so incensed at the wrangling that he announced that he was quitting, promptly left the site, and went home. He only agreed to return after visits by the vice president and the foreign minister. Upon returning to the tent, he joked that "sometimes the *loya jirga* becomes so hot it is close to burning, and sometimes it is so cold that I must go home and get something warm to wear." After a day of cooling tempers and arm-twisting by the government and international diplomats close to the process, the delegates returned, along with the chairman.

In the final heat of the debate, several other issues also erupted. In a dig at the so-called neckties in Karzai's cabinet—the returned Afghans who had been living in comfort abroad—restrictions on cabinet ministers holding foreign passports and even on having foreign wives were proposed. In the end, dual passports for ministers of the government were prohibited (but not for foreign wives), unless the parliament explicitly approved them. The debates over which languages would be official as well as the tongue of the national anthem were also disconcertingly

fierce. Years of ethnic polarization had made these tense issues, as they went to the very identity of the future state and the nation. To complicate matters, the voting procedures in the CLJ were extremely confusing. Many delegates often did not know which articles they were approving in a vote. The rules of procedure were also routinely ignored.

On January 1, nearly half of the 231 delegates boycotted the CLJ out of dissatisfaction with the process and its outcomes. It seemed possible that the talks would collapse altogether. Brahimi and Khalilzad went into crisis mode, convening leaders to find a way to save the CLJ. As one delegate noted, it would take a while for tempers to cool: "When an Afghan feels provoked, even if you ask him to go to heaven with you he will say no."<sup>94</sup> But the frustrated leaders pushed ahead, even with few delegates in the tent. They called for votes on further amendments, which passed with a bare quorum of representatives.

While Khalilzad and Brahimi negotiated with the leaders of various blocs late into the night of January 3, the CLJ leadership engaged in brinksmanship. They said that the following day would be the last, regardless of the outcome. With little hope of securing significant changes and under enormous pressure, the boycotters gave up their final objections and returned to the tent. The last issue to be resolved was to grant language rights to people in their home provinces if their language was the majority language of the area. This would allow Uzbeks to speak their own language in courts and government offices in their region.

On the final day of the CLJ, the entire draft document was read out in Dari and Pashtu. The delegates were never given a chance for a formal ballot on the draft. The rules of procedure were unclear on final ratification of the document, calling for "every effort to adopt decisions by consensus" and fail-

ing that, a majority vote.<sup>95</sup> In the end, Chairman Mojadeddi simply asked the delegates to stand to show their support. Most in the tent stood, and the document was considered ratified.<sup>96</sup> Given the high level of tension in the process in the final days, the sudden end and failure to call for a final ballot appeared to be an attempt to force through final approval and disband the CLJ without further delay or dissent.

In classic Afghan fashion, Mojadeddi offered an emotional note, reciting a poem that included the words, “there is rain coming, and flowers are growing from my body.”<sup>97</sup> President Karzai was triumphant, but noted that the constitution and the situation in the country were far from perfect. In a nod to his opponents, he said that the constitution could be amended, noting “the constitution is not the Quran. If five or ten years down the line we find that stability improves, proper political parties emerge, and we judge that a parliamentary system can function better, then a *loya jirga* can, at a time of our choosing, be convened to adopt a different system of government.”<sup>98</sup> For its part, the U.S. government, seeking a triumph to balance the growing chaos of Iraq, lauded the constitutional process as a great leap forward. Ambassador Khalilzad called the document “one of the most enlightened constitutions in the Islamic world.”<sup>99</sup>

UN special envoy Lakhdar Brahimi made a speech congratulating Afghanistan on adopting its new constitution, but he decried the ongoing control of Afghan politics by armed men in his address:

Fear . . . is in the heart of practically every Afghan because there is no rule of law yet in this country. The people of Afghanistan are afraid of the guns that are held by the wrong people and used not to defend them and not to wage a jihad . . . but to frighten people, to terrorize people, to take advantages for their own.<sup>100</sup>

Some of the men whose conduct Brahimi was addressing had been at the center of the

CLJ. They sat in the front rows, were the chairs of their subcommittees, and had access to the VIP tent where President Karzai, Ambassador Khalilzad, and Brahimi himself worked out political deals.

## Conclusion

Only two years after the fall of the Taliban, Afghanistan’s political and military leadership agreed on a new constitution, establishing the framework for the institutions of a new state. The new constitution will represent a significant achievement if it proves to be more than paper. At present, however, the constitution is aspirational. It seeks to create a modern, democratic Islamic state with a strong central government, a monopoly on the use of force, and the rule of law.

The constitution does not reflect the political realities of this physically and politically shattered nation. The country is replete with political and military factions pulling in different directions. There are fundamentalists inside and outside the tent whose visions for the country tend more toward theocracy than democracy. There are regional power brokers—the warlords and tribal leaders—who seek local autonomy to pursue ethnic-group interests and personal gain. Others seek control of national institutions for the same reasons. Although these groups participated in the constitutional process, it remains far from certain that they support the vision of the new constitution. Then there are total spoilers—the terrorists and drug traffickers, for whom the failure of the state is a means to their desired ends.

The constitutional process produced a clear victory for President Karzai and his domestic and international supporters. Afghanistan’s new political system is a purely presidential system, with a directly elected president and two vice presidents, a bicameral legislature, and an independent judiciary. The president is both head of state and head of government,

and is not subject to a no-confidence vote by the legislature (other than by impeachment). The president chooses his or her own cabinet, subject to approval by both houses of the legislature. The executive is represented and dominated by the powerful unitary figure of the president. Unfortunately, this outcome was not achieved through popular consensus building—which, research during the early phases of the constitution-making process suggests, was possible—but rather through backroom deal making.<sup>101</sup>

The constitution does, however, attempt to create a meaningful separation and balance of powers among the three branches of the central government. In the area of lawmaking, both the legislature and the executive can propose laws, which must be adopted by a majority of both houses of the legislature. The president can exercise a veto, which can be overridden by a two-thirds majority of the legislature. The Supreme Court has the power to review the constitutionality of laws and treaties, and may interpret those laws. The power to propose the budget lies with the executive, but the budget must be approved by the Wolesi Jirga, the 249-member lower house of parliament. There is also give and take with the appointments process. Cabinet officials must be approved by the legislature, and the Wolesi Jirga can both interpellate and dismiss cabinet officials, which had been a strong demand of those opposed to a presidential system. One-third of the Meshrano Jirga, the upper house of the parliament, is appointed by the president, and all Supreme Court justices are appointed by the president with the approval of the Wolesi Jirga. The president is the commander in chief of the military and has the right to declare war with the approval of the national assembly.

While there are important checks and balances in this constitutional setup, a political system that withstands actual confrontation among competing authorities is far harder to build. Ultimately, the system must be self-

enforcing. If a citizen, group, or governmental body fails to obey the law, the executive must be willing and able to enforce the law. The court system must be willing to apply the law, regardless of the power of the parties before the court—and regardless of the personal beliefs of judges. Simply put, all the branches and their officials must be willing to submit to the rule of law and to apply it to others equally.

Since the creation of Afghanistan's 2004 constitution, none of these requirements has yet been met. The executive has not had the power to enforce the law throughout most of the country; it has been unable to control even its own officials. In early 2004, the forces of Governor Ismael Khan in Herat clashed with a central government-appointed military commander, and the forces of Presidential Special Advisor on Security and Military Affairs Rashid Dostum chased a Kabul-appointed governor out of Faryab province.<sup>102</sup> Ismael Khan was ultimately removed as governor, but was made minister of power in the Karzai cabinet.

For its part, the reach of the Supreme Court has been extremely circumscribed, yet it initially managed to abuse even its limited authority. Only ten days after the new constitution was ratified, the court announced that a video of a female singer shown on Kabul TV was un-Islamic and therefore illegal.<sup>103</sup> This pronouncement, with no case before the court nor any law to back the judgment, was itself blatantly unconstitutional. Furthermore, the court's decree was not enforced, demonstrating the shaky foundation on which the new constitution rests. A new reform-oriented Supreme Court was empaneled in 2006 following the seating of a newly elected parliament, which promptly rejected Karzai's attempt to reappoint the fundamentalist former chief justice, Maulavi Fazl Hady Shinwari. This new court, with its powers of judicial review, has already been called upon to referee constitutional disputes between

the executive and an opposition-controlled parliament. In 2007, the lower house of parliament interpreted an ambiguous provision in the constitution to mean that they had the power to dismiss cabinet ministers through a vote of no confidence and attempted to remove the foreign minister. The president objected to the interpretation and the manner by which the vote was taken, and referred the question to the Supreme Court. The court ruled that the vote had indeed been problematic, annulling the minister's dismissal, without clearly addressing the question of the ultimate effect of a no-confidence vote. For its part, the leadership of the lower house claims that the Supreme Court did not have the jurisdiction to rule on this issue according to the constitution, and so refused to recognize the decision, producing a constitutional stalemate.<sup>104</sup>

Perhaps the greatest failing of the tightly controlled constitution-making process was its inability to address Afghanistan's greatest challenge as a nation and a state: balancing center-periphery issues. The new Afghan constitution creates a completely centralized state, with no political or administrative authority devolved to the provinces. Provincial governors and ministry officials stationed in the provinces are appointed by Kabul. The constitution does establish elected consultative bodies on the provincial and district (subprovincial) level. However, these councils are merely limited to "securing the development targets of the state" and giving "advice on important issues."<sup>105</sup> Elected mayors and city councils may be given more autonomous authority, to be determined by law.

The constitutional setup also could not be farther from the reality on the ground in Afghanistan. The territory, resources, and even government apparatus in most provinces remain in the hands of regional power brokers.<sup>106</sup> A true compromise on devolution of authority has yet to be reached, and thus, the extent to which governmental authority

will be centralized or decentralized remains a key question. This issue is critical in both a formal sense, as it will affect decisions in the institutional design process, and in a practical sense, as ideas of a strong central government confront the reality of strong regional autonomy created by the turmoil of the last few decades. Ethnic groups that were relatively disenfranchised in the past now have autonomous militia forces, and, to a lesser extent, political structures.<sup>107</sup>

Moreover, the historical reality is that power in Afghanistan has almost always operated through negotiation between the central authority and local power holders; tensions between these two levels have existed for as long as there has been a state. Even the Taliban, which exerted a greater measure of central control than its immediate predecessors, was forced to negotiate with local elites and accept a degree of local autonomy.<sup>108</sup> Most of Afghanistan has always been remote from the center, and the communications and transportation infrastructure is insufficient to impose high levels of central control. Strong local social organization and a tradition of independence mean that decisions imposed from outside are usually resented locally. Distrust of central government is also based on the experience of authoritarianism and brutality. The years of war opened up a gap between the local and the central structures, with little connecting them. Central government ceased to have anything to offer provinces, let alone districts. Part of the political challenge will be reestablishing that connection, and doing so in a legitimate way.

The disconnect between the constitution and the reality of the place that it is intended to govern is due to several factors. Due to the sense of entropy that emerged during the civil war in the 1990s, many Afghans became fearful that lack of a strong center leads to chaos or rule by predatory regional actors, tempering popular support for regional



autonomy or federalism. Additionally, the four most powerful parties to the constitutional process—the Americans, the United Nations, the Karzai circle, and the Shura-i-Nizar (Panjshiri) branch of the Northern Alliance—all wanted a strong center in which to consolidate power. At the same time, the 1964 constitution, which also envisioned a completely unitary state without any devolution, was used as the model for the first draft of the 2004 constitution. Finally, Afghanistan's educated elite, who participated in disproportionate numbers in the constitutional drafting and ratification process, and many of whom had been outside Afghanistan since the 1970s, carried an outdated vision of the Afghan state at the height of its power. As a result, there was little public debate about the prospects for such a high degree of centralization, and local voices were neither well organized nor heard.

The test of the new constitution, as with any law, will be in its implementation. Dozens of new laws and regulations will have to be put into place. Institutions, such as the courts, the police, the ministry of justice, and the office of the prosecutor general, must be built, virtually from the ground up, and furnished with the fiscal and political resources to do their work. But the government must not only be built, but made credible and legitimate in the eyes of a wary population. This process is time and resource intensive and will be more easily undermined than accomplished in the next few years.

The extent to which the stabilization and state-building mission in Afghanistan depend upon the provisions of the new constitution remains to be seen. The 1964 constitution was to be a serious revamping of the Afghan political system, and ultimately failed due to internal and external pressures. It attempted to ease the way toward democracy by limiting the powers of the king and his family, but left them in place as a check on the developing system. The 2004 consti-

tution has little such potential recourse to tradition. The system is bounded by itself, not by an outside actor or institution of higher authority. This change at once maintains the integrity of the system and places immense pressure on its weakly grounded legitimacy to overcome political crises. There is still the potential under the new constitution to call a *loya jirga* in times of crises, but it is unclear whether such an institutionalized *loya jirga* can have the necessary effect.

The 2004 constitution has done much more than previous constitutions to ensure a diverse parliament, and new laws have paved the way for political parties to form and operate. The election law, however, does not allow for party lists in the context of electioneering, and so the first parliament was elected without a strong party structure to ensure discipline in the people's house. The 2004 constitution also does much more than previous constitutions for Afghan diversity as a whole, recognizing major languages other than Dari and Pashto and allowing for minority Shiite jurisprudence to be used in the courts in cases brought by Shia. It has also guaranteed a substantial portion of seats to women in the parliament, which already has added many more Afghan women to visible political life than ever before.

The vague yet powerful references to Islam and the legal system of the country in the 2004 constitution leave some cause for concern. In the wrong hands, the language ensuring that laws must adhere to the "beliefs and provisions" of Islam potentially takes away an important degree of discretion from Afghan's elected leaders and lawmakers and places it into the hands of those wielding clerical authority. This grant of power to the politically unaccountable threatens the democratic system and individual rights in a country that has decades of struggle ahead of it to consolidate the rule of law.

Ultimately, the new Afghan constitution was borne of haste. The rushed Bonn process

laid out in a few days Afghanistan's transition on a tight timetable. Before the country was even nominally secured, it was agreed that a new constitution would be drafted, publicly vetted, and ratified within two years—following twenty-five years of devastation and disintegration. This timetable was largely imposed upon the disjointed Afghan factions by the United States, the United Nations, and other international actors leading the intervention, to ensure that the process would stay on track and that an exit strategy would remain in sight.

The combination of haste, lack of meaningful public debate, and outcomes at odds with powerful entrenched interests means that the constitution will have to overcome strong challenges to its legitimacy. A weak center that devolves no political authority will end up being defied by local *de facto* political authority not recognized within the constitutional framework. Additionally, there are early signs that the factions supporting a parliamentary system will continue to push that the constitution should be revised.<sup>109</sup>

It remains unclear whether the constitutional process of 2003 contributed to the goal of peacemaking and national reconciliation—or at least whether it could have been more effective in doing so. On one hand, the public spectacle of former enemies sitting in the same tent and producing an agreement (albeit with misgivings) strikes a dramatic contrast with the fratricidal conflict of the recent past. The use of the *loya jirga*, which strikes a chord of historical unity and national tradition for many Afghans, also contributed to the sense of progress toward peace. In addition, a framework for elections and division of powers, if followed, will hopefully channel conflict into the political system and away from more destructive pathologies.

However, the process also heightened tensions and highlighted deep fissures in the polity. The creation of a permanent consti-

tution can be a high-stakes game, defining future winners and losers through structural means. In Afghanistan, a presidential system likely means a Pushtun president for the foreseeable future. Lack of clear elite consensus on the future, and deep lingering distrust between political and ethnic groups, made the CLJ a risky venture. It almost unraveled entirely during the process, and only intense international pressure kept it from doing so. This pressure forced an outcome, but not a consensus, while also laying bare the hand of foreign intervention in a delicate process and heightening the perception that Karzai's power flows from the Potomac rather than the Kabul or Helmand rivers.

Ultimately, the governmental structure that the constitution created is cognizable to most Afghans. But whether it will function, and overcome the struggles ahead, is far from assured. The most important lesson from the 1964 process, perhaps, is that the spirit of the document needs to be obeyed by those with the power to disobey it.

## Notes

1. I would like to thank the constitutional and judicial reform commissions of Afghanistan, in particular Chief Justice Azimi, Justice Bahauddin Baha, and Ms. Fatema Gailani, for their extensive insights. I would also like to thank Toluwanimi Fadeyi for her research assistance. Portions of this chapter were previously published in J Alexander Thier, "The Making of a Constitution in Afghanistan," *New York Law School Law Review*, vol. 51, no. 3 (2006–07), pp. 557–79.

2. The *loya jirga* is an Afghan tradition with an august but vague history. The concept was extrapolated from the model of the tribal *jirga* or *shura*, an ad hoc, village-based institution that allows broad representation and, nominally, consensual decision making. The *loya jirga* is intended to be a national manifestation of community decision making. It has been used on average every twenty years to confirm the succession of monarchs, pass constitutions, and approve government policy. The last *loya jirga* deemed broadly legitimate was held in 1964 to approve a new reformist constitution.



3. For historical background on the conflicts, see William Maley, *The Afghanistan Wars* (New York: Palgrave Macmillan, 2002).
4. For insight into the cleavages within Afghan society, see Louis Dupree, *Afghanistan* (New Jersey: Princeton University Press, 1980); Larry P. Goodson, *Afghanistan's Endless War* (Seattle: University of Washington Press, 2001); Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System*, 2nd ed. (New Haven, CT: Yale University Press, 2002).
5. Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, S/2001/1154, 2001 (hereinafter, the Bonn Agreement).
6. The constitutional loya jirga (CLJ) was the constituent national assembly mandated by the Bonn Agreement to ratify a new constitution for Afghanistan. The CLJ's legal framework was created by the Presidential Decree on the Convening of the Constitutional Loya Jirga, July 15, 2003, and augmented by the Presidential Decree on the Rules of Procedure of the Constitutional Loya Jirga, November 30, 2003.
7. Carlotta Gall, "Afghan Council Gives Approval to Constitution," *New York Times*, January 5, 2006, p. A1.
8. *The Constitutions of Afghanistan (1923–1996)* (Kabul: Shah M. Book Co., n.d.).
9. Vartan Gregorian, *The Emergence of Modern Afghanistan* (California: Stanford University Press, 1969), pp. 248–52 and 300–07.
10. Gregorian, *Emergence of Modern Afghanistan*, pp. 263–74. See also Louis Dupree, *Afghanistan* (New Jersey: Princeton University Press, 1980), pp. 441–57.
11. Richard S. Newell, "The Politics of Afghanistan," *South Asian Political Systems*, ed. Richard L. Park (Ithaca: Cornell University Press, 1972), pp. 95–116; Dupree, *Afghanistan*, pp. 559–65.
12. Newell, "Politics of Afghanistan."
13. The Constitution of Afghanistan (hereinafter, Afghanistan Constitution), 1964.
14. Newell, "Politics of Afghanistan."
15. Newell, "Politics of Afghanistan"; Marvin G. Weinbaum, "Afghanistan: Nonparty Parliamentary Democracy," *Journal of Developing Areas*, vol. 7, no. 1 (October 1972), pp. 57–74.
16. Dupree, *Afghanistan*.
17. Ibid.
18. *Constitutions of Afghanistan (1923–1996)*.
19. Maley, *Afghanistan Wars*; Rubin, *Fragmentation of Afghanistan*.
20. UN Commission on Human Rights, Fifty-first Session, Item 12 of Provisional Agenda, *Final Report on the Situation of Human Rights in Afghanistan*, prepared by Felix Ermacora in accordance with UN High Commissioner for Human Rights, E/CN.4/1993/42, E/CN.4/1994/53, E/CN.4/1995/64, 1994.
21. See Whitney Azoy, *Buzkashi: Game and Power in Afghanistan* (Philadelphia: University of Pennsylvania Press, 1982). An Afghan game played on horseback, using a headless calf or goat as the ball. It is brutal, chaotic, and often played as every man for himself.
22. Dupree, *Afghanistan*, p. 566.
23. Dupree, *Afghanistan*, p. 566. In 2003, another Frenchman was sent to advise Karzai on the process and again inspired humor, this time about the potentially crippling competition between the president and prime minister embodied in the French constitution. In 1992, the Afghan prime minister in the interim government, Gulbuddin Hekmatyar, had famously shelled the presidential palace (and much of the city). And in 2003, Karzai's chief political rival, Younis Qanooni, made little secret of his desire for a weak president (Karzai) and a strong prime minister (himself). Cohabitation did not look promising to the Afghans.
24. Dupree, *Afghanistan*, p. 566.
25. Ibid., p. 566.
26. Ibid., p. 567.
27. Ibid., p. 567.
28. Ibid., pp. 567–78.
29. Ibid., pp. 567–78.
30. Ibid., at p. 571. The constitutional assembly convened in 1931 by King Zahir's father, Nadir Shah, had also begun on September 9, exactly thirty-three years earlier. Dupree, *Afghanistan*, p. 574.
31. Ibid., p. 573.
32. Ibid., p. 573.
33. Ibid., p. 585.
34. Afghanistan Constitution (1964), title 2, arts. 6–8.
35. Afghanistan Constitution (1964), title 4, art. 75.
36. Afghanistan Constitution (1964), title 8.
37. Afghanistan Constitution (1964), title 4, art. 41.

38. Afghanistan Constitution (1964), title 4, art. 42.
39. Weinbaum, "Afghanistan: Nonparty Parliamentary Democracy."
40. Afghanistan Constitution (1964), title 5, art. 84.
41. Afghanistan Constitution (1964), title 5, art. 78.
42. Afghanistan Constitution (1964), title 5, art. 78.
43. Afghanistan Constitution (1964), title 7.
44. Afghanistan Constitution (1964), title 7, arts. 97, 107.
45. Afghanistan Constitution (1964), title 7, art. 98.
46. Marvin G. Weinbaum, "Legal Elites in Afghan Society," *International Journal of Middle East Studies*, vol. 12, no. 1 (August 1980), pp. 39–57.
47. Afghanistan Constitution (1964), title 1, art. 2, and title 4, art. 64.
48. Afghanistan Constitution (1964), title 7, art. 102; see Colin Turner, *Islam: The Basics* (New York: Routledge, 1996). The Hanafi school is considered the oldest and most liberal of the four Sunni schools of law.
49. UN Security Council, UN Security Council Resolution 1378, S/RES/2001/1378, 2001.
50. Jarat Chopra, Jim McCallum, and J Alexander Thier, "Planning Considerations for International Involvement in Post-Taliban Afghanistan," *Brown Journal of World Affairs*, vol. 8, no. 2 (Winter 2002), pp. 2–4.
51. Ahmed Rashid, "Breaking the Cycle," *Far Eastern Economic Review*, December 6, 2001, p. 16.
52. The Bonn Agreement, art. I(6), available at [www.uno.de/frieden/afghanistan/talks/agreement.htm](http://www.uno.de/frieden/afghanistan/talks/agreement.htm) (accessed April 10, 2009).
53. Bonn Agreement, art. II(1).
54. The power of decree was granted to the interim administration in the Bonn Agreement (art. III(C)(1)), but was never explicitly granted to the transitional administration through the Bonn Agreement or the emergency *loya jirga*. The transitional administration, however, continued to exercise this power. As of December 2002, Chairman Karzai had issued more than 150 decrees.
55. Reuters, "Uzbek Warlord Rejects Afghan Accord," December 6, 2001; quoting Sir Sayeed Gailani.
56. Reuters, "Uzbek Warlord Rejects Accord."
57. Much of the information in this section is based on the direct experience of the author.
58. Islamic Transitional State of Afghanistan, Presidential Decree Appointing Constitutional Commission, Afghan Transitional Administration, October 5, 2002.
59. Abdul Salam Azimi, interview by the author, December 2004.
60. Abdul Salam Azimi, interview by the author, December 2004.
61. They were Dr. Mohammad Qasim Fazili; Dr. Mohamad Rahim Sherzai; Sayed Musa Ashari; Professor Mohamad Musa Marufi; Asefa Kakar; Mukarama Akrami; and Mohammad Sarwar Danesh.
62. International Crisis Group, *Afghanistan's Flawed Constitutional Process*, ICG Asia Report no. 56, June 12, 2003, pp. 1–2.
63. USAID funded the Asia Foundation to hire a number of consultants to provide substantive input to the constitutional drafting process, including Yash Pal Ghai and this author. These inputs were transmitted through meetings and a series of options papers that were drawn up on specific subjects. Barnett Rubin of New York University also commissioned a series of options papers from constitutional experts.
64. Secretariat of the Constitutional Commission of Afghanistan, "The Constitution Making Process in Afghanistan," March 10, 2003, p. 2.
65. Islamic Transitional State of Afghanistan, Presidential Decree on the Constitutional Commission, April 26, 2003.
66. Masuda Sultan and Hannibal Travis, letter to the editor, *Boston Globe*, November 13, 2003, p. A19.
67. Abdul Salam Azimi, interview by the author, September 2003, Kabul, Afghanistan.
68. Secretariat, Constitutional Commission, "Public Consultation Strategy," n.d. (on file with author). See also Vanessa Gezari, "Mistrust Mars Drafting of Constitution; Afghans Mindful of Prior Failures," *Chicago Tribune*, July 9, 2003, p. 4; Elizabeth Sullivan, "Afghanistan's Constitution is a Local Creation," *Plain Dealer* (OH), January 8, 2004, p. B9.
69. Fatema Gailani, interview by the author, December 2004, Kabul, Afghanistan.
70. Azarbaijani-Moghaddam, *Technical Lessons Learned from the Afghan Civil Society Forum (ACSF)/Swisspeace Civic Education for the Constitution Project* (Sipipi: ACSF-Swisspeace, 2003).

71. According to "The Constitution Making Process in Afghanistan" a report by the Constitutional Commission on March 10, 2003, which was formalized by decree on May 10, 2003, the responsibilities of the commission included "preparing a report analyzing the views of Afghans gathered during public consultations and making the report available to the public." For figures on the consultation process, see "UNAMA Draft Constitution Factsheet," available at [www.unama-afg.org/docs/\\_nonUN%20Docs/\\_Loya-Jirga/CLJ/Draft%20Constitution%20Factsheet.doc](http://www.unama-afg.org/docs/_nonUN%20Docs/_Loya-Jirga/CLJ/Draft%20Constitution%20Factsheet.doc) (accessed April 10, 2009).

72. Constitutional Commission Secretariat, Transitional Islamic State of Afghanistan, *Analytical Report of the Views and Proposals Made by the People, for the Drafting of a New Constitution*, October 2003.

73. See Islamic Transitional State of Afghanistan, Presidential Decree on the Convening of the Constitutional Loya Jirga, July 15, 2003.

74. See Presidential Decree on the Constitutional Loya Jirga, July 15, 2003.

75. Presidential Decree on the Convening of the Constitutional Loya Jirga, July 15, 2003, art. 4.

76. Paul Watson, "Fears of Vote Buying Muddy Path to Loya Jirga; Such Allegations Are Undermining the Credibility of Upcoming Afghanistan Assembly Before It Even Begins to Debate a Draft Constitution." *Los Angeles Times*, December 12, 2003, p. A5; see also *Afghanistan: Hell of a Nation*, directed by Tamara Gould, Wide Angle PBS, 2004, the documentary film in which CLJ delegates provide firsthand accounts of intimidation and vote buying in the CLJ elections.

77. In the end, President Karzai exceeded his allotted appointments by two, which went unchallenged. This was deemed a minor overstep compared to the 150 delegates Karzai unexpectedly added to the Emergency Loya Jirga.

78. Reuters, "Karzai Seeks Strong Powers at Key Afghan Assembly," December 14, 2003.

79. International Crisis Group, *The Afghan Transitional Administration: Prospects and Perils*, Asia Briefing no. 19, July 30, 2002.

80. Rules of Procedure of the Constitutional Loya Jirga, Order of the President of the Islamic State of Afghanistan no. 4913, dated 16.09.1382 (November 2003).

81. Accounts from CLJ subcommittees were provided by delegates and facilitators in interviews with the author.

82. "Dog washers" is a derogatory term for Afghans who left to live in the West. They are called dog washers to suggest that in the rich and decadent West, the only jobs these Afghans could get was to wash people's dogs. It is an indictment of both the West and the Afghans who went there.

83. Malali Joya, speech from the floor of the Emergency Loya Jirga, December 17, 2003.

84. Order of the President of the Islamic Transitional State of Afghanistan on the Rules of Procedure of the Constitutional Loya Jirga, no. 4913, 2003, chap. XII, art. 37.

85. Waheedullah Massoud, "EU Envoy 'Disturbed' as Afghan Assembly Chairman Brands Delegates 'Infidels.'" Agence France-Presse, January 1, 2004.

86. Gregorian, *Emergence of Modern Afghanistan*.

87. As noted above in note 23, the former prime minister, Gulbuddin Hekmatyar, shelled the capital and presidential palace in 1992.

88. Dupree, *Afghanistan*.

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

90. Afghanistan Constitution (2004), arts. 1–3.

91. Afghanistan Constitution (2004), art. 45.

92. Afghanistan Constitution (2004), art. 131. Compare mention of Shia schools with the 1964 constitution, which solely relies on the Sunni Hanafi school.

93. Chairman Mojadeddi, interview by the author, December 2004, Kabul, Afghanistan.

94. Opinion of delegate, quoted in, Stephen Graham, "Parties Try to Save Afghan Charter Talks," Associated Press, January 2, 2004.

95. Rules of Procedure for the Constitutional Loya Jirga, Article 25, November 2003 (copy on file with the author).

96. Hamida Ghafour, "Afghans Agree to New Charter," *Los Angeles Times*, January 5, 2004, p. A1.

97. Gall, "Afghan Council Gives Approval to Constitution."

98. President Karzai, Closing Address to the Constitutional Loya Jirga, January 4, 2004.

99. Zalmay Khalilzad, letter to the editor, *Washington Post*, January 6, 2004. Khalilzad was the special presidential envoy and ambassador to Afghanistan.

100. UNAMA, Transcript of Impromptu Remarks by the Special Representative of the Secretary-General, Lakhdar Brahimi, at the Closing Cere-

mony of the Constitutional Loya Jirga, January 4, 2004, available at [www.unama-afg.org/docs/Docs.htm](http://www.unama-afg.org/docs/Docs.htm) (accessed April 10, 2009).

**101.** See Chris Johnson, William Maley, J Alexander Thier, and Ali Wardak, "Afghanistan's Political and Constitutional Development," Overseas Development Institute, 2003, describing widespread support for a strong executive in interviews conducted throughout the country in 2002.

**102.** Carlotta Gall, "Provincial Capital in Afghanistan Seized by a Warlord's Forces," *New York Times*, April 9, 2004, p. A5.

**103.** Nick Meo, "Afghan Court Revisits Days of the Taliban With Ban on Cable TV," *The Independent*, November 11, 2004, p. 33.

**104.** Author interview with Adbul Salam Azimi, chief justice of the Supreme Court of Af-

ghanistan, October 2007; and author interview with Mohammad Younus Qanooni, speaker of the Wolesi Jirga (lower house) of Afghanistan, October 2007.

**105.** Afghanistan Constitution (2004), art. 139.

**106.** Barnett R. Rubin, "Afghanistan's Uncertain Transition from Turmoil to Normalcy," Council on Foreign Relations, March 2006, p. 26.

**107.** Conrad Schetter, "Ethnicity and the Political Reconstruction of Afghanistan," The Center for Development Research, Working Paper no. 3, 2004.

**108.** Maley, *Afghanistan Wars*.

**109.** Interview by the author with Mohammad Younis Qanooni, speaker of the Wolesi Jirga of Afghanistan, October 2007.