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SPECIAL REPORT

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ABOUT THE REPORT

This report examines the 2004 Afghan constitution as a point of negotiation in a prospective conflict settlement process between the Afghan government and the Taliban. Because changes to the constitution's core principles are frequently cited as a major risk of a potential peace process, the report seeks to examine various ways in which Afghans might approach the issue.

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Sean Kane

Talking with the Taliban

Should the Afghan Constitution Be a Point of Negotiation?

Summary

- Insisting that the Taliban accept the Afghan constitution is understandable insofar as the risks that peace talks could pose to Afghanistan's post-2001 achievements. Nonetheless, a periodic assessment of this condition is healthy, especially given the human toll of the ongoing insurgency and acknowledged shortcomings in the charter.
- To help Afghans make an informed choice on this dilemma, lessons can be drawn from other countries currently in talks to end decades-long insurgencies. Understanding the Taliban's possible constitutional demands as well as the Afghan constitution's amendment rules is also necessary.
- A comparison of the Afghan constitution and the Taliban's 2005 Order of the Islamic Emirate provides clues on what changes the movement might seek. The Taliban also have an overarching "ownership problem" with the constitution because of their exile from Afghan political life at the time it was drafted.
- Key divergences between the Taliban order and the constitution relate to the sources of legitimacy for government and laws and marked differences on women's and minority rights. The two documents also contain more overlap than might be assumed.
- The Afghan constitution requires public input on proposed amendments through the convening of a popular assembly, or *loya jirga*. The constitution further designates fundamental aspects of the political system and Afghans' rights as unamendable. These rules could be strategically applied to constrain Taliban efforts to use negotiations to completely remake the current constitutional order.
- Debate over peace talks with the Taliban has tended to be framed in terms of potential risks. Negotiations could also present an opportunity to challenge the Taliban to justify some of its more unpopular constitutional positions to other Afghans and, in the best case, to help the Afghan government seize the political high ground.

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Introduction

One of the most vexing and consequential dilemmas on ending the fighting between the Afghan government and the Taliban is whether to include the Afghan constitution as a point of negotiation in potential peace talks. The 2004 charter is a signal achievement of the post-2001 era and a symbolic bulwark on minority and women's rights. Should Afghans consider amending it if doing so might help bring about a negotiated political solution to a brutal and deadly conflict that is also blocking the country's economic and human advancement?

Until recently this difficult question was off the table, with the Afghan government and its international partners insisting that the Taliban end violence, break ties with al-Qaeda, and accept Afghanistan's constitution prior to any formal peace talks. However, in January 2013, a joint statement by then Afghan president Hamid Karzai and U.S. president Barack Obama indicated that the Taliban should meet these demands as "part of the *outcome* of any [peace] process" [emphasis added]¹. This evolution suggests that the constitution could be discussed in peace talks. Others have been more explicit. For example, Russia's special envoy for Afghanistan recently stated, "We've never said the existing Constitution...is ideal...We're doing our best to convince the Taliban to change the Constitution [using] due process of law."²

Senior Afghan leaders themselves have since suggested that they do not consider the constitutional text sacrosanct. Both Karzai and members of the Afghan High Peace Council have said that they are open to constitutional amendments that follow the charter's own rules and safeguard the rights of Afghans.³ The demand from parts of Afghan society for peace is clear, as demonstrated by a March 2014 petition to the Afghan government and Taliban. Signed by more than 250,000 Afghan women, it called for peace talks to begin without delay.⁴

The prominence that constitutional issues took on during Afghanistan's long presidential contest is also noteworthy. At a televised presidential debate, the initial five leading candidates discussed the suitability of the constitution and changes they might make to it.⁵ Constitutional issues later took center stage in the political agreement reached to overcome the impasse between Ashraf Ghani and Abdullah Abdullah following the second round of the election. In this agreement, the two committed to convene a popular assembly within two years to consider amending the constitution to establish the post of an executive prime minister. A natural question is therefore whether constitutional reform could also be used to help address one of the country's other major security and political challenges?

This question has no simple answer, but it is clear that the Taliban and other armed groups reject the current Afghan constitution.⁶ In a December 2012 Track 2 meeting,⁷ representatives of the Taliban characterized the document as "illegitimate" because it was "written under the shadows of [U.S.] B-52 aircrafts." The need for a constitution "written by Afghan scholars in a free atmosphere and...presented to the nation for approval" was the first priority in the Taliban statement.⁸ Along with demands for access to power in Kabul, the Taliban would likely put changes to the constitution at the forefront of their agenda in any peace talks.

The debate on peace talks and the constitution tends to be framed exclusively in terms of the risks it poses to Afghanistan's current system. These concerns are valid, but it is also important for Afghan negotiators to consider how talks could be used to their advantage. Prior to being squandered during the ensuing electoral impasse, the turnout of almost fourteen million Afghans across the two rounds of the 2014 elections was widely interpreted as a genuine political setback for the Taliban that led it to sack several of its military commanders. Similarly, peace talks could present the armed movement with the political challenge of having to justify some of its more unpopular constitutional positions to other Afghans.

Can the Taliban Be Engaged?

Given that Afghanistan is in the midst of complex political, security, and economic transitions, full-fledged negotiations with the Taliban do not appear imminent. The uncertainty the country faces also leads to several well-founded questions on the practicality of peace talks. These include whether the movement is actually unified enough that it can be meaningfully negotiated with, whether those Taliban figures who could agree to negotiate with the Afghan government exercise real influence over the movement's hard-line battlefield commanders, whether the movement and its external backers have the incentive to negotiate or to respect and implement the results of any talks, and whether the gulf between Taliban's world view and the Afghan constitution principles is simply too wide to be effectively bridged.

Many of these questions merit full studies in their own right, and several have in fact received them.⁹ This report does not attempt an in-depth analysis of internal Taliban dynamics, decision making, or incentives. Rather, it focuses on key political issues related to the nature of the Afghan state and public life that would necessarily arise in any talks between the Afghan government and the Taliban. If it is taken as given that there is no purely military solution to the Afghan insurgency, this forward thinking can help the Afghan government develop political stratagems for confronting the Taliban. Such guidelines will undoubtedly be required in what must be expected to be long, hard negotiations with a group that has a history of both honoring agreements and cynically exploiting talks to gain tactical advantage.¹⁰

Nonetheless, a few basic points on the feasibility of negotiating with the Taliban are warranted. The Taliban are not a single homogenous entity but rather a collection of semi-autonomous networks. But were a political understanding to be reached with the relative moderates in the Taliban's Political Committee (whose presentation at the Chantilly Track 2 meeting was authorized by the Taliban's Supreme Quetta Shura), it would be significant. To be sure, not all or perhaps even a plurality of Taliban fighters would reconcile in such a scenario. But the political and military dynamics of the Afghan conflict would be fundamentally changed by any political agreement reached with the movement's formal leadership.

Whether the Taliban's leadership will ever calculate that reaching and honoring a political deal with Kabul is in fact in their interest depends on a complex constellation of factors. These include Afghan leaders consolidating the new Afghan unity government and delivering improved governance, effective political leadership over the Afghan security forces, and securing long-term support from the international community. Such steps would shape not only Taliban decision making but also calculations by the country's neighbors, which might otherwise engage in hedging strategies. But the incentive for serious talks may not fully be in place until a military stalemate is perceived on both sides, which could take several years to emerge.¹¹ It is therefore clear that no single political issue, such as the government's signaling of openness to discussing the constitution, should be considered a panacea as opposed to a component of a larger overall approach to the Afghan conflict.

It may also ultimately be true that the gap between the Afghan constitution and the Taliban's worldview cannot be closed. But in the context of a grinding, decadelong conflict in need of fresh thinking, a conclusion to this effect should not simply be assumed but rather arrived at following thorough investigation. To make an informed choice as to whether including constitutional issues in peace talks is in their national interest, Afghans could learn from the experiences of the Philippines, Myanmar, and Colombia, whose governments are considering constitutional changes as part of peace talks to end seemingly intractable, decades-long insurgencies. Understanding both the constitutional changes the Taliban might demand and the Afghan constitution's amendment rules is also important.

Constitutional Talks and Ending Insurgencies

An exhaustive review of the practice of constitution-making published by the NGO Interpeace finds that the extent to which peace processes are linked to constitutional issues varies and notes both risks and opportunities to including the constitution in peace talks.¹² On the opportunities side, reviewing the constitution in peace talks forces leaders of armed groups to develop political platforms and confront the interests of other groups in society. In the case of Afghanistan, the Taliban straightforwardly reject international standards on democracy and human rights as an imposition of Western values. However, justifying some of their more extreme positions to other Afghans in a political negotiation would be less straightforward.

Especially in urban areas, Afghan society has changed significantly since Taliban rule ended in 2001: popular support for a democratic system of government, significant growth in access to education and health care, the development of a vibrant media sector, and an increased role of women in public life. As seen in the changing Taliban views on issues such as “modern education”¹³ and possible reluctance to attack Afghan voters during the 2014 elections,¹⁴ standard Taliban positions on these issues are unpopular and could be forced to further evolve as a result of formal political talks.

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The Interpeace study also identifies potential drawbacks to including constitutional reform in peace talks. The tendency to limit peace negotiations to warring groups often relates to the need to ensure the confidentiality of talks in environments of severe mistrust and to a sense of urgency to quickly conclude negotiations so as to curtail the ongoing violence. But several problems can arise from amending the nation’s social charter under such rushed and opaque circumstances. Most notably, the revised constitution could lack broader societal support, given its dependence on secret talks between combatant groups who may have alienated a war-weary population. It is also possible that the new charter would seek to protect belligerents at the expense of victims and other parts of society.

Interpeace therefore suggests a rule of thumb that the greater the constitutional changes contemplated in peace talks, the greater the public participation in the process should be. One way to accomplish this is through a two-stage process. The first and frequently confidential stage between the warring parties is intended to lead to a cessation of hostilities and possibly develop proposals for constitutional changes. The second and more participatory stage sees the constitutional changes being finalized and typically provides openings for inputs from democratically elected institutions, civil society, and the public.

With this context, this section examines current conflicts where peace talks between the government and armed groups have involved the possibility of changes to an existing constitution. Some caution on the applicability of this comparative research is required, however. The typical insurgency’s demands relate to regional autonomy for an ethnic or religious minority. In contrast, the Taliban formerly ruled Afghanistan and are associated with ethnic Pashtuns, the country’s largest and traditionally politically dominant community. The movement claims to be interested not in a mini-Islamic Emirate in southern Afghanistan but rather in power in Kabul and a say over how all Afghans’ political, social, and religious lives are ordered. These distinctions and the still fluid military balance of power between the Taliban and the Afghan government are germane because they shape and inform the constitutional changes the movement might demand.¹⁵

The Philippines

In March 2014, the Philippines government and the Moro Islamic Liberation Front (MILF) signed the final part of a peace agreement aimed at ending more than four decades of violence that killed more than 120,000 Filipinos and displaced two million people on the southern Philippine island of Mindanao. The main features of the peace deal relate to the

creation of an autonomous Muslim-majority region in the south of this Christian-majority country. The framework agreement underlying the peace deal establishes a Transition Commission to work on proposals to amend the Philippine constitution in order to entrench the agreements of the Philippine government and MILF.¹⁶

Constitutional issues have been a central and controversial feature of the Philippine peace talks. They also present a clear example of the risks of negotiating constitutional reform via secret talks. Specifically, the lack of public consultation on confidential proposals to change the constitution preliminary agreed to in August 2008 led to “indignation rallies” by Christian settlers in Mindanao and a petition to the Philippine Supreme Court to review the secret text of the agreement.¹⁷ By the time the court rendered its verdict on the MOA’s constitutionality two months later, up to 650,000 people had been displaced by rising tensions and intercommunal violence in Mindanao.

The court ultimately found the draft agreement unconstitutional because no public consultation had been held in its development and because it sidestepped constitutional amendment procedures by, in effect, guaranteeing the MILF that the constitution would be changed. The ruling resulted in a wave of counterprotests by Moros and further Moro-Christian violence in Mindanao. Informal peace contacts did continue, but formal talks, were only restarted some three years later.

The Filipino experience suggests two possible lessons for Afghanistan. The first is that if the Afghan government agrees to discuss constitutional changes in peace talks, it may wish to demand matching concessions from the Taliban. This was the basic equation for talks in the Philippines: Manila agreed to consider regional autonomy arrangements for Mindanao beyond what was currently permitted under the constitution in exchange for the MILF abandoning its decades-long fight for the complete independence of the island.

Second, Afghan negotiators should take note of how the lack of public input into confidential talks on constitutional changes led to a popular backlash among Filipino nationalists and renewed violence. The Philippine government and the MILF appeared to learn from this setback, establishing formal mechanisms for civil society and public consultation into the process that led to the landmark 2014 peace agreement.¹⁸

Myanmar

In 2011, parallel to a remarkable and ongoing transition toward a more democratic system, Myanmar launched an ambitious effort to end over six decades of ethnic conflict that predate even the country’s independence in 1948. Some believe this battle between the Myanmar state and multiple ethnic insurgencies to be the world’s longest-running civil war.

Since 2011, bilateral ceasefire agreements have been reached between the government and fourteen of the sixteen major ethnic armed insurgent groups. These preliminary agreements are intended as confidence-building measures to allow each ethnic group and the national government to discuss the underlying issues fueling their specific conflict. The final phase intends to convene a national conference to reach permanent agreement on ethnic issues and a universal ceasefire. The Myanmar government has expressed openness to this final agreement including constitutional reform to provide ethnic minorities with increased autonomy, more equal resource sharing, and greater protection of their cultural rights vis-à-vis the Myanmar majority.¹⁹

The seeming understanding by government officials, including President Thein Sein, that the country’s long-running ethnic conflicts cannot be reduced to a security problem gives cause for cautious optimism. However, even with this institutional backing, the path to constitutional reform is complex. Amending the Myanmar constitution requires the support of more than 75 percent of the legislature. The more conservative Myanmar military, however,

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holds 25 percent of the body's seats under existing constitutional provisions. Additionally, the ethnic armed groups are not currently allowed to form political parties and therefore only have indirect representation in the legislature. Thus, despite a preference to amend the constitution using existing procedures, other options were debated, including replacing the constitution or amending without following constitutional procedure.²⁰ These options might have been more expedient but would have resulted in a break in the country's constitutional continuity.

The current approach therefore starts with a national dialogue outside the legislature, which includes the government, the military, and the ethnic armed groups. It aims at producing a national accord that will be presented to the legislature for ratification through the passage of laws and amendment of the constitution.²¹ In parallel, the parliament is already considering a large number of constitutional amendments, including some devolution of powers to the states and changing the constitution's amendment rules themselves. The entire process, if it succeeds, is anticipated to take several years.

Afghanistan could face certain analogous procedural complications should it wish to amend its constitution. The Taliban does not have direct representation in the loya jirga, the popular assembly mandated by the Afghan constitution to enact amendments to the charter. This could potentially limit the movement's political buy-in to anything the jirga might approve. Afghanistan could also face certain procedural difficulties in actually convening a loya jirga according to the letter of the constitution. This means that even if an agreement were reached with the Taliban to change the constitution, Afghanistan might face its own continuity challenge in trying to enact the amendments. Afghan peace negotiators could therefore benefit from continuing to monitor Myanmar's peace process.

Colombia

After decades of failed negotiations and attempts to militarily defeat the Revolutionary Armed Forces of Colombia (FARC) guerrillas, the October 2012 launch of formal peace talks between the Colombian government and the FARC provide hope for a political solution to the Western Hemisphere's longest running internal conflict. Motivated by a military stalemate—the government is ascendant but seems to appreciate that it cannot decisively defeat the FARC, and the FARC appears to recognize that armed struggle permits little more than survival—the political will for talks to succeed may finally exist.²²

Before this suspension, FARC negotiators repeatedly made it clear that they want a constitutional convention to enshrine an eventual peace accord into permanent law. "For more than 30 years the FARC have awaited the convening of a National Constituent Assembly to find a true solution to the conflict," read a FARC statement dated June 11, 2013. The principal political reason the guerrillas seek a new constitution, rather than the Colombian government's preferred option of ratifying the peace agreement through a public referendum, relates to Colombia's last successful peace process with an insurgency. After it concluded negotiations in 1990, the M-19 guerrillas won more than a quarter of the seats in the constituent assembly that redrafted Colombia's 1886 constitution into the 1991 charter now in force. For FARC leaders, achieving less than this would be difficult to explain to its cadres.²³ The issue remains unresolved and has been set aside to be reconsidered when ratification and implementation of the peace agreement is discussed.²⁴ In Afghanistan, Taliban leaders, like the FARC, might also struggle to justify to their rank and file what their long insurgency has accomplished if they are not able to play a role in changing Afghanistan's 2004 constitution.

In contrast to those in the Philippines and Myanmar, the Colombian talks have been primarily enabled by a military stalemate rather than any signals from the government on its openness to a ceasefire and constitutional changes. This offers an alternative type of approach for Afghans to consider. Rather than proactively pursue peace talks, the new

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Afghan government could predicate its negotiating strategy on achieving a battlefield stalemate between its security forces and Taliban fighters (even if this might take several years and depends on a series of complex factors). At this point, negotiations could be pursued that include discussion of Taliban political demands. However, as in Colombia, it could be left up for deliberation in the talks themselves as to whether the eventual peace accord should be codified into the Afghan constitution or instead ratified by ordinary law or public referendum. In this respect, Article 65 of the Afghan constitution provides the Afghan president with the power to call for a referendum on important national matters.

What Would the Taliban Want to Change?

The Taliban did not formally adopt a constitution during their administration of Afghanistan, holding that the Holy Quran and sharia provided sufficient guidance. In 2005, however, it issued its Order of the Islamic Emirate of Afghanistan. This document is the nearest to a constitution the movement has produced and provides a window into their thinking about Afghanistan's constitutional order.

In 2011, the United Nations Assistance Mission for Afghanistan's (UNAMA) Human Rights Unit compared the Taliban's 2005 order with the 2004 Afghan constitution.²⁵ This section draws on and supplements the comparison to identify major areas of divergence between the two documents, which could be expected to become areas of possible future negotiations. Before delving into these issues, it is also important to appreciate the political significance of those aspects of the constitutional system that the Taliban might *not* want to change.

Over the last century, all of Afghanistan's constitutions have established a highly centralized state (at least on paper) and, with two brief exceptions, the country has had a Pashtun leader. The 2004 constitution is in fact largely modeled on the 1964 charter, substituting an elected president for the previous executive—a (Durrani Pashtun) constitutional monarch and his prime minister. This traditional centralization of power in the person of the president and the locus of authority in Kabul has periodically been a source of discontent among Afghanistan's non-Pashtun political class, some of whom during the drafting of the 2004 constitution championed a parliamentary system of government and greater decentralization of authority to the provinces. At the time the 2004 constitution was drafted however, researchers observed support for a strong central government and executive among the country's Tajik, Hazara, and Uzbek communities. This was due to concerns over fragmentation of the country and interference in Afghanistan's internal affairs by its neighbors.²⁶

These two issues returned to the fore in Afghanistan's long 2014 elections crisis, which resulted in President Ashraf Ghani appointing Abdullah Abdullah as chief executive officer and an agreement to subsequently hold a loya jirga to consider establishing the permanent post of an executive prime minister. Some political actors see the establishment of this post as an opening toward further dispersal of power in Afghanistan's political system. For example, Abdullah Abdullah's campaign platform included calls for statutory decentralization of powers to the provinces and constitutional amendments to replace Afghanistan's presidential system of government with a parliamentary one. It is also conceivable that the prospect of a reconciled Taliban joining the Afghan political system might increase support for decentralization to limit the scope for Taliban social and religious mores and traditional Pashtun tribal codes to be applied to other groups across the country.

Conversely, because of its largely Pashtun membership and desire to take up the reins of power in Kabul, the Taliban would likely support a continuation of Afghanistan's traditional unitary system and resist a diminution of the current strong executive. On these specific issues, President Ghani and the Taliban may counterintuitively have greater common ground than the

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president and some of his government of national unity partners. It is therefore important that Afghanistan's political leaders and communities approach any peace talks with a common understanding on the appropriate distribution of power within the Afghan state. A decade after the drafting of the constitution, the question of whether there is now popular support among non-Pashtuns for the decentralization of Afghanistan's political system is not fully understood. Without better clarity on these issues, a future loya jirga could open a Pandora's box of controversial and divisive issues that the Taliban could potentially seek to exploit.²⁷

Ownership of the Afghan Constitution

By way of preface, it needs to be clear that the Taliban have an "ownership" problem with the current charter. The Taliban's self-perceived need to respond to evolving Afghan society is demonstrated by the issuance of the Order of the Islamic Emirate. Despite not having a formal constitution when actually ruling Afghanistan, by 2005 the movement apparently felt it necessary to make a political riposte to the 2004 Afghan constitution.

Taliban representatives at the December 2012 Track 2 Chantilly conference did not voice opposition to the concept of a constitution. Instead they stated that every government needs a "complete and clear constitution" to organize its affairs. The Taliban's opposition to the 2004 charter focused on its origins, labeling it as "illegitimate" because it had been written under the "shadow" of U.S. B-52 bombers. The representatives further highlighted the need for a constitution written by Afghan scholars in a "free atmosphere" and then presented to the nation for its approval.

These remarks should be interpreted in the context of the Taliban's exile from Afghan political life during the drafting of the constitution in 2003. In a potential parallel to the FARC in Columbia, the Taliban leadership may need to demonstrate to their cadres that a decade of insurgency has resulted in redrafting Afghanistan's constitution.

Although reluctance to cater a constitutional amendment process to the Taliban's needs is understandable, a basic tenet of sustainable conflict resolution involves appreciating that the other side's political problem is also your problem. The possible benefit to the Afghan government of taking this perspective relates to the ongoing evolution in Taliban views on constitutionalism. A process of constitutional reform that integrates Taliban representatives and scholars into a loya jirga carries definite risks for Afghanistan's political and human rights achievements from the last decade. At the same time, it could also force further development in Taliban positions on constitutionalism.

The Taliban's Possible Negotiating Agenda

In its survey report on national arrangements for changing constitutions, the European Commission for Democracy Through Law (Venice Commission) divides constitutional amendments into two main categories: those related to institutional rules of the government and those related to the bill of human rights.²⁸ A comparison of the Afghan constitution to the 2005 Order of the Islamic Emirate suggests that the Taliban would likely seek changes in both areas.

Institutional Rules of Government

The UNAMA Human Rights Unit's comparison of the two texts finds the biggest points of divergence between the Afghan constitution and the Taliban order relate to the political systems they establish. These significant divergences cover the status of the head of state, the structure and separation of powers in the government, and sources of legislation.

The Afghan constitution establishes a democratic system of government in which a popularly elected president is the head of state and government. The Taliban order, by contrast, proclaims Afghanistan as an Islamic Emirate under the leadership of Mullah Mohammad

Omar, the self-designated Amir ul-Momineen (Commander of the Faithful). The order does not describe how the Amir ul-Momineen is selected nor how long an individual may serve in this role. (Omar himself was elevated to this role in 1996 by the acclamation of Taliban followers after he appeared on the roof of a mosque in the city of Kandahar wearing Afghanistan's holiest relic, the Cloak of the Prophet Muhammad.²⁹) The document does, however, specify that this person must be a male Muslim follower of the Hanafi school of Islamic jurisprudence.³⁰

Both documents describe similar duties for the president and the Amir ul-Momineen, but the latter is not the formal head of government. Instead, the Islamic Emirate is led by the Council of Ministers, whose chair is the head of government and must also be a male follower of the Hanafi school. The documents also envisage similar duties for the government, including implementing laws, maintaining public order, preparing the budget, and implementing social and economic programs.

The legislative and judicial branches of the two systems, meanwhile, differ significantly. The Afghan constitution establishes a bicameral National Assembly in which the lower house is directly elected and the upper house consists of a mix of indirectly elected and presidentially appointed senators. The Taliban order, by contrast, establishes a single chamber Islamic Council as the highest legislative organ, whose members are appointed by the Amir ul-Momineen based on their familiarity with the principles of jihad and sharia. The assembly and the council do have similar functions, such as approval of laws, the state budget, and treaties. Both the constitution and the order also recognize the judiciary as an independent branch of government with comparable duties and functions. However, under the Afghan constitution, laws are reviewed for their compatibility with the charter by the Supreme Court.³¹ The Taliban order gives this responsibility to the Islamic Council, blurring the separation of powers between the legislature and the judiciary.

In a point of commonality, both documents recognize Islam as the state religion and require that no law should conflict with its tenets and beliefs. With the exception of the Communist-era 1980 constitution, all Afghan constitutions have had a similar repugnancy clause. Over the last century, however, the country's myriad charters have consistently swung between traditional and reformist impulses on this exact point. Amanullah Khan's reformist 1923 constitution, Zahir Shah's modernizing 1964 constitution, and the 2004 charter all acknowledge sources of legislation other than sharia. Meanwhile, Nadir Shah's traditionalist 1931 constitution and the Mujahadin leaders (1992–96) and Taliban Emirate (1996–2001) declared sharia as the sole basis for organizing their respective states. Afghan scholar Mohammad Hashim Kamali describes the 2004 constitution as not only overall more conservative than its 1964 predecessor but also as maintaining that charter's major innovation of resolving the formal order of priority between sharia and statutory law in favor of the latter.³² Article 6 of the Taliban order would appear to seek to reverse this priority by stating that the law-making process and arrangement of Afghan life shall be "regulated" by "customary law in accordance with Hanafi jurisprudence."

The Taliban order also demonstrates the movement's support for a continuation of the country's political tradition of a highly unitary state. In fact, the first article of both the Afghan constitution and the Taliban order describe Afghanistan as an "independent, unitary, and indivisible state." The Afghan constitution in its chapter on administration describes a need to "preserve the principles of centralism" but does proceed to establish provinces as local administrative units as well as provincial and municipal councils to promote local developmental objectives. In Article 137, it also requires the national government to transfer the powers necessary to achieve these outcomes to local administrations. The Taliban order's discussion of subnational governance is almost nonexistent. It is limited to two articles (83 and 84), which merely note that the Emirate shall be divided into provinces, districts, and subdistricts "controlled and financed" by the national government.

The Venice Commission report notes that constitutional provisions on institutional rules of government need to be detailed and specific in order to create political stability and predictability. With this in mind, in-depth discussions would be required to ascertain what precise demands the Taliban might have on the structure of the state and to understand what was meant by Taliban remarks at the 2012 Chantilly conference to the effect that a new constitution should make clear “relations between the government and people...shed light on balance of government three structured powers...[and] determine government’s type, administration and powers.” On these scores, this initial review suggests that discussions on the role of the Amir ul-Momineen and differing provisions on the sources of legislation could be fraught.

Bill of Rights

Contrary to conventional wisdom, the UNAMA Human Rights Unit’s comparison finds areas of convergence between Afghan’s constitution and the Taliban’s order in their respective bills of rights. This is explained by the common grounding of human rights in the two documents in classical Islamic jurisprudence. The Afghan bill of rights include those to liberty, a presumption of innocence, due process of law, vote and run for elected office, freedom of expression, assembly, holding property, education for both men and women, access to health care, and work. The chapter also prohibits torture and forced confessions, provides protections against discrimination, and establishes an independent human rights commission to promote these rights.

The Taliban order, meanwhile, contains presumption of innocence, prohibition of torture and forced confession, rights to due process of law, legal representation, freedom of expression (within the limits of sharia), peaceful assembly, property, and work, as well as mandatory primary education (although it is not clear whether this applies to girls). The commonalities between the two documents may also be explained by the tradition and presence of bills of rights with roughly similar protections in earlier Afghan constitutions, including the 1931 and 1964 charters.

Areas of convergence aside, differences between the documents are marked on political, women’s, and minority rights. Furthermore, no body is established in the Taliban order to protect and promote human rights, as the Afghanistan Independent Human Rights Commission is in the Afghan constitution.

The 2004 constitution provides a right for Afghan men and women to vote and be elected for office. It further provides guarantees for women’s representation in both houses of the National Assembly and approximately one hundred women delegates participated in the drafting of the document.³³ In contrast, all of the government positions mentioned in the Taliban order are reserved for men. Moreover, despite Afghanistan’s tradition of elected legislative bodies dating back to the 1923 constitution, the order makes no mention of the right of citizens to elect their representatives. In addition, although Article 22 of the constitution’s bill of rights explicitly recognizes that men and women have equal rights and duties before law, in a number of provisions the Taliban document denies women fundamental rights on the same basis as men. For example, whereas the constitution specifically mentions an obligation of the state to foster education for women, the Taliban order states that education for women will be regulated through a separate “special law” within the limits of sharia.

The constitution also provides greater recognition and protection of minority rights. As mentioned, the Taliban order joins earlier Afghan constitutions to make extensive references to the Hanafi school to the exclusion of other schools of Sunni and Shia Islamic jurispru-

Differences between the documents are marked on political, women’s, and minority rights. No body is established in the Taliban order to protect and promote human rights, as the Afghanistan Independent Human Rights Commission is in the Afghan constitution.

dence. The constitution, by way of comparison, makes a single reference to the Hanafi school and explicitly approves the use of Shia schools of jurisprudence among Afghan Shia for personal status cases. Like the 1964 constitution, it also recognizes the rights of the small number of non-Muslim Afghans to practice their faiths within the bounds of law. The constitution specifically mentions minority languages other than Pashto and Dari and promotes the teaching of mother tongues in the areas where they are traditionally spoken.

Confounding expectations, this introductory review suggests that the Taliban might not necessarily seek as far reaching changes to the constitution's bill of rights as commonly feared. This perception is perhaps reinforced by the remarks of the movement's representatives at Chantilly who said that "the personal, civil, and political rights of all citizens of Afghanistan," including those of "brother ethnicities," should be regulated through a new constitution that abides by the principles of Islam, human rights, and Afghan national values.

In the absence of serious negotiations, this positive sounding rhetoric has never been put to the test. Several important key areas of divergence between the two documents are also obvious. These principally relate to political rights in the form of elections (which the Taliban order does not expressly prohibit), equal treatment of women in areas such as political life and education, and recognition of minorities. These are no small matters, but the Venice Commission provides some comfort in its findings that amendments to bills of rights are often constrained by many constitutions' references to international human rights conventions. The Afghan constitution is not an exception in this respect and states in Article 7 that it will "observe" the Universal Declaration on Human Rights.

Amending the Afghan Constitution: Can It Be Done?

Constitutions are by definition intended to be difficult to change. This is because they provide basic rules for ordering the state, regulating the sharing of power and resources, and safeguarding the basic rights of citizens. To protect against these fundamental principles being changed by transient political majorities, constitutions are usually protected against amendment by special mechanisms and supermajority requirements.

The Venice Commission highlights the danger posed by rules on constitutional change being too flexible. Such flexibility can lead to a lack of protection for democratic procedures and basic minority and human rights. Along these lines, some of the opposition in Afghanistan to talks with the Taliban is animated by a fear that core constitutional values could be sacrificed in the name of stability. But the Venice Commission also finds that strict amendment procedures can go too far. This report has already explored how the desire to preserve constitutional continuity can lead in practice to what the commission terms excessive constitutional rigidity. In Myanmar, current constitutional amendments procedures risk a lock-in of that country's constitutional text, potentially blocking changes needed to end decades of ethnic conflict. This section examines the extent to which Afghanistan's constitution poses either of these risks.

The Venice Commission also holds that the procedure by which a constitution is changed is of great importance. Rather than mere legal technicality, how constitutional reform is carried out in response to changed national circumstances can be vital in shaping the political norms. The Venice Commission stresses that the best guarantee of the legitimacy of constitutional change is to follow "prescribed formal amendment procedures." Such procedures are to ensure that reform and, by extension, the overall political system have broad public backing. The commission notes that this is especially important in young democracies like Afghanistan, where nascent political institutions often remain fragile.

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Although it might be argued that maintaining constitutional continuity is a legal nicety that can be disregarded if sufficient Afghan political consensus is achieved, a more principled approach also has certain strategic benefits. That the Afghan constitution's amendment rules render certain features of the current system unamendable, for example, could be strategically deployed to strengthen the hand of Afghan negotiators in potential talks with their Taliban counterparts.

The 2004 Constitution's Amendment Procedures

Article 150 of the Afghan constitution describes a process whereby via presidential decree, a commission comprising members of the government, National Assembly (Parliament), and Supreme Court create a draft set of proposed constitutional amendments. This proposal must then be approved by a two-thirds majority of a *loya jirga*. Following approval, the amendments are enacted after their formal endorsement by the president.

The *loya jirga* is separately described in Article 110 of the constitution as "the highest manifestation of the will of the people of Afghanistan." It consists of the members of Afghanistan's National Assembly and the heads of the country's provincial and district councils. *Loya jirgas* are well known in Afghan history as ad hoc bodies that bring the nation together for critical decisions in time of crisis or political transition and were convened to approve the country's 2004 constitution as well as its twentieth-century predecessors.³⁴

On the surface, Afghanistan's amendment mechanism does not seem to lock in the existing constitutional text and is grounded in the country's political traditions. It would appear to enable a two-step process in which a set of proposed constitutional changes might first be directly negotiated between the government and the Taliban. At the conclusion of talks, the president could issue a decree that tasks the country's legal experts to formulate the results of negotiations into a formal set of proposed constitutional amendments to be debated and approved by a *loya jirga* acting as the will of the people.

If the *loya jirga* process does not appear to lock in the current constitutional text, does it adequately safeguard the core values of the current political order? Although Article 150 requires a two-thirds supermajority of the *loya jirga* to approve constitutional amendments, some may not be satisfied with this protection given the experience of how the 2004 constitution was endorsed. Specifically, some observers saw the 2004 process as marred by bias and secrecy in the preparation of the draft constitutional text. The workings of the constitutional *loya jirga* were also openly influenced by armed powerbrokers, and the charter itself was adopted by a show of consensus rather than a formal vote.³⁵

The amendment rules also create some procedural questions, especially given that Afghan history suggests that the most predictive element of how a *loya jirga* will act depends on who is present.³⁶ For example, the Taliban do not have direct representation in Afghanistan's National Assembly or provincial and district councils. It is therefore unclear whether the amendment process of convening a *loya jirga* can address the armed movement's described ownership problem with the Afghan constitution. Would the Taliban agree to have the *loya jirga* review and possibly alter the package of amendments it negotiated with the government? Should potential constitutional reform therefore be sequenced to occur after a peace deal with the Taliban first enables their participation in the district council and parliamentary elections scheduled for 2015? Alternatively, could supplementary representation for the militant group in the *loya jirga* somehow be arranged? These are not easy questions but are likely best answered by Afghans before rather than after peace talks.

The timing of local elections is also important in the context of legally convening a *loya jirga* that includes the heads of Afghanistan's approximately four hundred district councils.

Since the adoption of the constitution in 2004, Afghanistan has not held district council elections due to political disputes and a lack of clarity on district boundaries. District council elections are scheduled for 2015, but if they again are not held it may not be possible to convene a loya jirga in full accordance with the constitution.³⁷ In the sensitive environment that would surround likely any accord with the Taliban, this seemingly obscure technical question could take on political significance if it detracts from the legitimacy of the loya jirga. Moreover, the country's political leadership seems to view the participation of district council heads in the loya jirga as necessary. The new national unity government has committed to hold district council elections as soon as possible, "as this is necessary for the convening of the loya jirga," to consider the question of whether to establish the post of executive prime minister.³⁸

Given that members of the National Assembly and district council heads together make up the bulk of the membership of the loya jirga, Ghani and Abdullah's agreement to convene this assembly in 2016 greatly raises the stakes of Afghanistan's 2015 parliamentary and district council elections. These polls would be of even greater consequence if prospective peace arrangements with the Taliban might also be up for inclusion on the loya jirga's agenda.

Unamendable Features of the 2004 Constitution

The Afghan constitution's principles for its own amendment possibly offer greater reassurance for those concerned about the risks posed by talks with the Taliban. In keeping with international practice, the Afghan charter renders a number of its principles and provisions unamendable. Specifically, in discussing principles for its amendment, Article 149 reads in part as follows:

The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended. Amending fundamental rights of the people shall be permitted only to improve them.

These principles are important and sweeping. Mohammad Hashim Kamali, an influential Afghan expert on Islam and legal issues, describes the constitution as manifesting Islam as the "most visible basis of national identity, reflecting also an entrenched social reality and a source of guidance for law and government."³⁹ As implied by Article 149, Afghan laws cannot be contrary to tenets of Islam, and—critically—this principle cannot be changed by amendment. The Taliban of course would be unlikely to object to this, but the concept of Islamic Republicanism would surely prove more contentious.

Under the theocratic vision of the state set out in the Taliban order, sovereignty belongs to God and the state exists to implement God's orders. In contrast, the Afghan constitution's Islamic Republicanism can be inferred to relate to a combination of a system in which Islam is the state religion, laws are based on the tenets and beliefs of Islam, but sovereignty belongs to the Afghan nation as manifested through its elected representatives.

The second sentence of the citation from Article 149 concerns the fundamental rights of the Afghan people, which are principally set out in chapter 2 of the charter.⁴⁰ According to Article 149, these rights cannot be amended, except to "improve" them. Admittedly, many of these rights remain aspirational. However, for present purposes, the significance of Article 149 is that by insisting on the principle of constitutional continuity Afghan negotiators could constrain Taliban demands to rewrite fundamental aspects of the current constitutional order. Withdrawing the popular franchise, removing recognition of minority languages or religions, or no longer requiring the Afghan government to promote women's education would be unlikely to meet the Article 149 test of an improvement. Former president Karzai suggested something similar in a speech to the National Assembly, in which he was explicit that some constitutional change is needed but also that any amendments had to follow Article 149.⁴¹

Conclusion: Questions for Afghans to Consider

This report identifies strategic issues on which Afghans need to make informed choices regarding a fundamental aspect of potential peace talks with the Taliban. Insisting that the Taliban accept the Afghan constitution as a precursor for talks is understandable given the real risks to Afghanistan's democratic and human rights standards of opening up the constitution to change. But a periodic assessment by Afghans of the continuing suitability of this condition is logical and healthy, especially when a spectrum of the country's political leaders have acknowledged that the charter has shortcomings. A focus on protecting core constitutional principles rather than rigid adherence to the current text might therefore be a more strategic approach.

Taking a broader view, the international cases reviewed here provide examples of differing approaches Afghans could consider. In the Philippines and Myanmar, government openness to constitutional change was held out to armed groups to enable ceasefires and find a political formula for peace talks. In Colombia, no formal ceasefire has been called and whether the peace accords will result in constitutional change has been left up for deliberation in the talks.

These and other international cases of constitutional changes being negotiated as part of a peace deal with an armed insurgency suggest some important principles worth restating. The first is that the more extensive the constitutional changes contemplated in peace talks, the greater the ultimate public participation in the process should be. One way this could be achieved in Afghanistan is through a two-stage process of confidential talks between the warring parties being followed by a more participatory *loya jirga* to endorse constitutional changes.

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However, based on experience with how difficult it is to manage a *loya jirga*, Afghan leaders would likely do well to only convene this traditional assembly with a coherent and unified strategy.⁴² Such a strategy would require some forward thinking as to whether, if peace talks bear fruit, their results should be included on the agenda of the planned 2016 *loya jirga* agreed to by Ghani and Abdullah or be put to a separately called assembly. The alternative could see any future *loya jirga* open a Pandora's box of controversial issues regarding executive powers and decentralization that the Taliban could seek to promote and exploit.

The second principle from international practice holds that the legitimacy of constitutional change is best guaranteed by following existing formal amendment procedures. This process would help ensure that any amendments and hence the reformed political system itself has broad popular backing. In Afghanistan's case, the important question arises of how the Taliban could be represented in a *loya jirga* so that their ownership issue with the current constitution might be addressed as well as the need for district council elections so that the constitution could be amended according to the letter of its own provisions.

Afghans would also benefit from research into the specific constitutional changes the group might demand. Afghan authorities would also be well advised to consult with a wide range of Afghan stakeholders on possible red lines in peace talks. The constitution's prohibition of changes to the principle of Islamic Republicanism and the fundamental rights of the Afghan people provide a possible starting point for this exercise. In fact, insisting on constitutional continuity would strengthen the negotiating hand of the Afghan government by binding it to Article 149's requirement that certain fundamental principles cannot be changed except to improve them (as well as to Afghanistan's current constitutional commitment to the Universal Declaration on Human Rights).

Finally, debate over whether to discuss the Afghan constitution with the Taliban has tended to be framed in terms of the risks it poses to Afghanistan's democratic system and human rights protections. To be sure, these are valid concerns that must be satisfactorily

addressed, but it is also important for Afghan negotiators to consider how they could use such a political dialogue to their advantage. As with the Philippines case, in return for putting the constitution on the table, the Afghan government could pursue a concession of matching symbolic magnitude from the Taliban. For example, an acknowledgment from the Taliban that sovereignty in Afghanistan is exercised on behalf of the Afghan nation—the foundation of many aspects of the current Afghan political system and certain basic rights.

In the best case, the Afghan government could proactively use talks with the Taliban to seize the political high ground by putting the armed movement in the position of having to justify some of its more out of date and unpopular positions on constitutional issues to other Afghans. Taking this type of an approach to peace negotiations could also perhaps force a more rapid evolution of the Taliban's political views than would be otherwise possible if the conflict simply persists in its current form.

Notes

1. Office of the White House Press Secretary, "Joint Statement by President Obama and President Karzai," January 11, 2013, www.whitehouse.gov/the-press-office/2013/01/11/joint-statement-president-obama-and-president-karzai.
2. See "Russia Ready to Talk with Taliban Movement to Convince It to Reach Reconciliation," ITAR-TASS News Agency, February 19, 2014, <http://en.itar-tass.com/world/719847>.
3. See former president Karzai's 2013 speech to Parliament on the peace process where he said he was "absolutely ready" for reform to the political system made "based on the constitution." Statement by H.E. Hamid Karzai at the Inaugural Session of the Fourth Legislative Year of the Parliament, March 7, 2013, <http://president.gov.af/en/documents?page=1>.
4. See "Afghan High Peace Council Members Present 250,000-Signature Petition Calling for Peace to UN," March 6, 2014, <http://unama.unmissions.org/Default.aspx?ctl=Details&tabid=12254&mid=15756&ItemID=37747>.
5. Clark B. Lombardi and Shamsad Pasarlay, "Might Afghans Amend the 2004 Constitution? Hints from a Televised Presidential Debate," I-CONNECT Blog, www.iconnectblog.com/2014/04/might-afghans-amend-the-2004-constitution-hints-from-a-televised-presidential-debate/.
6. The focus of this article is the Afghan Taliban. However Hezb-e Islami Afghanistan, the second largest Afghan insurgent group, published "New National Covenant for Peace" in May 2011 recommending the withdrawal of international military forces from Afghanistan and the establishment of an interim government that should "study" and make a "final decision" on the Afghan constitution, www.larawbar.net/26831.html.
7. Track 2 diplomacy involves unofficial contacts between nongovernmental groups, private citizens, and even government officials acting in a personal capacity. Its purpose is to explore possible solutions to conflicts outside the restrictions of formal negotiations.
8. Taliban Voice of Jihad website, "Text of Speech Enunciated by Islamic Emirate of Afghanistan at Research Conference in France," December 24, 2012, <http://shahamat-english.com/index.php/paighamooona/28777-text-of-speech-enunciated-by-islamic-emirate-of-afghanistan-at-research-conference-in-france>.
9. On Taliban structures and policymaking, see, for example, Antonio Guistozi, "The Taliban and the 2014 Elections in Afghanistan," USIP Peaceworks no. 94, April 3, 2014, www.usip.org/publications/the-taliban-and-the-2014-elections-in-afghanistan; and on the Taliban's past negotiating behavior, see Michael Semple, "Talking to the Taliban," *Foreign Policy Online*, January 10, 2013, www.foreignpolicy.com/articles/2013/01/10/talking_to_the_taliban.
10. The most notorious example of this came during the Taliban's 1995 offensive where the movement ostensibly agreed to an alliance with Abdul Ali Mazari, a Hazara leader, only to renege on the deal, arrest Mazari, and have him killed. See Semple, "Talking to the Taliban."
11. See Jonathan Schroden et al., "Independent Assessment of the Afghan National Security Forces," CNA Strategic Studies, January 2014. The study forecasts that the Afghan security forces may need to withstand increased insurgency attacks until at least 2018 to create the conditions for an enduring political settlement to the conflict.
12. Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Regan, "Constitution-Making and Reform: Options for Process," Interpeace, November 2011.
13. Mullah Mohammad Omar's 2013 Eid-al-Fitr message postulates that a "modern education is a fundamental need of every society" and says that the "emerging generation will have both religious and modern education." See "Message of Felicitation of Amir-ul-Momineen on the Occasion of Eid-ul-Fitr," Taliban Voice of Jihad, August 6, 2013, www.shahamat-english.com/index.php/paighamooona/35234-message-of-felicitation-of-amir-ul-momineen-may-allah-protect-him-on-the-occasion-of-eid-ul-fitr.
14. Some Taliban commanders indicate that they received orders not to attack civilians during Afghanistan's 2014 elections, probably because such violence would damage the Taliban's public standing. See Azam Ahmed, "Lull Prompts Question: What Are Taliban Up To?" *New York Times*, April 28, 2014.
15. A recent U.S. National Intelligence Estimate forecast that military gains made by U.S. and Afghan security forces against the Taliban could be reversed if international security and financial assistance is withdrawn. See Ernesto Londoño, Karen DeYoung, and Greg Miller, "Afghanistan Gains Will Be Lost Quickly after Drawdown, U.S. Intelligence Estimate Warns," *Washington Post*, December 28, 2013.
16. See Framework Agreement on the Bangsamoro, in particular Article 4.b under "VII. Transition and Implementation."
17. Timothy Williams, "The MoA-AD Debacle—An Analysis of Individuals' Voices, Provincial Propaganda and National Disinterest," *Journal of Current Southeast Asian Affairs* 29, no. 1 (2010): 121–44.

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18. This revamped process has been called one of the most “participation-friendly” in the world. See Kristian Herbolzheimer and Emma Leslie, “Innovation in Mediation Support: The International Contact Group in Mindanao,” Conciliation Resources Practice Paper Series, www.c-r.org/sites/c-r.org/files/PracticePaper_MindanaoICG_ConciliationResources_0.pdf.
19. See International Crisis Group (ICG), “Reform in Myanmar: One Year On,” Asia Briefing no. 136–11, April 2012.
20. See, for example, the Bingham Centre for the Rule of Law, “Constitutional Reform in Myanmar: Priorities and Prospects for Amendment,” working paper no. 2014/01, January 2014.
21. Jim Della-Giacoma and Richard Horsey, “A House Divided: Finding Peace in Multiethnic Myanmar,” *World Politics Review*, September 10, 2013, www.worldpoliticsreview.com/articles/13200/a-house-divided-finding-peace-in-multiethnic-myanmar.
22. See ICG, “Colombia: Peace at Last?” Latin America Report no. 45–25, September 2012.
23. Ibid.
24. Washington Office on Latin America, “Colombia Peace Process Update,” November 15, 2013, www.wola.org/commentary/colombia_peace_process_update_november_15_2013.
25. The author would like to thank UNAMA for providing access to this unpublished comparison.
26. See for example, Chris Johnson, William Maley, Alexander Thier, and Ali Wardak, “Afghanistan’s Political and Constitutional Development,” Overseas Development Institute, January 2003, 19–21.
27. This consensus building does not necessarily have to be constitutional. For example, substantial power has now been delegated by President Ghani via presidential decree to Abdullah’s newly created Chief Executive Officer post. Candidate Ghani also spoke of leaving provinces free to tailor national policies to local needs and allocating 40 percent of the national budget to provincial authorities. See Lombardi and Pasarlaj, “Might Afghans Amend the 2004 Constitution?”
28. European Commission for Democracy Through Law (Venice Commission), “Report on Constitutional Amendment,” Study no. 469/2008, Strasbourg, January 19, 2010.
29. The Cloak of the Prophet also has symbolic ties to the founder of modern Afghanistan, Ahmad Shah Durrani, who brought it to Kandahar almost three hundred years ago.
30. The Hanafi school is the most widely subscribed of the four major Sunni schools of jurisprudence of Islamic law and the predominant school in Afghanistan. The 1964 constitution required the king of Afghanistan to be a male follower of the Hanafi school, but the 2004 constitution contains no such requirements for the president.
31. Article 157 of the Afghan constitution also describes a Commission for the Supervision of the Implementation of the Constitution, the constitutional powers of which are vague but also plays a role in constitutional interpretation.
32. Mohammad Hashim Kamali, “References to Islam and Women in the Afghan Constitution,” *Arab Law Quarterly* 22, no. 3 (2008): 270–306.
33. It is sometimes claimed that this was the first time Afghan women had participated in constitutional drafting, but Louis Dupree reports that six Afghan women were in fact delegates to the 1963 constitutional loya jirga.
34. See J. Alexander Thier, “The Making of a Constitution in Afghanistan,” *New York Law School Law Review* 51 (2006/2007): 557–74.
35. Ibid.
36. Louis Dupree describes loya jirgas as historically being handpicked bodies of “king’s men” intended to rubber-stamp policy decisions. He describes the 1963 constitutional loya jirga as breaking with this tradition by including ex officio members from the national assembly and judiciary as well as persons elected from the provinces. See Louis Dupree, *Constitutional Development and Cultural Change*, South Asia Series vol. 9 (American Universities Field Staff, 1965). The 2004 loya jirga was also regarded by Thier and others as generally representative.
37. Some legal scholars have argued that the quorum for convening a loya jirga could be met without its district council representatives, but Afghanistan’s Commission for Supervision of the Implementation of the Constitution has taken the position that the loya jirga requires the participation of district council representatives’ participation. See, for example, Tom Ginsburg, “Comparative Constitutional Review,” USIP memo, www.usip.org/sites/default/files/ROL/TG_Memo_on_Constitutional_Review_for_2011_v4.pdf.
38. Copy of political agreement on file with the author.
39. Mohammad Hashim Kamali, “Afghanistan’s Constitution Ten Years On: What Are the Issues?”
40. Thirty-eight articles covering the “Fundamental Rights and Duties of Citizens.”
41. Daily Outlook Afghanistan, “Constitution Needs Amendments: Karzai,” March 16, 2014, http://outlookafghanistan.net/national_detail.php?post_id=9649.
42. This approach is suggested by one of Afghanistan’s foremost legal scholars. See Kamali, “Afghanistan’s Constitution Ten Years On.”



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