

CRAFTING A CONSTITUTION FOR AFGHANISTAN

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On 4 January 2004, nearly all 502 members of the Constitutional Loya Jirga (Grand Council) meeting in Kabul silently stood to approve a new constitution for the “Islamic Republic of Afghanistan.” President Hamid Karzai signed and officially promulgated the document on 26 January 2004, inaugurating Afghanistan’s sixth constitution since King Amanullah Khan promulgated the first in 1923. Delegates hoped that this relatively liberal Islamic constitution would provide a framework for the long task of consolidating basic state structures, as the country struggled to emerge from decades of anti-Soviet jihad, interfactional and interethnic civil war, and wars of conquest and resistance by and against the radical Islamists of the Taliban movement. In his speech to the closing session of the Loya Jirga, President Karzai explained why he thought that the new constitution—which mandated a presidential system with a bicameral parliament, a highly centralized administration with unprecedented rights for minority languages, and an Islamic legal system safeguarded by a Supreme Court with powers of judicial review—would meet the needs of a desperately indigent but proud country searching for a period of stability in which to rebuild.

The constitution was the next to last step in the road map to “reestablishing permanent institutions of government” outlined in the Bonn Accords of 5 December 2001. Afghans signed that agreement under UN auspices as the United States was completing the job of routing the Taliban regime that had given refuge to Osama bin Laden. The constitution provided a framework for the “free and fair elections” to choose a

“fully representative government” that were to complete that process. But two and a half years—the time frame of the Bonn Agreement—could hardly suffice to turn a failed state into a stable democracy. Whether the constitution, and with it the international effort in Afghanistan, could achieve its stated goals still depended on efforts beyond its scope, such as demobilizing militias and eradicating the drug trade and other illicit activities that accounted for more than a third of the Afghan economy.

Unlike some postwar agreements, the Bonn Accords set out a process rather than a detailed settlement of major political issues. This reflected the time pressure under which the Accords were forged, which set a speed record as such things go. Afghanistan had been through 23 years of many-sided civil strife marked by the overt and covert involvement of regional and global powers, yet only nine days elapsed between the UN’s opening of talks in the former West German capital and the affixing of signatures on 5 December 2001.

Once U.S. president George W. Bush announced on October 1 that the United States would support a political transition and a UN-coordinated reconstruction program in Afghanistan, the pressure was on to cobble together a successor regime to the ousted Taliban movement, whose rule had sheltered al-Qaeda while that organization made Afghanistan into its base for global terrorism.¹ Four Afghan groups participated in Bonn. The two most important were the Islamic United Front for the Salvation of Afghanistan, commonly known as the Northern Alliance (NA), which had received the bulk of U.S. military assistance leading up to and during the military operations that began on October 7, and the “Rome group” representing exiled King Muhammad Zahir Shah, a resident of the Italian capital since his overthrow by a 1973 military coup.

The NA represented force on the ground and a mixture of ethnic claims with those of politicized Islam, both Sunni and Shi’ite. Figuring prominently in NA ranks were members of such northern and central ethnic groups as the Tajiks, the Uzbeks, and the Hazaras—all of which had armed and mobilized themselves during decades of warfare. Their Taliban foes represented a reassertion of the power of the historically dominant Pushtun ethnic group, this time in the guise of a harsh Islamic fundamentalist militia. Most of the NA groups had fought against the Soviets as *mujahideen* (holy warriors), though the main Uzbek group had begun as a tribal militia under the communist regime.

The Rome group, consisting of exiles mostly living in the West, brought with it the legitimacy of the ex-king, whose forty-year reign (1933–73) had marked the last time that Afghanistan had enjoyed any substantial degree of peace or stability. While long-suffering Afghans felt great sympathy for their former monarch, he had no political or military organization in the country and nothing resembling a concrete program. The ex-king seemed valuable to the United States and the UN as a possible source of historic continuity and a potential rallying point for

Pushtuns, who had no armed organizations comparable to those of the NA. The Pushtun-led groups in the NA, including a radical Islamist formation under Abd al-Rabb al-Rasul Sayyaf, had no ethnic or tribal base of support in the southern heartland of the Pushtuns. The other two groups—known as “Peshawar” and “Cyprus” after places where they had met—included small, ad hoc groups based in Pakistan and Iran.

Despite this attempt at ethnic inclusiveness, the group assembled in Bonn did not represent the people of Afghanistan, either directly or indirectly. The UN veteran and former Algerian foreign minister Lakhdar Brahimi, who chaired the talks in his capacity as Secretary-General Kofi Annan’s special representative, repeatedly stressed that no one would remember how unrepresentative the meeting had been if the participants managed to fashion a process that would lead to a legitimate and representative government.

The Path to Legitimacy

The process that the Bonn participants agreed upon aimed at forming such a government. The approval of a new constitution and the holding of the elections were to be the final steps. Given the insecurity and disarray besetting Afghanistan, immediate direct elections would clearly be impossible. To fill the resulting gap, the Bonn Accords drew on an institution that had figured in the crafting of each of Afghanistan’s five previous constitutions (1923, 1931, 1964, 1977, and 1987), the Loya Jirga. Previous rulers had summoned such meetings to legitimate key decisions. Mostly these earlier jirgas had been appointed, docile bodies. A few, such as the Constitutional Loya Jirgas (CLJs) of 1923 and 1964, had actively debated issues. And one, in November 1928, had actually rejected reform proposals put forward by King Amanullah and set the stage for the revolt that would drive him from his throne two months later.

The Loya Jirga developed as a state institution, but it harked back to large jirgas that Pushtun tribes had held in earlier centuries, when these tribes constituted both the main military force and, in effect, the electors of the king. During periods of turmoil when Afghans recognized no legitimate ruler, such jirgas had taken key national decisions. Drawing on these precedents, Zahir Shah’s followers had developed a proposal for an Emergency Loya Jirga (ELJ) as a first step to reconstituting state power. The NA, despite the misgivings of some members, agreed to a UN-monitored ELJ as the legitimating device for the process of building a more representative government. Like all former constitutions of Afghanistan, the one drafted as part of the Bonn process was also to be approved by a Loya Jirga.

As an interim measure, the agreement reached at Bonn reinstated much of Zahir Shah’s 1964 basic law, which had turned Afghanistan

into a constitutional monarchy. While that constitution had provided guarantees of public liberty unprecedented in Afghan history, it had failed to establish a stable system of government. Over a mere ten years, the country had three elections and four governments, none of which succeeded in implementing needed reforms. Many Afghans greeted with relief the constitutional monarchy's overthrow and the establishment of a more authoritarian republic by Zahir Shah's cousin, Daoud Khan.

The Bonn Accords did not reestablish the monarchy, of course, but instead vested both executive and legislative power in the cabinet, to be headed by a president who would be head of state as well as chief of government. The 1964 constitution had followed its predecessors in making Afghanistan an officially Sunni Muslim state. Religious rites performed by the state were carried out in accord with the Hanafi sect, one of the four main schools of jurisprudence followed by Sunni Muslims (Article 2). In cases where judges could find no provision in the constitution or written law to resolve a case, they were required to follow "the basic principles of the Hanafi jurisprudence of the *shari'a* of Islam and, within the provisions set forth in this constitution, render a decision that in their opinion secures justice in the best possible way" (Article 102). Hence, as in most "moderate" Sunni constitutions, the 1964 constitution was supreme over a judge's interpretation of Islam. No law could be contrary to the "basic principles of the sacred religion of Islam" (Article 64), but the king, not the judiciary or the *ulama* (Islamic scholars), had been the ultimate arbiter of this provision. The 1964 constitution also declared Afghanistan a unitary state organized according to the "principle of centralization" (Article 108). As of late 2001, however, power was in fact anything but centralized, pointing to a disjunction between legal and ground-level realities that would soon become a focus of much political and constitutional controversy.

The participants in Bonn chose the personnel of an interim administration to serve under these provisions. Though the Accords claimed that considerations of "professional competence and personal integrity" had guided the choice of interim officials, no one should be too surprised that they were mostly selected to offer patronage to different factions and to recognize the distribution of armed might on the ground. The interim administration's chairman, Hamid Karzai, was a Pushtun, originally from Kandahar but more recently residing in exile, who had ties to the king and who had come back to Afghanistan with U.S. assistance to raise forces against the Taliban in its own southern bastion of Kandahar Province. The "power ministries"—defense, interior, and foreign affairs—all went to the leading faction within the NA, which also controlled the powerful intelligence service, developed in the 1980s on the model of the Soviet KGB. This faction, the Supervisory Council of the North (Shura-yi Nazar or SN), was based in the Tajik areas in and around the Panjshir Valley just north of Kabul. The SN's founder, mili-

tary leader Ahmed Shah Massoud, had been murdered on 9 September 2001 by al-Qaeda suicide bombers posing as journalists. When Taliban and al-Qaeda forces fled Kabul under U.S. bombing on November 17, the SN had moved in and begun placing its own candidates in key posts.

Most Afghans probably saw the government chosen at Bonn as tilted in favor of the heavily Panjshiri SN. The Bonn process was designed to make the government gradually more representative. The first step was to be the holding of an ELJ by June 2002, with the mission of electing a head of state and approving what the Accords called the “structure and key personnel” of a transitional administration. With UN and other international help, the government held the ELJ on time. The indirectly elected body of about 1,500 representatives voted to keep Hamid Karzai as Afghanistan’s chief executive for another two years. After lengthy negotiations, Karzai named a government on 19 June 2002, the last day of the nine-day meeting. Many delegates objected that the ELJ had not in fact enabled them to vote on the “structure and key personnel” of the transitional administration and that the new administration (named the Transitional Islamic State of Afghanistan) was not significantly more representative than its predecessor.

Show of Hands or Show of Force?

The same factors that limited the accomplishments of the ELJ bedeviled the constitutional process which followed. Afghanistan was and is not a place where a show of hands at a meeting can decide who will hold power. The U.S.-led coalition gave commanders weapons and cash to fight the Taliban. The commanders used those resources to remobilize patronage networks into armed groups. These groups were then able to seize control of assets such as land, customs posts, and businesses as well as smuggling routes for drugs, lumber, or gems. The mutually reinforcing personal control of armed groups and economic assets meant warlordism. The warlords occupied the power vacuum left by the collapse of the state over decades and the destruction of the Taliban administration. Though international aid and troops ensured that the Karzai government would hang on in Kabul, the first post-Taliban year saw little in the way of effective efforts to widen the reach of President Karzai’s writ or boost state-building. Even within Kabul, Karzai had only limited control over his own government, many of whose top officials led militias that had fought or were still fighting against the Taliban with U.S. support. It was little wonder that he hesitated to dislodge such leaders.

The Karzai government’s inability to guarantee the security of voters during the stages of voting for the ELJ, or of the delegates once elected, hampered the entire ELJ. In some districts, armed commanders occupied the polling places, and the UN canceled or invalidated the elections. More commonly, intimidation was harder to prove, but just as clear to

its objects. Agents of the security services worked inside the Loya Jirga tent. One Islamist leader (Abd al-Rabb al-Rasul Sayyaf) claimed that anyone criticizing “mujahideen” deserved the death penalty for blasphemy. Fear of the intimidation tactics used by Islamists at the ELJ made the UN and the Karzai government cautious about opening the constitutional process to the public too early. Previous Afghan constitutions had been drafted in secret by governments that controlled the outcome. This was the first Afghan constitutional process where the outcome was open to political debate, and the UN insisted on introducing a measure of public consultation into the process. Brahimi also saw the UN’s role as assuring that the constitution would create a “workable” form of government and conform to basic international standards. Ultimately, the commission consulted Afghans in every province, in the refugee communities of Pakistan and Iran, and through tens of thousands of written questionnaires. Nonetheless, the government and UN thought it best to keep the content of deliberations confidential until the commission could make public a thoroughly vetted text.

The president first appointed a drafting commission of nine members, which completed a text based heavily on the constitution of 1964. A larger commission of 35 members reviewed the text, which was also shown to a few international experts and the government’s National Security Council (NSC).² The government did not publish the text even during the public-consultation sessions. The government published the commission’s final draft, with changes incorporated at all these stages, on November 3, only 37 days before the scheduled opening of the CLJ, which finally convened a few days late on 14 December 2003.

The CLJ went better than many had dared to hope it would. The UN had more time and experience in making the meeting secure, and the president and his supporters were better organized. Hence warlords and jihadi leaders had lost some of the capacity to intimidate that they had exercised at the ELJ. The result was a constitution that reflected to a considerable extent the agenda shared by Karzai and those cabinet members who considered themselves “reformers.” The constitution, nonetheless, is a product of the fluid situation that is postconflict Afghanistan. It remains to be seen whether measures crafted with an eye to the immediate demands of state-building will serve equally well the needs of long-term governance. We can explore this question by examining what the new Afghan constitution has to say on such key issues as the form of government, the place of Islam, the structure of the state, language and ethnic identity, and the judiciary.

Debate over these issues reflected historical realities as well as current dilemmas. Afghanistan began as a Pushtun empire ruled by tribal dynasts from Kandahar, and even today the ethnic question in its plainest form asks whether the state is to be the instrument of a mostly Pushtun elite, or a mechanism through which all citizens may equally

take part in self-government. Both Loya Jirgas showed the strength of a supra-ethnic “Afghan” national identity, but this national identity coexisted with strong ethnic identities, and ethnic politicians from different groups advocated different views of how to constitute the Afghan nation. Pushtuns have tended to want a strong and Pushtun-run central state. Tajiks have focused on power sharing in the central state, while Uzbeks and Hazaras have desired recognition of their identities and mechanisms of local self-government. Strengthening the central government was also a goal of those CLJ delegates who saw the regional warlords as illegitimate and who supported state-initiated reforms. Among the strongest advocates of centralizing reforms were Westernized Pushtuns. Their opponents, including non-Pushtun Islamist commanders, charged that an ostensibly “nonethnic” position actually served the interests of the largest group. All agree that Pushtuns are the largest group, but by how much, and whether they are a majority, are hotly contested issues.

Debate over basic institutions reflected assumptions about ethnic politics. Everyone took it for granted that the first elected president would be a Pushtun, and furthermore, one who enjoyed U.S. approval—that is, Hamid Karzai. In a departure from the electoral system developed on the basis of the 1964 constitution, which gave more weight to Pushtun areas, the new constitution provides that the new bicameral parliament’s popularly elected lower house, the Wolesi Jirga, will be filled by deputies elected “in proportion to population.” This reflects the contention by opponents of Pushtun domination that Pushtuns are not a majority. These opponents therefore expect that the Wolesi Jirga, now scheduled to be elected concurrently with the president in September 2004, will be a mostly non-Pushtun body in which local and regional powerholders will exert great influence.

The Debate over Presidentialism

The draft constitution had called for a semipresidential system until the NSC-review stage (the last phase before the CLJ met). Drafting-commission members had hoped that the probable combination of a directly elected Pushtun president and a non-Pushtun prime minister (chosen by the Wolesi Jirga, and possibly a Panjshiri), would provide ethnic balance. Hence the commission members resisted making the prime minister fully subordinate to the president, an essential element of stable semipresidential systems.

For a long time, in keeping with the power-sharing model, the commission insisted that the prime minister, after being named by the president, would need to pass a confidence vote in the Wolesi Jirga before taking office. The argument that this would breed instability in a highly factionalized and armed society by creating two executives with

competing bases of power—the popular vote versus the support of parliament—led in September 2003 to the adoption of a more workable system in which the president’s appointed PM would not need a vote of confidence to serve, but could be removed by a no-confidence vote.

Late in the joint review by the NSC and the drafting commission came a shift to full presidentialism. The office of prime minister was eliminated and the president received full power to appoint a cabinet (whose members could not be serving legislators) subject to parliamentary approval. Splits within the NA bloc and among the SN leaders in the cabinet had set the stage for this move, long resisted by the drafting commission. Major SN figures such as Education Minister Yunous Qanooni and Defense Minister Mohammed Qasim Fahim had taken different positions—the former had his eyes on a prospective premiership, while the latter aspired to become sole vice-president under Karzai—and the broader NA bloc had split as well. Qanooni found himself the cabinet’s only supporter of the soon-to-be-rejected premiership option, while Fahim failed to deliver the support of any of his faction’s CLJ delegates to the presidential system. The ethnic-Hazara vice-president, Abdul Karim Khalili, however, delivered some support for the proposal, and Karzai then backed the idea of two vice-presidents, one of whom would presumably be Khalili.

The issue of governmental systems came into sharp relief at the CLJ as calls rang out for an up-or-down vote on presidentialism versus parliamentarism. Nearly all Pushtun delegates, joined by some members from other ethnic groups, came out for presidentialism. A bloc of non-Pushtun delegates, however, strongly supported a parliamentary system. Both sides made cases that mixed genuine public considerations with ethnopolitical ambitions. For Pushtuns and reformers, presidentialism provided a way for one of their own—everyone knew that the first incumbent would be Karzai—to emerge from the Bonn compromise with non-Pushtun armed factions as the popularly elected head of state. There would be no uncertainty about who held legitimate executive power in Kabul, and Washington would retain the benefit of having a clearly identifiable Afghan partner whom it would know well and indeed preferred. The largely non-Pushtun delegates who opposed presidentialism saw in it a risk of personal and ethnic dictatorship. A parliamentary system, they argued, would likely result in coalition governments that would be more representative and inclusive, safer from potential abuses of executive power, and hence more stable.

To some extent, the debate rehearsed standard arguments about the relative merits of presidential versus cabinet government, but with a twist: Afghanistan has been struggling to leave behind years of failed statehood. The challenge for any new government there is not to enact this or that policy so much as it is to found the basic institutions that must exist and function if the very idea of “policy making” is to mean

anything at all. Afghanistan, in other words, needs to build a state. Decades of internal warfare have left standing only the weakest of security institutions. The rule of law still does not extend over much of the country, and political parties are feeble and embryonic. Some believe that a parliamentary system could better serve such a multiethnic country, though ethnic factions have also captured parliamentary systems. The presidentialists' argument persuaded those who worry that a parliament chosen under these arduous conditions is too likely to be a fragmented body dominated by warlords, local factions, and even drug traffickers. In his speech to the CLJ's closing session, President Karzai cited post-1945 Italy and India since the Congress Party's decline as negative examples. Afghanistan's most urgent need is a functioning government. Presidentialism's advocates—who are not all Pushtuns—say that such a system, with its greater potential for what Alexander Hamilton called “energy and dispatch,” is more likely to bring such a government about.

Another bruising issue concerned qualifications for office. This revolved around the difficult relations between the elites who had remained in Afghanistan and those who were returning after decades of exile, in many cases having become citizens of developed countries where they found refuge, most often the United States. Two key cabinet members, Finance Minister Ashraf Ghani and Interior Minister Ali Ahmad Jalali, whom Karzai had appointed in 2003 as part of the process of broadening and professionalizing the composition of the cabinet, belong to the latter group. By virtue of their roles, they have been on the front lines of building a state and opposing warlordism. Both are U.S. citizens and lived in the Washington, D.C., area as officials of the World Bank and the Voice of America, respectively. During public consultations on the constitution, a powerful nativism surfaced, with people from all over the country calling for a ban on ministers' holding dual citizenship. This feeling also crossed ethnic and partisan lines at the CLJ, but the president and international actors voiced strong opposition to such a ban. The compromise that was reached seems to keep the ban, but then provides that if the president nominates a minister with dual citizenship, the Wolesi Jirga will vote on it. Since the Wolesi Jirga has to confirm all ministerial appointments anyway, nothing new is added. The struggle over this issue, however, divided the cabinet and left more bruised feelings than any other question.

The Constitutional Status of Islam

The debate on the role of Islam involved numerous elements of the constitution, and the final result is a package deal that contains potential contradictions to spark future conflicts. More than almost any other issue, this one involved balancing outside actors' demands for the ac-

ceptance of international standards with the demands of domestic actors, notably Islamist politicians and the *ulama*, for a constitution that conforms to their understandings of Islam and empowers Islamic elites.

From the start of the drafting, international actors made it clear that, while they accepted that the new constitution would declare Afghanistan an Islamic state, they did not want any explicit reference to *shari'a* in the text. In addition, the rising political influence of Shi'ite Afghans, mostly ethnic Hazaras, as well as the insistence of neighboring Iran, required that the constitution for the first time make Islam alone, rather than the Hanafi sect, the state religion. Shi'ite jurisprudence enjoys near-parity in the current constitution, a milestone of sorts in national inclusiveness.

The final text passed at the Loya Jirga resulted from hard, late-stage bargaining among Islamists, President Karzai, and international representatives, along with some adroit tactical moves.³ In quiet negotiations diplomats made clear to Islamist leaders what the international community's red lines were, and the final result reflected negotiation among many Afghan and international parties. The commission's draft named the state the "Islamic Republic of Afghanistan," a move pushed through the commission by the chair, Vice-President Nematullah Shahrani, despite opposition from many members. At the CLJ, the Islamists did not oppose a presidential suggestion to change Article 2's sweeping statement that "the religion of Afghanistan is the sacred religion of Islam" to the more qualified "the religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam." The Islamists also accepted a presidential proposal to expand the constitutional scope accorded the religious activities of non-Muslims. Whereas Article 3 had previously declared non-Muslims "free to perform their religious ceremonies," it would after the president's suggestion give non-Muslims the broader-sounding freedom "to exercise their faith."

As part of the negotiated deal, Islamists also dropped their attempts to have the constitution cite Islam or *shari'a* as limits on Afghanistan's international human rights obligations. Article 7 unqualifiedly requires that the state observe the Universal Declaration of Human Rights and all covenants to which the government is a party, which include the major human rights covenants. Nor did Islamists ultimately oppose Article 22, which declares the legal equality of men and women without any of the qualifications found in *shari'a*, stating that "the citizens of Afghanistan—whether women or men—have equal rights and duties before the law." The women delegates to the CLJ—about 20 percent of the total—made this passage their core demand.

In return, Islamists advanced their position on other important parts of the constitution. Article 3 contains a provision—which in some form is standard in the constitutions of predominantly Muslim countries—that bans laws contrary to Islam. Earlier drafts had reiterated the 1964

constitution's decree that no Afghan law could be against the "basic principles of the sacred religion of Islam and the values of this constitution." At one point this clause had been whittled down simply to "Islam." The final draft goes farther than did the 1964 document toward enshrining *shari'a* by specifying that laws cannot contradict any of Islam's "beliefs and provisions" and by omitting the 1964 reference to other "values of this constitution."

This article promises to be more central to political life than in the past, as the constitution for the first time grants the Supreme Court the power to review the constitutionality of legislation, presidential decrees, and international treaties. The president's team rejected the commission's proposal for a separate constitutional court, expressing the fear that it would resemble the Council of Guardians in Iran, but by granting the same power to the Supreme Court, a body that has always been dominated by *ulama* trained in Islamic jurisprudence rather than constitutional law, the president's advisors may have worsened their future predicament. For it is almost inevitable that conflicts will arise between the constitution's acceptance of international human rights standards and embrace of male-female legal equality, on the one hand, and the requirement that no law may contradict the "beliefs and provisions" of Islam, on the other. When that happens, one may safely predict that political rather than purely interpretive considerations will shape the outcome.

The Islamists tried and failed to push a measure requiring that the president be male, but they made no objection to the constitution's requirement that at least a quarter of lower-house seats and 16 percent of upper-house seats be filled by female legislators. Behind these numbers lay a notable victory for female CLJ delegates, who had successfully campaigned to double the lower-house quota to 25 percent by insisting on two female deputies from each province.

While non-Pushtun delegates from northern Afghanistan failed to win any decentralization measures, the CLJ debates marked a milestone in the recognition of cultural pluralism. Afghanistan's origin as an empire can be seen in its *de jure* unitary state: The administration was meant to enable the center to control the periphery, not to help local communities exercise self-government. Provincial governors and district commissioners are appointed by the center, and there was a longstanding practice of naming administrators who are not natives of the places they govern, which the current government is trying to revive. The new constitution retains this "principle of centralization." The constitution also provides for elected councils at all levels, elected mayors of municipalities, and potential devolution of some powers to councils through legislation.

Whatever the law may say, however, the fact is that under the interim and transitional administrations most governors and military command-

ers received their posts because they already had power, rather than having power because of their official positions. A few, the major warlords, exercised power over several provinces. Uzbeks from northern Afghanistan, as well as Hazaras, though less insistently, wanted institutionalization of aspects of this less centralized administration. While they had retreated from earlier demands for federalism, at the CLJ Uzbek delegates proposed that governors be elected rather than appointed. As a weaker alternative, they proposed that the center appoint governors from among a pool of candidates proposed by provincial councils. Uzbek delegates explained that these proposals were designed to prevent the center from imposing Pushtun governors on them. In the past such governors allocated land and assets to Pushtun settlers and engaged in other kinds of abuses.

The government, which had an active lobbying team on the floor of the CLJ, rejected all of these proposals. While some Pushtuns insist on centralism for ethnic reasons, many people of all ethnic groups genuinely fear the disintegration of the country. During the decades of war, regional commanders developed close ties to patrons in neighboring countries. Kabul has less influence over parts of Afghanistan than do Iran, Pakistan, or Uzbekistan. These commanders remain so potent that strengthening local government could simply mean strengthening them or other criminalized elements. Many serious Afghans argue that centralization is needed now to help overcome the obstacle posed by extralegal local powerholders—perhaps by persuading them that it is time to incorporate themselves into the state-building process that Kabul hopes to direct. Decentralization or devolution can come later.

Acknowledging Afghan Diversity

Despite its rejection of administrative decentralization, the constitution takes major steps forward in recognizing Afghanistan's cultural diversity. During the drafting phase, a major issue was the relation of the two state languages, Pushtu and Dari (Afghan Persian). In the past, while Pushtu was the language of the dominant ethnic group, Dari was the language of urban life, high culture, and the bureaucracy. While the rulers were Pushtuns, many could not speak Pushtu, and Dari was the de facto language of government. The 1964 constitution gave official status to both tongues, while mandating the state to "implement an effective program for the development and strengthening of the national language, Pushtu" (Article 35).

In 2003, the draft constitution recognized more linguistic pluralism than ever before: Pushtu and Dari remained the official languages, but five others received mention, along with a guarantee of the freedom to broadcast or publish in any of them. For the first time, the draft also encouraged the development and teaching of all languages in areas

where they were spoken. The relationship between Dari and Pushtu became the biggest topic of controversy at the CLJ. A proposal to require the state to train employees to work in both languages fell before objections voiced by Tajiks, who feared that the provision was a threat to fire all functionaries not conversant in Pushtu. They did agree, if reluctantly, that the national anthem should be in Pushtu.

In the CLJ, the northern bloc that had called for parliamentarism also demanded recognition of the multiethnic character of Afghanistan, including official recognition of Turkic tongues (Uzbek and Turkmen) as national languages. Some leaders of this group even raised the issue of the meaning of “Afghan,” a noun that originally referred to Pushtuns but which this constitution, like that of 1964, defines as applicable to any and every citizen. For instance, they demanded that citizens be called “Afghanistanis” and that the name of the currency be changed from the afghani to the paisa. These demands aroused a backlash from Pushtun delegates, who then sought to make Pushtu the sole official “national” language again.

It would take a novel to do full justice to the manner in which this Gordian tangle of issues was at last resolved, but here I can sketch the results. After negotiations at the CLJ, the constitution recognizes for the first time both the ethnic pluralism and the political unity of Afghanistan. As Article 4 states:

The nation of Afghanistan is comprised of Pushtun, Tajik, Hazara, Uzbek, Turkmen, Baluch, Pashai, Nuristani, Aymaq, Arab, Kyrgyz, Qizilbash, Gujar, Brahui, and other ethnic groups.

The word Afghan applies to every citizen of Afghanistan.

The constitution makes Pushtu and Dari official languages. The national anthem is in Pushtu, but its lyrics must mention all the ethnic groups listed in Article 4, and the chorus must contain the Islamic phrase “Allahu akbar” (Arabic for “God is great,” which also appears in the Dari lyrics of the anthem used from 1992 to 1996). Pushtun delegates long resisted making the Turkic languages official, partly out of a desire not to hand a victory to the ex-communist Uzbek warlord Abdul Rashid Dostum. In the end, the CLJ settled on making Turkmen and Uzbek, along with Pashai, Baluch, Nuristani, and Pamiri, additional official languages in areas where a majority speaks one of them rather than Pushtu or Dari as its first language. In addition to keeping the national anthem in Pushtu, the constitutional provision on language (Article 16) also states that Pushtu nomenclature for certain institutions and titles must be retained in Dari and other languages as well.

One area about which there was unfortunately no controversy was the judiciary. This was a shame since in Afghanistan the judges have become a self-perpetuating caste. The Supreme Court is not only the ultimate appellate forum, now with the power of judicial review, but

also the chief administrative organ of the judiciary. It controls judicial budgets and appoints, pays, promotes, and disciplines the lower-court judges. While judicial nominees must win presidential confirmation, Karzai has never refused a candidate whom the Supreme Court has put forward. During the public consultations on the constitution, judicial corruption was an oft-heard complaint. The constitutional commission's leaders privately admit that the current system creates corrupt networks of judges. Yet the new constitution retains this system: Judgeships form the main source of employment for the *ulama*, and neither the president nor the commission wants to confront them. Given the expanded powers of the Supreme Court and the interest of the *ulama* in keeping a monopoly of the power to interpret Islam, the failure to create more constitutional space for judicial reform could prove a serious barrier against needed change in the future.

A Good Start?

Given its difficult circumstances, Afghanistan is fortunate to have arrived at a result this positive. And yet the new constitution contains many obstacles to stable and effective governance. The pressure of time and inhibitions on public discussion due both to intimidation and self-censorship on sensitive issues prevented full discussion of many important questions. In some respects, Afghanistan has lost a one-time opportunity to rethink its social compact in depth. The elderly leadership of the constitutional commission sometimes seemed more intent on recovering lost traditions than on figuring out how to meet the demands of radically new conditions.

But perhaps the biggest challenge is the central paradox of postconflict constitution making. Societies emerging from civil conflict need to agree on rules for national decisions that seem reasonably fair to all or most parts of the society. A constitution is most often written—and the Afghan constitution is no exception—to be difficult to amend and to last for a long time. Yet this historical moment when societies most need a constitution is also the one when they are least prepared to adopt it. Not only are their national capacities depleted by war and emigration, but it is uniquely difficult to draft for the ages when even the fairly immediate future is so uncertain.

As noted earlier, the type of institutional or political structure needed for state-building may not be the same political structure that will later provide the best governance. One powerful minister, considered a stalwart supporter of presidentialism and centralization, confided in private that he thought a more decentralized parliamentary system would ultimately be better for a stable and inclusive Afghanistan, but that adopting such options in the short term would delay or even prevent the building of urgently needed institutions.

Right now, the main challenge is to create a stable locus of authority. Yet broader inclusion and participation remain important goals, even if this is not the time to stress them above all else. So parliamentarism might someday be the better choice, and it may not be wise to lock decisions dictated by a temporary situation (decisions such as the option for presidentialism) into a hard-to-change constitution. Perhaps the Bonn Accords should have furnished an interim constitutional arrangement of more than two years. Perhaps the new constitution should also have been equipped with a “sunset clause” or other mechanism to guarantee popular review after a certain period. Some postconflict constitutions, such as that of East Timor, contain such provisions. Afghans to whom international advisors suggested such options, however, were wary of doing anything that could undermine a document already so beset with threats to its realization and enforcement. In his final speech to the CLJ, President Karzai stated:

[T]he constitution is not the Koran. 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.⁴

It seems likely that such a revision will indeed be necessary in five to ten years, if this document can last that long. That will depend on many things, some of which of course lie far outside the scope of the constitution itself. Yet among them will be the question as to whether Afghans can evade the pitfalls and contradictions that their new constitution contains.

NOTES

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1. See Larry P. Goodson, “Afghanistan’s Long Road to Reconstruction,” *Journal of Democracy* 14 (January 2003): 82–99.

2. While many international experts offered advice of one sort or another to the commission, the author was one of three who worked with it closely. The other two were Yash Pal Ghai of Kenya and Guy Carcassonne of France. The author recruited other experts to draft papers on issues identified by the commission. These papers are available at www.cic.nyu.edu/conflict/conflict_translations.html.

3. The commission drafted the text in Dari and translated the working text into Pushtu as needed. The UN provided unofficial English translations of the drafts for its own use and that of the international experts permitted to see the text. At the CLJ, the text was distributed in a bilingual edition in Dari and Pushtu.

4. Hamid Karzai, “Address to the Closing Session of the Constitutional Loya Jirga,” 4 January 2004. See www.unama-afg.org.