

# **THE MAKING AND THE BREAKING OF CONSTITUTIONS IN AFGHANISTAN**

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## ABSTRACT

In recent years as scholars have begun to strenuously study and evaluate the performance of written constitutions, the role of constitution-making processes in that venture is coming to the fore. Some scholars argue that the design of processes through which constitutions are written may have a bearing on the expected endurance and functioning of these important documents. In other words, the performance of constitutions is more pertinent, in some respects, to how they are produced than to what is actually written in them. In this paper, I evaluate constitution-making processes in Afghanistan and explore the role these processes played in producing “successful,” enduring constitutions. Specifically, I examine why some constitution-making processes in this country produced stable and enduring constitutions, whereas others crumbled before agreement on basic questions could be forged or begot short-lived, “failed” constitutions. I also highlight what role political elites, short-term partisan bargaining, and interests played in these constitution-making processes. Finally, I probe why many constitutions in Afghanistan have died young and why the death of constitutions has been violent.

## I. INTRODUCTION

Afghanistan is typically reputed as the “graveyard of empires” because of the heavy costs inflicted upon the world’s superpowers that tried to conquer this land.<sup>1</sup> Setting aside the accuracy of this sobriquet, contemporary Afghanistan has, instead, become the graveyard of constitutions. Constitutions in this country have perished with remarkable regularity, and the fall of each constitutional order has invariably ushered in a profound period of political crisis and violent civil conflict.<sup>2</sup> Although constitutions elsewhere around the world also do not typically last long,<sup>3</sup> Afghanistan is home to some of the world’s shortest-lived, failed constitutions. Over the past century, the country has experienced ten different constitutions, including several failed attempts to draft one during the civil war of the 1990s. Only two of these, the 1931 and the 2004 Constitutions, survived over an extended period and scored well on the yardsticks scholars use to evaluate the success of written constitutions. Some of these metrics include the following: producing legitimate political orders, enhancing the protection of fundamental rights, easing the delivery of public service, addressing ethno-religious and political conflict through peaceful constitutional routes, and avoiding political “self-entrenchment,” meaning that they do not entrench authoritarian regimes.<sup>4</sup>

In post-conflict settings, constitutions are commonly written to remedy the root causes of societal conflict and to enable peaceful political contestation. However, many Afghan constitutions were drafted in a way that exacerbated existing religious and political conflict and, in some instances, created fresh sources of societal tensions. Indeed, those who orchestrated the processes through which Afghanistan’s various constitutions were written used these basic laws to entrench their favored vision of the state and to weaken the champions of alternative viewpoints by excluding them from the political process. At the same time, because the constitution writers’ opponents were powerful enough to wreck any constitutional order that did not honor their interests, no constitution endured without the assent of all pertinent stakeholders. In short, constitution-making exercises in Afghanistan have never been a “Ulysses-like self-binding against [the constitution writers’] own desires, but rather a self-interested binding of the other,

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<sup>1</sup> See, e.g., SETH JONES, IN THE GRAVEYARD OF EMPIRES: AMERICA’S WAR IN AFGHANISTAN (2010); Milton Bearden, *Afghanistan, Graveyard of Empires*, 80 FOREIGN AFF. 17 (2001).

<sup>2</sup> For a detailed and contextual analysis of each Afghan constitution since 1923, see Shamshad Pasarlay, *Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of Coordination and Deferral Theory* (June 2016) (PhD Dissertation, University of Washington) (on file with University of Washington Research Works Archive).

<sup>3</sup> See ZACHARY ELKINS ET. AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 2 (2009) (finding that the average lifetime of written constitutions around the world is only 19 years).

<sup>4</sup> See, e.g., ASSESSING CONSTITUTIONAL PERFORMANCE (Tom Ginsburg & Aziz Huq eds., 2016); see also Aziz Huq & Tom Ginsburg, *What Can Constitutions Do?: The Afghan Case*, 25 J. OF DEMOCRACY 116 (2014).

credibly threatening actors who advance rival worldviews and policy preferences.”<sup>5</sup> In this environment, constitutions that did not secure the interests of all powerful actors only begot political crises, conflict, and rebellions.

Afghan constitutions have been judged historically by the norms they codified in their content; scholars have piled up praise on constitutions that committed to liberal democratic values while mounding disdain on an unprecedented scale upon those that did not reflect such ideals. However, a contextual analysis of each Afghan constitution demonstrates that the country’s much-celebrated “liberal” national charters, such as the 1964 Constitution, were far less effective in governing the deeply divided, conflict-prone polity. Instead, Afghanistan’s so-called liberal constitutions were drafted through a process that heightened ethno-religious conflict and produced renewed sources of political disputes that ultimately brought down the authoring regimes. Conversely, constitutions that historians have derided as an embodiment of “a hodgepodge of unworkable elements,”<sup>6</sup> or ones that liberal constitutionalists may condemn as “illiberal,” fare significantly well when measured against certain yardsticks of constitutional success.<sup>7</sup> These successful Afghan constitutions have not been credited adequately for generating useful outcomes which proved instrumental in addressing political conflict through formal institutions and promoting peaceful coexistence among Afghanistan’s deeply divided, heavily armed and restive tribal and religious communities.

Comparative constitutional scholarship emphasizes that constitution-making processes are important, and how a constitution is written does “matter.”<sup>8</sup> In fact, the strengths and weaknesses of constitutions may not be related so much to what is codified in the constitution, as they are intertwined with how a particular constitution is drafted.<sup>9</sup> In countries like Afghanistan, which transition from civil war or authoritarianism, the constitution-making processes are vital to how the documents they produce perform in actual real-world governance, and how they may be received by the general populace as well as the powerful ethno-religious factions whose assent is needed if a constitution is to survive. Yet historical and

<sup>5</sup> Ran Hirschl, *The Strategic Foundations of Constitutions*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 170 (Denis Galligan & Mila Versteeg eds., 2013).

<sup>6</sup> LOUIS DUPREE, *AFGHANISTAN* 464 (1973).

<sup>7</sup> See Shamsad Pasarlay, *Rethinking Afghanistan’s Longest-Lived Constitution: The 1931 Constitution through the Lens of Constitutional Endurance and Performance Literature*, 10 ELON L. REV. 283, 284 (2018) (arguing that the 1931 Constitution of Afghanistan was a document that was far more successful than scholars have realized).

<sup>8</sup> See generally Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L. J. 364 (1995); Tom Ginsburg et. al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. OF L. & SOC. SCI. 201 (2009); Aurel Croissant, *Ways of Constitution-Making in Southeast Asia: Actors, Interests, Dynamic*, 36 CONTEMP. SE. ASIA 23 (2014); Kevin Tan, *The Making and Remaking of Constitutions in Southeast Asia: An Overview*, 6 SING. J. OF INT’L. & COMP. L. 1 (2002); FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING PAGE NUMBER? (Laurel Miller ed., 2010).

<sup>9</sup> See, e.g., CONSTITUTION MAKING (Sujit Choudhry & Tom Ginsburg eds., 2016).

contemporary accounts of Afghan constitutions elide the processes through which each of Afghanistan's basic laws were ratified. Hence, I highlight that understanding Afghanistan's constitutional order and evaluating the performance of its written charters require us to look past the values enshrined in the constitutions and explore, instead, the dynamics of the processes that produced each of the country's constitutions. I evaluate these constitution-making processes and underscore that the performance or "goodness" of Afghan constitutions cannot be meaningfully scrutinized independently from the processes through which they were written.

Constitutions in Afghanistan were invariably drafted after violent, abrupt political ruptures. Regimes that came to power through victory in a civil war or by means of coups and violent rebellions typically used constitution-making processes to pursue the exact same goals they had earlier sought through violent means.<sup>10</sup> For Afghan rulers, constitution writing presented an opportunity to entrench themselves and exclude those who championed alternative constitutional visions, thereby silencing extant and future challenges to their rule. However, because the authoring regime did not have the power abundant to enforce its constitutional ordering on its opponents, constitutions drafted through such winner-take-all processes were violently removed. Conversely, constitutional processes that were inclusive and provided a bargaining opportunity among the most powerful actors and served most, if not all, of these actors' interests tended to produce "successful," enduring constitutions. For the purposes of this paper, a successful Afghan constitution is one that created institutions able to peacefully pilot political conflict for a sufficient period of time, lessened religious tensions in the deeply divided, conflict-prone Islamic society, provided sufficient incentives for warring factions to work within the political process to pursue their goals and averted the consolidation of political authority in the hands of a single faction or person.<sup>11</sup> Although scholars discuss several other criteria in assessing constitutional success in various contexts, these are the minimum core of constitutional success in a post-conflict environment like Afghanistan, where it is likely that a culture of peaceful democratic discourse has not yet been established.

In Afghanistan, processes that produced successful constitutions shared the following features: first, they were inclusive, meaning that they enabled rival factions who had the power to scuttle a constitutional order to *assemble* and negotiate a constitution acceptable to all actors. Second, successful processes did not heighten ethno-religious and political conflict by avoiding entrenching the preferences of a single faction; instead, they were "incremental," meaning that they used strategic ambiguity and conflicting provisions to avoid deciding explosive

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<sup>10</sup> See Darin Johnson, *Conflict Constitution-Making in Libya and Yemen*, 39 UNIV. OF PENN. J. OF INT'L. L. 293, 302 (2017). Darin Johnson has called this approach to constitutional creation as "conflict constitution-making," whereby armed combatants see the constitutional process as an opportunity to realize goals that they otherwise pursue on the battlefield.

<sup>11</sup> See Ginsburg & Huq, *supra* note 4, for a detailed discussion of when a constitution is 'successful.'

questions during the moment of constitutional creation.<sup>12</sup> Third, successful constitution-making processes in Afghanistan were not concerned too much about popular participation, deliberation, or the moral and principled vision of politics; rather, they were related to creating stakes necessary to safeguard the constitutional order by actively making concessions to the interests of powerful actors.<sup>13</sup> Fourth, and more importantly, they produced a written constitution — desirably one that survived and piloted political disputation peacefully.<sup>14</sup> Put differently, successful constitutional processes in Afghanistan were about the need to engender acquiescence by divided communities whose support was necessary to preserve the constitutional order such that no faction felt compelled to bring it down. Constitution writing processes that shared these features generated more stable, enduring constitutions than those processes that lacked these characteristics.

To underscore the role that constitution-making processes played in producing successful enduring constitutions in Afghanistan, Part II explores the processes that created Afghanistan's monarchical constitutions and evaluates the performance of each. Part III scrutinizes the processes that begot Afghanistan's short-lived ideological constitutions in the second half of the 20<sup>th</sup> century and analyzes why each of these processes failed to generate a workable constitutional arrangement. Part IV evaluates the failed process for the making of the 1993 *mujahidin* constitution and explores how that process only deepened political conflict and fueled the civil war. In Part V, the paper appraises the 2002–2004 constitution-making process that produced Afghanistan's 2004 Constitution and evaluates the strengths and weaknesses of that process. Finally, Part VI concludes by highlighting that process does seem to have a bearing on how constitutions perform.

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<sup>12</sup> See HANNA LERNER, *MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES* (2011) on how constitutions defer explosive questions to the ordinary political process; see also Rosalind Dixon, *Constitutional Design Deferred*, in *COMPARATIVE CONSTITUTION MAKING* (David Landau & Hanna Lerner eds., 2019).

<sup>13</sup> See Nathan Brown, *Reason, Interest, Rationality, and Passion in Constitution Drafting*, 6 *PERSP. ON POL.* 675 (2008) for a discussion on constitution-making as a venue for incorporating short-term interests and passions; see also Tom Ginsburg, *How to Study Constitution-Making: Hirschl, Elster, and the Seventh Inning Problem*, 96 *BOST. UNIV. L. REV.* 1347 (2016).

<sup>14</sup> It should be noted that this criterion does not mean that all constitutions must be written or that unwritten constitutions are failed constitutions. These types of processes are not unique to Afghanistan. Similar dynamics are at play in other post-conflict divided societies as well. See, e.g., Jennifer Widner, *Constitution Writing in Post-conflict Settings: An Overview*, 49 *WM. & MARY L. REV.* 1513 (2008); see also Kirsti Samuels, *Post-conflict Peace-Building and Constitution-Making*, 6 *CHI. J. OF INT'L L.* 663 (2006); Jamal Benomar, *Constitution-Making after Conflict: Lessons for Iraq*, 15 *J. OF DEMOCRACY* 81 (2004) for a more general exploration of constitution-making processes in post-conflict environments.

## II. THE MAKING OF AFGHANISTAN'S MONARCHICAL CONSTITUTIONS: 1923-1964

The modern state of Afghanistan emerged in the middle of the 18<sup>th</sup> century. Before then, the region that constitutes contemporary Afghanistan was a hodgepodge of diverse tribal communities.<sup>15</sup> For most of their history, these tribes were ruled by empires that rose in their neighborhood in the regions which form modern-day Iran, the Indian subcontinent and the Central Asian republics.<sup>16</sup> In 1747, the leaders of these Pashtun tribes elected one of their own as *primus inter pares*, in what seemed to install the foundation of a tribal state. This ruler, Ahmad Shah Durrani, united the Pashtun tribes and created an empire that extended westwards to Mashhad, Iran, to the Oxus in the north and stretched eastwards to the Indus.<sup>17</sup> During his reign, Ahmad Shah promulgated a series of regulations to administer his empire, but in the Durrani empire Islam and the *Hanafi fiqh* (Islamic law as defined over the centuries by scholars associated with the *Hanafi* school) served as the supreme law of the land to which the actions and regulations of the emperor had to comply.<sup>18</sup>

After the death of Ahmad Shah, his vast empire disintegrated at the same speed it was built. From the dissolution of the Durrani Empire in 1793 up to Amir Abdul Rahman Khan's rise to the Afghan throne in 1880, "two themes dominated the Afghan scene: internal disorder and external invasions and pressures."<sup>19</sup> Royal princes went to war against each other to claim the throne. In these battles, only those who earned the support of the tribal chieftains and the blessings of the *'ulama*, the class of people versed in Islamic scriptures, theology, and law, usually won the Kabul crown. The winner's rivals, however, would form independent kingdoms of their own away from Kabul and fight the Kabul king from these regions.<sup>20</sup> The tribal chieftains hence achieved the reputation of "kingmakers" while the *'ulama's* vote of confidence was needed to confer religious legitimacy upon the monarchs. The endurance of the Afghan monarchies depended on the support of these two camps of power. Both groups operated independently, enjoyed a privileged position in the monarchy and were opposed to the expansion of the central authority to their

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<sup>15</sup> See PERCY SYKES, A HISTORY OF AFGHANISTAN (2 vols., 1940); MOHAMMAD SEDIQ FARHANG, AFGHANISTAN DAR PANJ QARN-I AKHĪR [AFGHANISTAN IN THE PAST FIVE CENTURIES] (1988); CHRISTINE NOELLE, STATE AND TRIBE IN NINETEENTH CENTURY AFGHANISTAN: THE REIGN OF AMIR DOST MUHAMMAD KHAN (1826–1863) (1998).

<sup>16</sup> See, e.g., ARNOLD FLETCHER, AFGHANISTAN: HIGHWAY OF CONQUEST (1966).

<sup>17</sup> See GANDA SINGH, AHMAD SHAH DURRANI: FATHER OF MODERN AFGHANISTAN (1959) for a thorough discussion of the Durrani Empire.

<sup>18</sup> SENZIL NAWID, RELIGIOUS RESPONSE TO SOCIAL CHANGE IN AFGHANISTAN, 1919–29: KING AMAN-ALLAH AND THE AFGHAN ULAMA 7 (1999); 'AZIZ AL-DIN POPALZAI, 'DAR AL-QAZA DAR AFGHANISTAN: AZ AWAYEL 'AHD-I ISLAM TA 'AHD-I JAMHURIAT [THE JUDICIARY IN AFGHANISTAN: FROM THE START OF ISLAM TO THE REPUBLIC] 32 (1990).

<sup>19</sup> DUPREE, *supra* note 6, at 343.

<sup>20</sup> *Id.* See also AMIN SAIKAL, MODERN AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL 17 (2004); MIR GHULAM MOHAMMAD GHUBAR, AFGHANISTAN DAR MASĪR-I TARIKH [AFGHANISTAN IN THE COURSE OF HISTORY] (Vol. 2, 1999).

regions, fearing that a centralized government would impinge upon their privileged position.<sup>21</sup> As such, early Afghan monarchs did not attempt to expand the writ of the central government to the regions of these independent tribes; they opted, instead, to form tribal consultative councils to assist the monarchs in making important decisions, such as waging war or making peace.<sup>22</sup> Additionally, although these rulers did decree laws, these laws had to be consistent with Islam and would be judged for compliance with Islamic dicta and the *Hanafi fiqh* by the *'ulama* over whom the monarchs exercised no meaningful influence.<sup>23</sup>

In 1880 after the second Anglo-Afghan war (1878–1880), Amir Abdul Rahman Khan assumed the Afghan throne with the consent of the British government in India.<sup>24</sup> Worried that tribal warriors from Afghanistan would spill over to the Indian Subcontinent and that the Afghan ruler would drift towards the Russian Empire, Britain chose to empower the Afghan Amir to keep the tribes and the *'ulama* in check and forced him to accept British control over Afghanistan's foreign affairs.<sup>25</sup> In turn, the British rewarded Abdul Rahman Khan with money and weapons.<sup>26</sup> The Amir's access to British subsidies enabled him to build a powerful army and a harsh spy system to subdue political rivals (tribal leaders) and establish an unprecedented degree of centralized control over the hitherto independent tribal lands.<sup>27</sup> Furthermore, he proclaimed "himself the Muslim ruler of all [diverse] Afghan people and claimed divine sanction for his rule, thus becoming the first Afghan ruler strongly to invoke something akin to the divine rights of the king as a source of political legitimacy."<sup>28</sup> As a result, he argued that, as God's chosen ruler, his commands were mandatory and disobedience to him was equivalent to rebellion against God. Backed by a powerful military, Abdul Rahman Khan claimed successfully that he, alone, was the lawgiver, and his interpretation of Islam would be controlling.<sup>29</sup> For the first time in Afghan history, the Amir thus bureaucratized the judiciary and adopted a judicial manual, *Asas al-Quzat*, directing his courts to only apply his version of Islamic law and the *Hanafi fiqh* to cases at bar.<sup>30</sup>

Amir Abdul Rahman Khan thus changed the implicit principles of Afghan governance which were previously based on consultation with tribal chieftains and obedience to the *'ulama*. He established direct authoritarian rule over the entire

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<sup>21</sup> VARTAN GREGORIAN, *THE EMERGENCE OF MODERN AFGHANISTAN: POLITICS OF REFORM AND MODERNIZATION, 1880-1946*, 40–42 (1969).

<sup>22</sup> *Id.* at 48.

<sup>23</sup> *See generally* GHOLAM VAFAI, *AFGHANISTAN: A COUNTRY LAW STUDY* (1988).

<sup>24</sup> DAVID EDWARDS, *HEROES OF THE AGE: MORAL FAULT LINES ON THE AFGHAN FRONTIER*, 1, 33 (1996).

<sup>25</sup> DUPREE, *supra* note 6, at 409, 422.

<sup>26</sup> *Id.* at 422; *see also* SAIKAL, *supra* note 20, at 35–39.

<sup>27</sup> *See generally* HASAN KAWUN KAKAR, *GOVERNMENT AND SOCIETY IN AFGHANISTAN: THE REIGN OF AMIR 'ABD AL-RAHMAN KHAN* (1979).

<sup>28</sup> SAIKAL, *supra* note 20, at 35.

<sup>29</sup> Amin Tarzi, *Islam, Shari'a, and State Building under 'Abd al-Rahman Khan*, in *AFGHANISTAN'S ISLAM: FROM CONVERSION TO THE TALIBAN* 133 (Nile Green ed., 2017).

<sup>30</sup> Ashraf Ghani, *Disputes in a Court of Sharia, Kunar Valley Afghanistan, 1885-1890*, 15 INT'L J. OF MIDDLE E. STUD. 353, 354 (1983).



country where the ruler did not require the consent of the tribes or the blessings of the *'ulama* to make policy, draft laws, or structure the judiciary.<sup>31</sup> Although the Amir created a proto-constitutional state, albeit one that had transformed the existing structures of the Afghan government, he did not adopt a formal, written constitution. He acknowledged that the Afghan state needed a written constitution and encouraged his successors to draft one, but he cautioned that a written constitution that would attribute a shared identity to the divided tribes and religious communities, a common religion, and a common set of laws should only be crafted incrementally. Specifically, the Amir wrote:

The foundation stone of a Constitutional Government has been laid by me; though the machinery of Representative Government has not taken any practical shape as yet. It is necessary that every ruler should [...] apply the best modes of governing gradually, modifying them according to circumstances and the position of his country [. . .] There are three kinds of representatives who assemble in my court [known as the] Sirdars (or aristocracy), Khawanin Mulki (Commons, or representatives of the people), and Mullahs (ecclesiastical heads and church representatives) [... These] constitutional [bodies have] not yet attained the ability nor the education to qualify it for being entrusted with authority of any importance for giving sanction to Bills or Acts of the Government. But in time they will perhaps have such authority, and in this way the people of Afghanistan will be governed for their own safety by themselves [. . .] My sons and successors should not try to introduce new reforms of any kind in such a hurry as to set the people against their ruler, and they must bear in mind that in *establishing a Constitutional Government, introducing more lenient laws, and modelling education upon the system of Western universities, they must adopt all these gradually* as the people become accustomed to the idea of modern innovations.<sup>32</sup>

Abdul Rahman's son, Habibullah Khan (1901–1919), heeded his father's advice and chose not to draft a constitution, but he abandoned his father's brutal and oppressive way of governing the deeply divided, religious communities and orchestrated, instead, a more conciliatory approach to governance.<sup>33</sup> He eased the strict surveillance apparatus his father had installed to keep the tribal chieftains and the *'ulama* under the watchful eyes of the state. Further, Habibullah Khan brought tribal leaders together in a 'State Council' to secure tribal interests and address inter-

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<sup>31</sup> ASTA OLESEN, ISLAM AND POLITICS IN AFGHANISTAN 62–68 (1995); Tarzi, *supra* note 29.

<sup>32</sup> SULTAN MOHAMMAD KHAN, THE LIFE OF ABDUR RAHMAN KHAN: AMIR OF AFGHANISTAN 187–190 (Vol. 2, 1900). Italics added.

<sup>33</sup> OLESEN, *supra* note 31, at 95–97.

tribal disputes.<sup>34</sup> He also restored the prerogatives of the *'ulama* in formulating the state's religious policy – a right that the *'ulama* had lost under Abdul Rahman Khan. Specifically, Habibullah Khan assembled an elite group of *'ulama* in a committee called *Mizan al-Tahqiqat-i Shari'at* (Shari'a Research Committee) and vested in it the power to scrutinize the consistency of state laws and policies with Islam.<sup>35</sup> While Abdul Rahman Khan had taken it upon himself to interpret Islamic scriptures and other sources of Islamic law, Habibullah Khan allowed the *'ulama* some freedom to exercise that right.

Religious dignitaries and tribal aristocrats were not the only groups that regained some of their lost power under Habibullah. In the mid-1910s, a different, far more assertive, liberal, and forward-looking movement also began to appear on the political scene in the capital of the Afghan monarchy. This new group was known as the “constitutionalist movement,” and it included two classes of new intellectuals: Faculty members from the first public college in the country, the *Habibiya* School, and a new class of *'ulama* who adopted a different, “modernist” approach to interpreting Islamic texts.<sup>36</sup> The constitutionalist movement advanced the establishment of a limited government — one that would respect the rule of law and the norms of a written constitution — and demanded that the state should advance equity and social justice as well as promote modern education throughout the country.<sup>37</sup>

The constitutionalist movement, however, came to an abrupt and violent end when Habibullah Khan was informed that its members wanted to remove the monarch and replace his autocratic monarchy with a constitutional government.<sup>38</sup> Although several prominent members of the movement were either executed or jailed, the ideas that it championed nurtured a second constitutionalist movement in 1909.<sup>39</sup> The goals of this second movement were similar to its predecessor, but it championed more vigorously the drafting of a constitution that would enshrine the rights of the people that the state would have to respect to the full extent.<sup>40</sup> Habibullah Khan forcefully opposed the group's desire to create a constitutional monarchy and was adamant once again about ending the constitutionalist movement. However, this time the Amir was assassinated, and his son, Amanullah Khan, assumed the Afghan throne in 1919.

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<sup>34</sup> GREGORIAN, *supra* note 21, at 181.

<sup>35</sup> OLESEN, *supra* note 31, at 96.

<sup>36</sup> *See generally* ABDUL HAI HABIBI, JUNBISH-I MASHROTIAT DAR AFGHANISTAN [CONSTITUTIONAL MOVEMENT IN AFGHANISTAN] (1363 [1984]); Amin Tarzi, *Islam and Constitutionalism in Afghanistan*, 5 J. OF PERSIANATE STUD. 205, 207–208 (2012); Faiz Ahmed, *In the Name of a Law: Islamic legal Modernism and the Making of Afghanistan's 1923 Constitution*, 48 INT'L J. OF MIDDLE E. STUD. 655, 663 (2016).

<sup>37</sup> HABIBI, *supra* note 36, at 55–56.

<sup>38</sup> *Id.* at 34–46; *see also* FARHANG, *supra* note 15, at 312.

<sup>39</sup> Tarzi, *supra* note 36, at 208–209; HABIBI, *supra* note 36, at 111.

<sup>40</sup> HABIBI, *supra* note 36, at 174.

### **A. The Drafting and Performance of Afghanistan's First Written Constitution**

Upon assuming the throne, Amanullah Khan (1919–1929) moved quickly to free Afghanistan from British control over her foreign policy. This gained the new king the respect of the *‘ulama* and the tribal aristocrats, and the Afghan ruler was viewed as the champion of Islam in his Muslim neighborhood.<sup>41</sup> Amanullah then embarked upon a process one scholar has called, “Legalizing Afghanistan.”<sup>42</sup> He formed a legislative committee to draft a wide-ranging set of laws that basically codified the hitherto unwritten rules of the *Hanafi fiqh* as the statutory law of the land.<sup>43</sup> The Legislative Committee had two chambers: the Administrative Chamber and the Islamic Law Chamber. The former had the responsibility to draft Amanullah’s “Islamic” statutes, and the latter, which included some of the most renowned *‘ulama*, scrutinized these laws for compliance with Islamic dicta and the *Hanafi fiqh*.<sup>44</sup> Importantly, both chambers represented the king’s vision of the state and his approach to Islamic legal interpretation influenced by modernist methods.<sup>45</sup> They did not embody Afghanistan’s traditional power hubs: the tribes and the traditionalist *‘ulama* outside the state apparatus. To put it differently, Amanullah’s legislative bodies did not consider the version of Islam that was previously the supreme law of the land.

In 1923, the King’s Legislative Committee drafted Afghanistan’s first written constitution. The draft constitution inevitably reflected “the basic framework of what King Amanullah and his modernist supporters envisaged the modern Afghan nation-state to be,” representing “the ideological break with the past, the departure from the autocratic but still tribally-based” monarchies before him.<sup>46</sup> However, to ratify the constitution, the king convened a grand assembly, a *Loya Jirga*, Afghanistan’s constitutional convention, in the eastern province of Nangarhar. The *Loya Jirga* ratified the king’s constitution without any changes or serious debates on its key and divisive issues including the role of Islam and the nature of rights that the document pledged to protect.<sup>47</sup> Like the constitutional drafting committee, the constitutional ratification convention also represented the king’s acolytes and left out from the drafting process the powerful southern tribes

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<sup>41</sup> NAWID, *supra* note 18, at 53, 57; OLESEN, *supra* note 31, at 114.

<sup>42</sup> FAIZ AHMED, *AFGHANISTAN RISING: ISLAMIC LAW AND STATECRAFT BETWEEN THE OTTOMAN AND BRITISH EMPIRES* 207 (2017).

<sup>43</sup> LUDWIG ADAMEC, *AFGHANISTAN’S FOREIGN AFFAIRS TO THE MID-TWENTIETH CENTURY* 81 (1974); *see also* POPALZAI, *supra* note 18, at 51; NAWID, *supra* note 18, at 79; Ahmed, *supra* note 36, at 663–664.

<sup>44</sup> POPALZAI, *supra* note 18, at 52; Ahmed, *supra* note 36, at 663.

<sup>45</sup> *See* OLESEN, *supra* note 31, at 119; AHMED, *AFGHANISTAN RISING*, *supra* note 42, at 230.

<sup>46</sup> OLESEN, *supra* note 31, at 120.

<sup>47</sup> Shamshad Pasarlay, *Crafting Amendments during Political Upheaval: Amendment Models and Constitutional Stability in Afghanistan*, in *THE ARCHITECTURE OF CONSTITUTIONAL AMENDMENTS: HISTORY, LAW, POLITICS* (Richard Albert ed., forthcoming 2023).

and the *‘ulama* — actors who had been incisive in making or wrecking rulers in the past.

Scholars have celebrated the 1923 Constitution as a constitution before its time,<sup>48</sup> a “revolutionary document,”<sup>49</sup> and a “very liberal” and “unquestionably landmark” constitution which provided a “good base on which to construct a secular code of laws.”<sup>50</sup> The Constitution has received these accolades simply because it was written, and it guaranteed, though vaguely, liberal rights. For example, it formally granted to Afghans, for the first time in the country’s history, fundamental rights that were the hallmark of “liberal Western constitutions.”<sup>51</sup> The Constitution also created a partly elected State Council, which functioned as a legislative branch and a cabinet of ministers, which assisted the king in performing his executive duties.<sup>52</sup> The king also promised that over time, the State Council would give way to an elected parliament that would wield significant legislative and oversight powers.<sup>53</sup> Hence, the state would deal directly with the people as its constituents and lessen the influence and power of the tribal chieftains.

The 1923 Constitution perhaps merits the credit that is bestowed upon it, not because of its relatively liberal content but because it was Afghanistan’s first written constitution and put the country on a constitutional course — a path Afghanistan’s subsequent rulers felt obliged to follow. However, the Constitution failed to generate useful outcomes that could sustain the political order, of which it was emblematic. It proved futile in addressing ethno-religious conflicts through peaceful means, lessening tensions between the king and the *‘ulama*, or easing the king’s tight grip on political, legislative, and judicial power. In fact, the Constitution itself became the principal source of conflict between the king and the tribal aristocrats; the latter were vehemently supported by the *‘ulama*. Two major features of the Constitution were the subject of particular animus. First, tribal leaders were alarmed that the Constitution’s provisions that vested in the king the power to appoint cabinet ministers and judges were designed to weaken their historical power. Second, the *‘ulama* were outraged at the Constitution’s provisions which made the state the final arbitrator of what Islam required and what laws were Islamic;<sup>54</sup> they, too, complained that the Constitution encroached upon their

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<sup>48</sup> MOHAMMAD TAHIR BORGAI, *DA AFGHANISTAN LOMRANI ASSASI QANUN TA YAWA KATANA* [A LOOK AT AFGHANISTAN’S FIRST CONSTITUTION] (1995).

<sup>49</sup> OLESEN, *supra* note 31, at 176.

<sup>50</sup> LEON POUILLADA, *REFORM AND REBELLION IN AFGHANISTAN, 1919–1929: KING AMANULLAH’S FAILURE TO MODERNIZE A TRIBAL SOCIETY* 93, 98 (1973).

<sup>51</sup> OLESEN, *supra* note 31, at 123.

<sup>52</sup> NIZĀMNĀMAH-’I ASĀSI-’I DAWLAT-I ‘ALĪYAH-’I AFGHĀNISTĀN [CONSTITUTION OF AFGHANISTAN] Apr. 9, 1923, art. 6; *Id.* art. 41.

<sup>53</sup> See Ludwig Adamec, *Egypt x. Relations with Afghanistan*, 8 *ENCYCLOPEDIA IRANICA* 266 (1998); see also SAIKAL, *supra* note 20, at 73.

<sup>54</sup> NIZĀMNĀMAH-’I ASĀSI-’I DAWLAT-I ‘ALĪYAH-’I AFGHĀNISTĀN [CONSTITUTION OF AFGHANISTAN], *supra* note 52, at art. 72 (providing that in drafting laws, the state should carefully consider the peoples’ living condition, the requirements of time and, specifically, the demands of the *shari’a*. A state appointed body of Islamic scholars realized this provision in practice).

privileged position as the final judges of state laws' Islamic compliance.<sup>55</sup> Moreover, both the tribal notables and the leaders of the *'ulama* took umbrage at their exclusion from the constitutional drafting process and were forced to publicly air their disobedience to the king's constitutional order.

Hence, Amanullah's Constitution encountered hostility within one year of its adoption. The opposition and opprobrium to the Constitution manifested in the form of a revolt staged by the disgruntled southern tribes and the *'ulama* — two groups excluded from the drafting and ratification of the Constitution in 1923.<sup>56</sup> The Constitution, through which the king tried to attribute to the divided communities a common identity and force upon them the state's version of Islam, was one of the driving causes of the rebellion.<sup>57</sup> Those who picked up arms against the king felt they had been insulted by those constitutional provisions that did not sufficiently honor their interests and views. The revolt forced the king to convene another *Loya Jirga* in 1924 to amend the Constitution.

The constitutional amendment *Loya Jirga* was filled with those figures who shared the rebels' disdain for the constitutional order.<sup>58</sup> The constitutional amending convention, the *Loya Jirga*, made five major changes to the Constitution which tilted the balance of power in favor of the *'ulama* and the tribal chieftains. Additionally, the *Loya Jirga* altered those provisions that the *'ulama* viewed to be inadequately divinely ordained. For example, the original article 9 prohibited all types of torture and inhumane punishment including, arguably, penalties prescribed under Islamic law, but it was amended to make an exception under which punishments decreed under Islam would be allowed.<sup>59</sup> Article 2, which originally afforded freedom to non-Muslim residents of the country, was amended to require non-Muslims to wear distinctive clothing and to pay the special Islamic tax (*jazy*a), something that the rebellious *'ulama* demanded.<sup>60</sup> One of the major amendments related to the formation of a special religious committee, staffed with members of the traditional *'ulama* that would scrutinize the consistency of state law with Islamic dicta.<sup>61</sup> This new committee replaced the *Hai'at-i Tamiz* (Islamic Review Board), a body composed of modernist Islamic scholars that had originally ascertained the Constitution's consistency with Islam. The traditional *'ulama* thus regained the final legal authority on the compliance of state law with Islam and the *Hanafi fiqh*. After these amendments were written in the Constitution, the rebels laid down arms and retreated to their day-to-day business.

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<sup>55</sup> See Mohammad Nazif Shahrani, *Review: King Aman-Allah of Afghanistan's Failed Nation-Building Project and Its Aftermath*, 38 IRANIAN STUD. 661, 669–70 (2005); see also David Edwards, *Charismatic Leadership and Political Process in Afghanistan*, 5 CENT. ASIAN SURV. 273 (1986).

<sup>56</sup> Senzil Nawid, *The Khost Rebellion: The Reaction of Afghan Clerical and Tribal Forces to Social Change*, 56 REV. OF DEPART. OF ASIAN STUD. & DEPART. OF STUD. & RSCH. ON AFRICA & ARAB COUNTRIES 311, 311 (1996).

<sup>57</sup> See, e.g., Shahrani, *supra* note 55, at 668–669; NAWID, *supra* note 18, at 101.

<sup>58</sup> Pasarlay, *supra* note 47.

<sup>59</sup> *Id.* See also NAWID, *supra* note 18, at 112.

<sup>60</sup> NAWID, *supra* note 18, at 112.

<sup>61</sup> POULLADA, *supra* note 50, at 122–123; NAWID, *supra* note 18, at 111.

Although the amendments won over the groups who were excluded from the original drafting of the Constitution and whose consent was needed if the king's constitutional order were to survive, the document remained ineffective in addressing political conflict peacefully. Towards the end of the 1920s, Amanullah began to deploy his discretionary power to dismantle the institutions that could, in theory, serve as a venue for peaceful political dispute. In 1928, the king dissolved the State Council and two other "consultative chambers" through amendments that he himself had orchestrated.<sup>62</sup> These bodies had historically "represented the interests of the feudal lords and the powerful Afghan tribes."<sup>63</sup> The king desired to substitute this locus of traditional power with a popularly elected parliament of 150 deputies.<sup>64</sup> He also chose to bypass the special religious committee established through the 1924 amendments and drafted laws that negated the traditionalists' understanding of Islam. In other words, the king did not consult the religious committee when he chose to write new statutes or amend the Constitution. These reforms were unacceptable to the tribal chieftains and to the members of the *'ulama*; both joined hands once again and brought down the Constitution and removed Amanullah Khan in 1929.<sup>65</sup>

Amanullah's Constitution and the process through which it was crafted essentially upended the *modus vivendi* that his predecessors had reached with the tribes and the religious establishment, a *modus vivendi* under which the latter exercised a veto on state legislation's Islamic compliance. Instead of using the constitutional process to create, with the consent of all pertinent parties, a mutually advantageous document, Amanullah Khan deployed the constitutional process as a vehicle to uproot the influence of the most powerful groups and entrench his own idiosyncratic vision of the state. The exclusive constitution-making process that the king engineered and the focus of the process on "revolutionary" goals rather than concessions to tribal interests worsened societal conflict and perversely generated new sources of tensions that ultimately doomed Afghanistan's first experiment with constitutional government.

## **B. The Making of the 1931 Constitution: Incrementalism, Inclusion, and Concessions to Interests**

The tribes and the religious notables who removed Amanullah put Mohammad Nadir Shah on the throne in 1929. Nadir Shah initially seemed less willing to accept the crown, but the tribal and religious dignitaries were adamant about making him king because they believed that Nadir was the type of ruler who would govern in a consultative manner.<sup>66</sup> Given the tribe's enormous support and ovation, Nadir Khan accepted the throne stating that because "the people do

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<sup>62</sup> GREGORIAN, *supra* note 21, at 259.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> POUILLADA, *supra* note 50.

<sup>66</sup> See DONALD WILBER, AFGHANISTAN: ITS PEOPLE, ITS SOCIETY, ITS CULTURE 154–155 (1962).

designate me so, I accept. I will not be the King but the servant of the tribes and the country.”<sup>67</sup> Shortly thereafter, Nadir Shah issued a ten-point declaration that summarized his approach to governance and included, chiefly, governance in line with Islam and the *Hanafi fiqh* — a concession to the *‘ulama* who had overthrown Amanullah.<sup>68</sup> Further, he pledged to govern under the Islamic principle of *shura* (consultation) and promised he would not act unilaterally in making important decisions about the state’s future. Thus, Nadir rekindled the traditional approach to governance by opting to rule in coordination with the tribes rather than forcing them into obedience to the central government’s will. This conciliatory approach then informed Nadir’s choice to write Afghanistan’s second constitution in 1931.

Immediately after assuming the throne, Nadir Shah formed an executive cabinet of ten tribal notables. In September 1930, he convened a *Loya Jirga* that served as a legislative branch and represented Afghanistan’s powerful ethnic groups,<sup>69</sup> figures who had dethroned Amanullah and torn down his constitutional order. After the *Loya Jirga* pledged support for the king’s ten principles of governance and adopted a law for the election of a national assembly; it selected 105 of its members to serve in a constitutional drafting convention.<sup>70</sup> This 105-member constitutional convention was tasked to write a constitution, which it prepared in October 1931.<sup>71</sup> The tribal leaders were thus directly involved in writing the 1931 Constitution.

The other pertinent group, the *‘ulama*, was also included in the constitutional drafting process. Nadir Shah had assembled a society of the traditionalist *‘ulama* named the *Jami‘yat-i ‘Ulama* (Council of Jurists) and consulted it regularly on important social, religious, and political questions.<sup>72</sup> This organization included some of the most prominent members of the *‘ulama* and had in its composition both elected as well as appointed members; the former had a fixed temporary mandate, while the latter were permanent members of the Council. The Council’s permanent members included the head of the center for Arabic sciences — a reference to Islamic sciences — a representative judge from the Kabul courts of justice, a judge from the high directorate of courts of appeals, and the Imams (clerics) of two of the leading historical religious seminaries in Kabul, the *Pol-i Khishti* and the *Shah-i Do-Shamshera*.<sup>73</sup> One of the most important duties given to the Council of *‘Ulama* included evaluating the consistency of state laws

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<sup>67</sup> GREGORIAN, *supra* note 21, at 287.

<sup>68</sup> MOHAMMAD ALAM FAIZAD, *JIRGA HAI BUZARG-I MILLI-YE AFGHANISTAN, LOYA JIRGA HA WA JIRGA HAI NAM-NIHAD THAT-I TASALOT-KAMONIST HA WA RUS HA [AFGHANISTAN’S LOYA JIRGAS AND SYMBOLIC JIRGAS UNDER THE COMMUNIST AND THE SOVIETS]* 139–140 (1989).

<sup>69</sup> DUPREE, *supra* note 6, at 463.

<sup>70</sup> *Id.* See also FARHANG, *supra* note 15, at 407.

<sup>71</sup> FARHANG, *supra* note 15, at 407; POPALZAI, *supra* note 18, at 120.

<sup>72</sup> Donald Wilber, *The Structure and Position of Islam in Afghanistan*, 6 MIDDLE E. J. 41, 43 (1952); OLESEN, *supra* note 31, at 184; GREGORIAN, *supra* note 21, at 299.

<sup>73</sup> POPALZAI, *supra* note 18, at 124.

and regulations with Islam and the *Hanafi fiqh*.<sup>74</sup> The king would not make any new statutes unless this Council attested to their consistency with the *Hanafi fiqh*. The 1931 Constitution thus went through the eyes of the *'ulama* before it was ratified at the *Loya Jirga*.

Unlike the 1923 constitutional process, the drafting of the 1931 Constitution included as many stakeholders as needed to sustain the constitutional order. It engaged directly with the interests of the groups that had overthrown the earlier constitutional settlement, and its content made no secret of concessions to these interests.<sup>75</sup> At the same time, the inclusion of diverse communal groups in the process through which the 1931 Constitution was written made an agreement on fundamental questions difficult. The framers knew that the costs of omitting any particular worldview from the constitutional order could be fatal to its durability and performance. In order to avoid such an omission, the framers of the 1931 Constitution deployed what comparative constitutional law scholars have termed incremental tools (e.g., textual ambiguity and contradictory provisions) to avoid entrenching a particular vision of the state and/or sweeping under the rug answers to controversial questions that had doomed the 1923 Constitution.<sup>76</sup>

Notably, the deployment of incremental strategies and the involvement of a broad cross-section of powerful actors in the drafting process produced a constitution that inevitably lacked logical consistency, internal harmony, and textual clarity. For example, the 1931 Constitution attempted to establish a parliamentary government but vested almost all political power in the monarchy. It vowed to protect liberal rights but vaguely subjected each fundamental right to comply with the *shari'a*; the document empowered the religious dignitaries to administer justice but also compelled general courts of justice to implement state law over time, thereby replacing the *Hanafi fiqh* as the supreme law of the land.<sup>77</sup> It also required that state law must not contradict Islamic law but did not clarify which version (interpretation) of Islam enjoyed normative supremacy against which state laws should be judged, and who, for that matter, should ensure in practice that state law complied with Islam.<sup>78</sup> No aspect of the Constitution seemed complete or definitive; instead, the document was riddled with ambiguities and contrasting provisions.

Hence, scholars have belittled the 1931 Constitution as a “hodgepodge of unworkable elements,”<sup>79</sup> an “uncomfortable” and “unworkable duality” of religious

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<sup>74</sup> MOHAMMAD ALI, PROGRESSIVE AFGHANISTAN 190 (1933); see also Wilber, *supra* note 72, at 43; OLESEN, *supra* note 31, at 184; GREGORIAN, *supra* note 21, at 299.

<sup>75</sup> Tarzi, *supra* note 36, at 215.

<sup>76</sup> Pasarlay, *supra* note 7, at 306; see LERNER, *supra* note 12 (describing incremental constitution-making)

<sup>77</sup> DUPREE, *supra* note 6, at 471.

<sup>78</sup> Pasarlay, *supra* note 7, at 298.

<sup>79</sup> DUPREE, *supra* note 6, at 464.



and democratic legitimacy,<sup>80</sup> and a “step backward” in Afghan constitutionalism.<sup>81</sup> The document has been the subject of such bitter disdain because of its discordant content and its methodological laxity. However, seen from the prism of constitutional performance theory, the 1931 document is anything but a failed constitution. Its ambiguities and its ostensibly conflicting provisions “reflected the fact that Nadir Shāh was trying to placate simultaneously [several powerful groups including] the modernists, the clergy and the tribes by evoking values and concepts from their respective, separate discourses.”<sup>82</sup> Ratifying this Constitution was no less a task than “squaring of the circle” and the outcome expectedly lacked logical consistency and methodological perfection.<sup>83</sup> In fact, what historians have viewed as contradictory elements within the Constitution is something that constitutional theorists may recognize as incremental constitutional strategies or constitutional deferrals<sup>84</sup> — deliberate choices the framers made to create enough stakes within the constitutional order that all actors involved in its drafting had the incentive to preserve it. Without these incremental tools, ratifying the 1931 Constitution seemed extremely daunting at best.

The 1931 Constitution survived for thirty-three years, becoming Afghanistan’s longest-lived constitution, and surpassing the average lifespan of constitutions around the world by nearly a decade and a half.<sup>85</sup> It also performed better in actual, lived governance by providing a helpful framework for lessening conflict between the king and the powerful religious and tribal leaders — a conflict that had in the past wrecked monarchies and caused regular rebellions. The ambiguous settlements under the 1931 Constitution created a useful framework in which each powerful faction had more to gain from remaining within the constitutional order than by opting to violently remove it. The rules of the 1931 Constitution were written in a way that left sufficient room to substitute the utter violence experienced twice under the 1923 Constitution with accommodation through appointments to various state institutions. Among these institutions was a House of Nobles, which Nadir filled with figures who might have engaged in violence if stripped of political influence.<sup>86</sup>

Most importantly, under the 1931 constitutional order, a *Loya Jirga* of nearly all relevant socio-political groups ensured that no changes were made to the constitutional order without their consent.<sup>87</sup> This *Loya Jirga* of prominent groups would be convened every three years to evaluate and confirm changes to the

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<sup>80</sup> JONATHAN LEE, *AFGHANISTAN: A HISTORY FROM 1260 TO THE PRESENT* 514–515 (2018).

<sup>81</sup> Fausto Biloslavo, *The Afghan Constitution Between Hope and Fear*, 1 *CEMISS QUARTERLY* 61, 62 (2004).

<sup>82</sup> OLESEN, *supra* note 31, at 178.

<sup>83</sup> *Id.* at 178–179.

<sup>84</sup> Dixon, *supra* note 12, at 20; *see also* Rosalind Dixon & Tom Ginsburg, *Deciding not to Decide: Deferral in Constitutional Design*, 9 *INT’L. J. OF CON. L.* 636 (2011).

<sup>85</sup> Pasarlay, *supra* note 7.

<sup>86</sup> *Id.* *See also* GREGORIAN, *supra* note 21, at 294.

<sup>87</sup> GREGORIAN, *supra* note 21, at 305; DUPREE, *supra* note 6, at 469.

Constitution.<sup>88</sup> Therefore, the 1931 constitutional scheme not only permitted extant social forces to have a say in changes to the status quo, but also created stakes for groups who might rise to prominence after the constitutional founding to play by its rules because the formal constitutional process was open to them as well. These concessions were, *indeed*, necessary if the new Constitution was to survive in a society whose constitutive communities had just rebelled against a constitutional order that had offended their values. These communities thus concluded that their interests were served better by working under the new constitutional scheme than by attempting to violently remove it.

Tellingly, addressing political conflict through peaceful routes was not the Constitution's only achievement. Under the terms of the 1931 Constitution, Afghanistan experienced for the first time in its history a greater measure of democracy. The Constitution provided for a directly elected national assembly (the parliament).<sup>89</sup> Although the parliament early on was filled with regional notables and the king's handpicked representatives, over time, they were unseated and replaced by the educated class elected directly by the people.<sup>90</sup> Specifically, the national assembly that the people elected in 1949, "reflected a spirit of progressive" reform and was celebrated as the "liberal parliament" owing to its highly educated, forward-looking, liberal members.<sup>91</sup> This liberal parliament began to robustly exercise its oversight power enunciated in the Constitution and subjected cabinet members to stringent questioning and accountability.<sup>92</sup> The liberal parliament adopted a press law that guaranteed freedom of speech; the press law and the government's tolerance for freedom of opinion and organization provided a breeding ground for independent newspapers and media outlets where fiery opinions critical of the government and the monarchy were published regularly.<sup>93</sup>

Crucially, several political groupings, which developed into proper political parties in the second half of the 20<sup>th</sup> century, began to steadily take hold under the terms of the 1931 Constitution. These movements subscribed to "Islamist," "leftist," and liberal political platforms.<sup>94</sup> Most "advocated a constitutional monarchy, the separation of powers, free elections and [broader] civil liberties."<sup>95</sup> Even the ruling elites trumpeted its political platform through the

<sup>88</sup> ALI, *supra* note 74, at 191; GREGORIAN, *supra* note 21, at 305.

<sup>89</sup> OSOLNĀMNĀMAH-'I ASĀSI-'I DAWLAT-I 'ALĪYAH-'I AFGHĀNISTĀN [CONSTITUTION OF AFGHANISTAN] 1931, arts. 20, 30.

<sup>90</sup> WILBER, AFGHANISTAN, *supra* note 66, at 147.

<sup>91</sup> *Id.*

<sup>92</sup> Hafizullah Emad, *Establishment of Afghanistan's Parliament and the Role of Women Parliamentarians: Retrospect and Prospects*, 39 INTERNATIONALES ASIENFORUM 5, 8–9 (2008); DUPREE, *supra* note 6, at 495–496.

<sup>93</sup> WILBER, AFGHANISTAN, *supra* note 66, at 148; DUPREE, *supra* note 6, at 495; HAFIZULLAH EMADI, DYNAMICS OF POLITICAL DEVELOPMENT IN AFGHANISTAN: THE BRITISH, RUSSIAN AND AMERICAN INVASIONS 1, 11 (2010).

<sup>94</sup> Thomas Rutting, *Islamists, Leftists – and a Void in the Center. Afghanistan's Political Parties and where they come from (1902-2006)*, KONRAD ADENAUER FOUNDATION (2006), at [https://www.kas.de/c/document\\_library/get\\_file?uuid=3ed251b2-1783-f26b-3882-88e7872886ba&groupId=252038](https://www.kas.de/c/document_library/get_file?uuid=3ed251b2-1783-f26b-3882-88e7872886ba&groupId=252038).

<sup>95</sup> *Id.* at 4; *see* EMADI, *supra* note 93, at 11 for more details.

formation of a political party, the National Democratic Party.<sup>96</sup> Although these nascent political movements were under occasional pressure from the monarchy, they did transform the way politics were contested in Afghanistan. Members of these movements contested elections on clear political agendas and articulated vibrant policies that included, among others, respect for fundamental rights and a more accountable government.<sup>97</sup> In fact, it was the 1931 Constitution that provided the foundation for what is known as the “Decade of Democracy” in Afghanistan — the period from 1963 to 1973 in which a liberal constitution was ratified and a popularly elected and vibrant, though disorganized, parliament exercised significant legislative and oversight power.<sup>98</sup>

No other constitution in Afghan history has generated as useful outcomes as did the 1931 Constitution. It was a constitution that not only endured but also gradually achieved the results the 1923 Constitution had failed to generate. It was precisely because of an inclusive process, engagement with private interests, and the framers’ choice to deploy incremental tools that allowed the 1931 Constitution to promote peaceful politics for more than three decades. In fact, the 1931 constitution-making process was such that it enabled ethno-religious leaders to create a document that offered gains to any group who decided to abide by its terms. Its incremental approach did not entrench any vision of the state but signaled to all pertinent actors that they could realize their goals through the ordinary political process if they chose to accept the Constitution’s terms. It was no accident therefore that the 1931 Constitution survived and secured peace for such a long period. By the time it was replaced in 1964, Afghanistan was ready to begin its life as a parliamentary democracy, but the 1931 Constitution’s gains would be lost under a new constitution that was drafted through a process that was not inclusive of those factions that could wreck any constitutional order that did not sufficiently honor their commitments and interests.

### **C. Constitution-Making as Self-Interested Exclusion of Others: The Drafting of the 1964 Constitution**

Nadir Shah was assassinated in 1933, and his nineteen-year-old son, Zahir Shah, became king. Nevertheless, Zahir Shah’s uncles, Mohammad Hashim and Shah Mahmud, who served as prime ministers from 1933 to 1946 and 1946 to 1953, respectively, exercised substantial executive power. In 1953, the king’s cousin, Mohammad Daoud Khan, became prime minister. Daoud pursued an ambitious socio-economic reform policy.<sup>99</sup> He seemed ready to upend the political structure written in the 1931 Constitution. Specifically, Daoud opposed the extensive

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<sup>96</sup> WILBER, *AFGHANISTAN*, *supra* note 66, at 148.

<sup>97</sup> ABDUL HAMEED MUBAREZ, *TAHLIL-I WAQ’AT-I SIYASI-YE AFGHANISTAN: 1919-1996* [ANALYSIS OF POLITICAL DEVELOPMENTS IN AFGHANISTAN] 141–142 (1996).

<sup>98</sup> See Marvin Weinbaum, *Nonparty Parliamentary Democracy*, 7 *THE J. OF DEVELOPING AREAS* 57 (1972) for a detailed description of the parliament, and its workings during this period.

<sup>99</sup> EMADI, *supra* note 93, at 59.

authorities that the king and the tribal aristocrats exercised under the 1931 Constitution and derided its ambiguous and contradictory provisions; he desired to replace the 1931 Constitution with one in which the king would be a ceremonial head of state while the executive power would rest with the prime minister.<sup>100</sup> Daoud inveighed that the system under the 1931 Constitution was feudalistic and that it was time to establish a “constitutional monarchy” or a “parliamentary democracy” in Afghanistan.<sup>101</sup> He presented to the king a draft constitution that reflected the Premier’s constitutional vision.<sup>102</sup> Zahir Shah, however, viewed Daoud’s motives with suspicion and feared that the monarch would lose power if Daoud remained prime minister. The king thus asked his prime minister to step down.<sup>103</sup> Daoud resigned in 1963, but he was hopeful that the king would implement the constitutional reforms that he had proposed. He wished to run for political office again as the leader of a political party under a new constitutional paradigm that Daoud believed would create a parliamentary monarchy.<sup>104</sup>

Daoud trusted that the king would not take a different route than the path the Premier had put forward in his draft constitutional blueprint. Therefore, he accepted a request from the king to “assume a reclusive lifestyle” and temporarily abandon political activities “for the sake of political continuity and stability.”<sup>105</sup> Daoud believed he and the king had a “gentlemen’s agreement” under which Daoud moved away from the political limelight so that the king could assume his central role in politics. The king, for his end of the bargain, would, Daoud believed, effectuate the constitutional reform the latter had suggested — a constitutional monarchy where the king would only be a symbolic head of state.<sup>106</sup> The king’s entourage, however, had other plans; they wished to lessen Daoud’s access to political power in all possible ways. They would proceed with such constitutional reforms that completely excluded Daoud from the political process.

With Daoud in the shadows, the king, in March 1963, appointed a committee of seven experts to draft a “new liberalized constitution.”<sup>107</sup> The Constitutional Drafting Committee (the Committee) included individuals who shared the king’s vision of a constitutional monarchy in which the monarch would not be a ceremonial head of state but would wield ultimate political authority. It included no members from the Daoud camp or figures who championed alternative worldviews, chiefly a parliamentary system in which political parties exercised the

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<sup>100</sup> Mohammad Hasan Kakar, *The Fall of the Afghan Monarchy in 1973*, 9 INT’L. J. OF MIDDLE E. STUD. 195, 199 (1978); see also MUBAREZ, *supra* note 97, at 209, 212.

<sup>101</sup> MUBAREZ, *supra* note 97, at 209.

<sup>102</sup> DUPREE, *supra* note 6, at 566; SAYED QASSEM RISHTYA, AFGHANISTAN: THE MAKING OF THE 1964 CONSTITUTION 39 (Leila Rishtya Enayat-Seraj, trans., 2005).

<sup>103</sup> SABAHUDDIN KUSHKAKI, DAHA-YE QANUN-E ASSASI [DECADE OF THE CONSTITUTION] 12–13 (1986) (describing how some observers report that Daoud’s souring relationship with Pakistan over the issue of Pashtunistan that led to the closure of the Afghanistan-Pakistan border — a move that hurt Afghanistan economically — was a key reason for Daoud’s resignation); see DUPREE, *supra* note 6, at 554.

<sup>104</sup> KHUSHKAKI, *supra* note 103, at 15.

<sup>105</sup> SAIKAL, *supra* note 20, at 14.

<sup>106</sup> *Id.*

<sup>107</sup> DUPREE, *supra* note 6, at 565–566; RISHTYA, *supra* note 102, at 10–11.

freedom to elect the government without the monarch's assent.<sup>108</sup> Daoud initially believed that the Committee might evaluate his draft constitution and prepare a fundamental charter based on his suggestions, but the Committee included figures who had opposed Daoud's constitutional vision due to its authoritarian disposition; many members of the Committee were thus viewed less approvingly by the former Premier.<sup>109</sup>

In February 1964, the Committee wrote the first draft of the new constitution. Inevitably, the draft included a provision that eliminated any formal routes that Daoud could use to return to politics. The draft's article twenty-four stated that members of the Royal Family should not become prime minister, minister, justice of the Supreme Court, or members of the parliament.<sup>110</sup> The drafters argued that article twenty-four was an important part of transitioning to a constitutional monarchy; according to them, "the principle that any participation in the Government of members of the Royal Family, in whatever form or appellation and under whatever condition, will abrogate the basic principle of the separation of powers, which in fact, is the only significant difference between" the new constitution and its predecessor, the 1931 Constitution.<sup>111</sup> In other words, the framers argued that banning members of the Royal Family from party politics was necessary to separate the monarchy from partisanship and to entrench a version of separation of powers. The drafters, however, failed blatantly to illustrate how exactly such a ban on the members of the Royal Family would promote the separation of powers or constitute a necessary step for a constitutional monarchy based on some versions of separation of powers where the monarch wielded significant authoritarian powers. Their arguments thus seemed questionable at best. The true purpose of article twenty-four, of course, was something else: to block Daoud's pathway to political influence.

Although Daoud was precluded from partaking in the drafting process, King Zahir Shah sought his former Premier's opinion on the draft constitution.<sup>112</sup> The king had hoped that such a gesture might win Daoud's acquiescence to the new constitutional paradigm. Unsurprisingly, Daoud suggested that he would acquiesce only if the ban on the members of the Royal Family was removed.<sup>113</sup> The king's loyalists in the Drafting Committee rejected Daoud's request.<sup>114</sup> Thereafter, the king appointed a larger Constitutional Advisory Committee (CAC) to revise the draft constitution, but it included no representatives from the Daoud camp or the emerging diverse political groupings. Hence, article twenty-four and the supremacy of the monarchy remained intact. The CAC read every article of the draft and voted to approve each by a simple majority rather than by consensus.<sup>115</sup> Any views in the minority were effectively overlooked.

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<sup>108</sup> KUSHKAKI, *supra* note 103, at 10; Kakar, *supra* note 100, at 198–199.

<sup>109</sup> KUSHKAKI, *supra* note 103, at 14.

<sup>110</sup> DUPREE, *supra* note 6, at 576; *see also* KUSHKAKI, *supra* note 103, at 16.

<sup>111</sup> RISHTYA, *supra* note 102, at 68.

<sup>112</sup> *Id.* at 59; *see also* FARHANG, *supra* note 15, at 487.

<sup>113</sup> FARHANG, *supra* note 15, at 487.

<sup>114</sup> *Id.* *See also* RISHTYA, *supra* note 102, at 50–53.

<sup>115</sup> DUPREE, *supra* note 6, at 567.

In September 1964, after the draft constitution was thoroughly reviewed, King Zahir Shah convened a constitutional *Loya Jirga* to ratify the new national charter. Daoud requested to participate in the *Loya Jirga* proceedings, but the king and his stalwarts were unamenable to Daoud's appeals.<sup>116</sup> With no representatives from Daoud, the *Loya Jirga* moved to further isolate the former Premier. Expecting that the *Loya Jirga* would approve the ban on the members of the Royal Family written in article twenty-four, Daoud indicated that he might form a political party to indirectly partake in the political process.<sup>117</sup> The *Loya Jirga*, however, amended article twenty-four and barred members of the Royal Family from forming political parties or becoming part of them besides the earlier prohibition on becoming prime minister or a justice of the Supreme Court.<sup>118</sup> Daoud did not hesitate to find a way around the ban; he contemplated abandoning his membership in the Royal Family to be able to contest politics under the new constitution.<sup>119</sup> But the king-dominated *Loya Jirga* was not ready to allow Daoud to return to politics in any possible way; it added another amendment to article twenty-four which made membership in the Royal Family permanent.<sup>120</sup> With this latest move against Daoud written in the draft constitution, the *Loya Jirga* ratified it on September 20, 1964, and it was promulgated by the king on October 1, 1964.

The king and his allies left Daoud and his supporters with no option to peacefully address their grievances or return to peaceful politicking. The Constitution and the process through which it was ratified essentially did violence to Daoud and other political elites who championed a different vision of the state. Daoud would not be able to resume his political career as long as the 1964 Constitution was in force. He thus felt "betrayed" and became, as one historian has said, a "sworn enemy" of the new Constitution and the political order created therein.<sup>121</sup> Other powerful figures and the leaders of nascent political groupings (e.g., the communists, the Islamists, and the nationalists) also felt threatened by the new constitutional order because it vested enormous power in the king and did not legalize political parties; they, too, "bitterly criticized" the way in which the Constitution was drafted.<sup>122</sup> Some of these political movements gathered around Daoud to consider alternative ways of returning to political standing. In short, Daoud and his allies were eagerly awaiting an opportunity to topple the constitutional order that had completely excluded them from the political process.

Despite its flawed process, the contents of the 1964 Constitution seemed attractive; it created a constitutional monarchy and separated, for the first time in Afghanistan's history, legislative, judicial, and executive power. The parliament was popularly elected and was empowered to elect the executive branch and exercise oversight functions.<sup>123</sup> The Constitution protected a long catalog of liberal

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<sup>116</sup> *Id.* at 570.

<sup>117</sup> KUSHKAKI, *supra* note 103 at 15–16.

<sup>118</sup> DUPREE, *supra* note 6, at 576.

<sup>119</sup> KUSHKAKI, *supra* note 103, at 15–16.

<sup>120</sup> DUPREE, *supra* note 6, at 576.

<sup>121</sup> KUSHKAKI, *supra* note 103, at 16.

<sup>122</sup> LEE, *supra* note 80, at 566.

<sup>123</sup> CONSTITUTION OF AFGHANISTAN 1964, title 4.

rights and guaranteed religious freedom for those who followed a religion other than Islam. It was the first constitution that instituted the normative supremacy of state law (legislation adopted by the parliament and signed by the king) over uncodified Islamic *fiqh*. Further, Zahir Shah's Constitution instructed courts to resolve disputes based on state law and turn to *Hanafi fiqh* only in cases for which state law provided no guidance.<sup>124</sup> Article 64 of the Constitution stated that no "law shall be contradictory to the basics [*assāsāt*] of the sacred religion of Islam and other values enshrined in the Constitution."<sup>125</sup> While under the 1931 constitutional order, the *Jami'yat-i 'Ulama*, a traditionalist religious body, reviewed the consistency of state law with Islamic dicta, the text of the 1964 Constitution included no indication regarding what institution would exercise this prerogative. In practice, however, a "secular" institution, the Bureau of Legislation within the Ministry of Justice, performed an abstract review to ensure state law did not contradict the "basics of Islam,"<sup>126</sup> an arrangement praised as the "finest formula for the reconciliation of Islam and constitutionalism" in the Muslim world.<sup>127</sup> The content of the Constitution thus tilted heavily towards liberal, democratic values as opposed to conservative religious norms.

The 1964 Constitution is thus lionized in the literature as the "finest in the Muslim world,"<sup>128</sup> a "cherished symbol,"<sup>129</sup> a "liberal, enlightened, forward-looking, comprehensive and definitive"<sup>130</sup> constitution that "set a progressive orientation for the future,"<sup>131</sup> and a valuable case of the "meeting of liberal constitutionalism and Islamic modernism."<sup>132</sup> Furthermore, the decade 1964–1973, during which the 1964 Constitution remained in force, is often referred to as the "Decade of Democracy" or the "new democracy" in Afghanistan.<sup>133</sup> If constitutions are judged normatively by their liberal content or methodological soundness, then the 1964 Constitution may deserve the praise that is abundantly bestowed upon it. However, if one measures this Constitution against some useful outcomes that successful constitutions tend to generate, then it scores spectacularly low.

Unlike the 1931 Constitution, the 1964 Constitution was not only short-lived (surviving only nine years), but it also proved ineffective in addressing political conflict through formal constitutional mechanisms. In fact, the Constitution itself was one of the driving factors in the growing political rifts within

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<sup>124</sup> *Id.* art. 102.

<sup>125</sup> *Id.* art. 64. Italics added.

<sup>126</sup> DUPREE, *supra* note 6, at 580; Said Amir Arjomand, *Constitutional Developments in Afghanistan: A Comparative and Historical Perspective*, 53 *DRAKE L. REV.* 943, 953 (2005).

<sup>127</sup> Arjomand, *supra* note 126, at 952.

<sup>128</sup> DUPREE, *supra* note 6, at 565.

<sup>129</sup> Ebrahim Afsah, *Afghanistan: An Aborted Beginning*, in *CONSTITUTIONAL FOUNDINGS IN SOUTH ASIA* 261 (Kevin Tan & Ridwanul Hoque eds., 2021).

<sup>130</sup> Donald Wilber, *Constitution of Afghanistan*, 19 *MIDDLE E. J.* 215, 216 (1965).

<sup>131</sup> RISHTYA, *supra* note 102, at 42.

<sup>132</sup> Arjomand, *supra* note 126, at 952.

<sup>133</sup> Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 *N. Y. L. SCH. L. REV.* 558, 560 (2007).

the Royal Family and between the monarchy and the nascent political movements. Additionally, the decade (1964–1973) throughout which the Constitution remained in force was a period of profound political instability. Afghanistan saw five prime ministers within a period of less than ten years. Although the parliament was aggressive in exercising its mandate, it remained highly disorganized, undisciplined, and unable to act as a coordinated branch of the government.<sup>134</sup> Political gridlock and government weakness plagued the entire decade of the constitution. The king, on his part, did nothing to stabilize politics; in fact, he misused his constitutional powers and refused to ratify the crucial law of the political parties that the parliament had passed as mandated by the Constitution.<sup>135</sup> The government essentially did not enjoy any lasting coordinated support within the parliament. As a result, resentment toward the monarchy and its founding charter grew swiftly and violently.

Most importantly, because the Constitution left Daoud with no avenue to contest politics peacefully under its term, the former Premier had no option but to capture power through violent means. The growing antipathy with a dysfunctional constitutional monarchy created an opening for which Daoud had longed since the creation of the Constitution. In 1973, the leaders of the disgruntled political groupings, particularly the communist party, joined hands with Daoud and toppled the monarchy in a coup, and abrogated its founding Constitution.<sup>136</sup>

Although constitutions, by themselves, may not be held responsible for a state's collapse, it is hard not to blame the fall of the Afghan monarchy on its founding charter and the process that produced it. That process suffered from two fatal flaws: (1) it was exclusive, meaning that it did not include as many stakeholders (figures such as Daoud) as required to preserve the constitutional order; and (2) the constitutional process dismissed private interests and was not responsive to the interests of all pertinent actors. The framers of the 1964 Constitution favored internal harmony, textual clarity, and methodological rigor over incremental tools. The result was a constitutional order that entrenched the king and his liberal protégés' vision of the state at the expense of alternative viewpoints.

Unlike its predecessor, the 1964 Constitution thus created no institution that the king's powerful rivals could realistically influence. Although some of the disgruntled political factions were vocal in the parliament, the king's blatant refusal to ratify the law of political parties drafted pursuant to the 1964 Constitution robbed these factions of an opportunity to organize cohesive and disciplined political parties within the parliament. Without the law of the political parties, these movements found it hard to influence the political process and cycle to power in a competitive political environment. Consequently, for most of these factions, the costs of abiding by the Constitution far outweighed the costs of rebellion. Put differently, a broad cross-section of political elites concluded that they were better off without the Constitution, and that their interests were richly served by trying to

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<sup>134</sup> See Weinbaum, *supra* note 98.

<sup>135</sup> *Id.* at 61; see also EMADI, *supra* note 93, at 70, 77.

<sup>136</sup> SAIKAL, *supra* note 20, at 134.



replace it. Unsurprisingly, when the Constitution made peaceful politics impossible, violent politics became inevitable. The 1964 constitutional order collapsed not because Daoud and his allies focused on self-interested, short-term goals, as many have claimed; it failed simply because the constitutional process did everything to ensure that the king's opponents did not realize their interests through formal institutional means.

### **III. POLITICAL TURMOIL, COUPS, AND THE MAKING OF SHORT-LIVED IDEOLOGICAL CONSTITUTIONS: 1977-1990**

The fall of the 1964 constitutional order ushered in more than three decades of political unrest and a civil war in the mid-1990s. Throughout this time, a series of ideologically motivated groups took control of Kabul by engineering a coup or winning a civil war.<sup>137</sup> Each crafted a constitution that they hoped would legitimize their rule throughout the country and delegitimize their rivals. Nearly all constitutional processes during this period were dominated by the group which controlled Kabul, excluding actors who controlled the countryside and wielded sufficient power to tear down any constitutional order that did not value their interests. Constitutions in this period were not only short-lived, but they also exacerbated the very sources of conflict that they aimed to remedy. During this period, all constitutions and the processes that produced them were failed undertakings by all metrics.

After overthrowing the monarchy, Daoud declared a republic with himself as its founding president. He did not initially draft a new constitution, rather, he opted to govern by executive decrees of constitutional nature.<sup>138</sup> Later, Daoud turned his attention to writing a constitution for two reasons: (1) to give his republican system a constitutional founding and legitimacy; and (2) to formally adopt constitutional restrictions on his opponents' access to political power, particularly, the communist Peoples Democratic Party of Afghanistan (PDPA), a party that had helped Daoud overthrow the monarchy in 1973.<sup>139</sup> In March 1976, Daoud appointed a 20-member Constitutional Study and Review Committee (CSRC) to revise a draft constitution that was prepared already by a commission comprised of Daoud's cabinet.<sup>140</sup> The CSRC was not inclusive and was composed only of Daoud's associates,<sup>141</sup> including individuals who were aligned ideologically

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<sup>137</sup> Pasaaray, *supra* note 2, at 120.

<sup>138</sup> In the first decree Daoud adopted, he abolished the monarchy, declared a republic and transferred all of the king's power under the 1964 Constitution to the president of the republic, Daoud himself. His other decree defined the structure of the executive branch that operated under the direct rule of the president.

<sup>139</sup> MUBAREZ, *supra* note 97, at 340.

<sup>140</sup> Louis Dupree, *Towards Representative Government in Afghanistan, Part II: Steps Six through Nine and Beyond*, American University Field Staff Reports, Asia, No. 14, 1 (1978).

<sup>141</sup> *Id.* at 2.

with Daoud's constitutional vision — a single-party, authoritarian constitutional order.<sup>142</sup>

The CSRC took four months to finalize a draft constitution. Thereafter, in January 1977, Daoud convened a constitutional *Loya Jirga* to ratify his new constitution.<sup>143</sup> This constitutional convention included 352 elected and appointed delegates. Elected members, however, were stringently vetted by the government.<sup>144</sup> Appointed members included military officers, Daoud's cabinet, members of the Supreme Court, farmers, workers, and the 20 members of CSRC.<sup>145</sup> Although Daoud had symbolically signaled that all political factions, including the two most powerful movements of the time, the communists (backed strongly by the Soviet Union) and the Islamists, were free to contest elections for the *Loya Jirga*; no political movement decided to partake in the process.<sup>146</sup> The communists, a one-time Daoud ally, feared they would be completely ignored in the new constitutional order; they did not want to legitimize it by participating.<sup>147</sup> They chose to boycott the process. Daoud's authoritarian rule had already compelled the Islamist party to armed battles in some parts of the countryside. They were not participants in Daoud's constitutional convention either.

In February 1977, the *Loya Jirga* approved the new constitution, which entrenched Daoud's long-held faith in a highly centralized, single-party, presidential executive. The 1977 Constitution gave the president widespread powers that he could, in theory, abuse, and Daoud's actions did suggest that he was inclined to abuse his powers and suppress those who opposed his constitutional vision.<sup>148</sup> The Constitution not only created an authoritarian president but also codified an electoral system for presidential elections under which only Daoud could easily become president. It provided that the president should be elected with a two-thirds majority vote of the members of the *Loya Jirga*, which functioned as an electoral college. This constitutionalized *Loya Jirga* was comprised of the members of the *Milli Jirga*, the National Assembly, members of the Central Council of Daoud's National Revolutionary Party, members of the executive branch, and the High Council of the Armed Forces.<sup>149</sup> Because all these institutions were under Daoud's direct control, to all eyes, it was clear that Daoud would remain president for as long as he wished.

Daoud had criticized the 1964 Constitution as authoritarian because it concentrated power in the monarch only, but the replacement he crafted was

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<sup>142</sup> Pasarlay, *supra* note 2, at 116 (The CSRC included 7 cabinet members, 2 army generals, 3 sitting judges, 3 university professors and the rest represented other expertise). See also FAIZAD, *supra* note 68, at 305–306.

<sup>143</sup> FAIZAD, *supra* note 68, at 307; Dupree, *supra* note 140, at 1.

<sup>144</sup> Dupree, *supra* note 140, at 1.

<sup>145</sup> FAIZAD, *supra* note 68, at 308; Dupree, *supra* note 140, at 2.

<sup>146</sup> Dupree, *supra* note 140, at 1.

<sup>147</sup> *Id.* See also SAIKAL, *supra* note 20, at 181–182.

<sup>148</sup> Pasarlay, *supra* note 2, at 119.

<sup>149</sup> Constitution of Afghanistan (1977), art. 65.

outright autocratic.<sup>150</sup> It ignored the interests of powerful political actors who had the ability to threaten Daoud's authoritarian ambitions. The 1977 Constitution created no stakes to incentivize peaceful political discourse; instead, it only aggravated conflict in an already perilous political environment. Therefore, political factions left outside the constitutional scheme began to look outside the constitutional framework to ascend to political supremacy. Anticipating growing opposition to his authoritarian rule, Daoud moved to suppress his main opponents, the communists and the Islamists. Daoud had already weakened the Islamists by jailing and exiling their leaders, but the communists had embedded themselves too deeply in the military apparatus to be removed easily.<sup>151</sup> When Daoud arrested the communist leaders to eliminate all potential threats to his authoritarian rule, the communists' sympathizers in the military staged a ruthless coup, killing Daoud and several members of his family.<sup>152</sup> The 1977 Constitution was thus abrogated in less than a year since its adoption, thereby becoming Afghanistan's shortest-lived constitution.

Afghanistan fell to the *Khalq* (masses) faction of the communist party in 1978, and the party chairman, Noor Mohammad Taraki, became president. The communist government did not instantly adopt a formal constitution, but it formed a Revolutionary Council (RC) under the leadership of Taraki to govern the country through executive decrees.<sup>153</sup> The communists were quick to implement some wide-ranging reforms aimed at transforming Afghanistan's deeply Islamic society along socialist lines. The hasty reforms, however, flared strong resistance all over the country.<sup>154</sup> The communist government responded with violence and persecuted anyone who condemned their policies. For ideological reasons, the Islamists were the subject of the communist government's particular wrath as it chose to execute those Islamist leaders who were imprisoned under Daoud.<sup>155</sup> In response, the Islamists, both *Sunni*, and *Shi'i*, mobilized in the countryside as well as in Pakistan and began to effectively challenge the communist rule.<sup>156</sup> As a result, the communist government lost control of the countryside, and sporadic revolts

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<sup>150</sup> M.S. Agwami, *Saur Revolution and After*, 9 INT'L. STUD. 557, 559 (1980); Pasarlay, *supra* note 2, at 118.

<sup>151</sup> SAIKAL, *supra* note 20, at 183.

<sup>152</sup> A complete and thorough account of the coup against Daoud is provided in SAIKAL, *supra* note 20, at 183.

<sup>153</sup> Mohammad Nazif Shahrani, *Introduction: Marxist "Revolution" and Islamic Resistance in Afghanistan*, in *REVOLUTIONS & REBELLION IN AFGHANISTAN: ANTHROPOLOGICAL PERSPECTIVES* 12–18 (Mohammad Nazif Shahrani & Robert Canfield eds., 1984); GILES DORRONSORO, *REVOLUTION UNENDING: AFGHANISTAN, 1979 TO THE PRESENT*, 86 (2005).

<sup>154</sup> Senzil Nawid, *Comparing the Regimes of Amanullah (1919–29) and the Afghan Marxists (1978–92): Similarities and differences*, 2 CRITIQUE: CRITICAL MIDDLE E. STUD. 15, 25–26 (2007).

<sup>155</sup> DORRONSORO, *supra* note 153, at 96; *see also* THOMAS BARFIELD, *AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY*, 228 (2010); MUBAREZ, *supra* note 97, at 383.

<sup>156</sup> For a detailed analysis of the Afghan Islamist movements and their resistance against the PDPA and the Soviet invasion, *see* OLIVER ROY, *ISLAM AND RESISTANCE IN AFGHANISTAN* (1990).

against the communist regime turned into a wholesale uprising towards the end of 1978.

As the communists' grip on the country weakened, the Soviet Union began to pour money, weapons, and advisors into the communist government to prevent its collapse. At the same time, an internal rift between the *Khalq* leaders, president and prime minister, Taraki, and deputy prime minister, Hafizullah Amin, sowed tensions in the Soviet Union. Amin, who became prime minister in March 1979, worked covertly within the party to replace Taraki as the chairman of the PDPA, the communist party.<sup>157</sup> The Soviets viewed Amin less favorably because of his apparent amenability to U.S. influence.<sup>158</sup> Taraki thus conspired with the Soviets to have Amin killed, but Amin ultimately triumphed in this battle and arrested Taraki, who was later killed in custody.<sup>159</sup> Amin became president, and he appointed a commission of his close confidants to draft a constitution, a plan that was never realized.<sup>160</sup> The Soviets, suspicious of Amin's loyalty and the weakening of their installed government in Kabul, invaded Afghanistan in December 1979.<sup>161</sup> They inaugurated the chairman of the *Parcham* (flag) faction of the PDPA, Babrak Karmal, as the new president of Afghanistan in 1980. To battle the Soviet invasion, the U.S. government began to arm the Islamist parties, whose leaders had taken refuge in Pakistan. The U.S. arms to the Islamist parties were channeled primarily through the Pakistani security establishment.

President Karmal adopted an interim constitution in 1980. This constitution did not have a distinct process. Like other ordinary laws and decrees, the Revolutionary Council drafted the Constitution, which was then submitted to the Council of Ministers for review.<sup>162</sup> Thereafter, the Revolutionary Council ratified the Constitution and asserted in a declaration published in the Official Gazette that the new constitution had been ratified to protect the rights and interests of the workers and farmers.<sup>163</sup> It also stated that the document had been adopted in "strict adherence to the sacred religion of Islam."<sup>164</sup> Islam, however, was not featured in the Constitution at all.

The 1980 Constitution was ratified at a time when the Soviets had occupied Afghanistan, and the Islamists' *jihad* (holy war) was gaining momentum and international support. The government used the constitutional process and the outcome to try to weaken the Islamists and bolster its own legitimacy. However, the process and the document gave the Islamists more reasons to fight the Soviets and its ordained regime in Kabul. The Interim 1980 Constitution remained in force until 1987 under the Soviet's strong protection of its authoring regime. At this time,

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<sup>157</sup> DORRONSORO, *supra* note 153, at 89–90.

<sup>158</sup> BARFIELD, *supra* note 155, at 233–234 (noting that the US had no intentions to view Amin as a potential ally, and Amin had nothing special to offer in meetings with US officials but have a cup of tea).

<sup>159</sup> MUBAREZ, *supra* note 97, at 410; DORRONSORO, *supra* note 153, at 90.

<sup>160</sup> Pasarlay, *supra* note 2, at 122.

<sup>161</sup> BARFIELD, *supra* note 155, at 234; DORRONSORO, *supra* note 153, at 91–92.

<sup>162</sup> Pasarlay, *supra* note 2, at 124.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

Karmal appointed a new commission to draft a permanent constitution, but shortly thereafter, the Soviets announced withdrawal from Afghanistan, and Mohammad Najibullah replaced Karmal as president.<sup>165</sup> Najibullah seemed to appeal to the Islamists to lay down arms and peacefully contest politics once the Soviets withdrew. The Islamists, who were on the verge of a total victory, refused to disarm and continued their violent ways of taking power. President Najibullah then turned to the constitution-making process and tried to use it in a conciliatory manner to give the regime's powerful opponents incentives to contest politics peacefully under the terms of a mutually acceptable constitution. He added 13 new members, most of whom were religious scholars and tribal elders, to Karmal's constitutional drafting commission, in the hopes that such a process might allay the resistance.<sup>166</sup>

Najibullah's commission prepared a newly revised constitution and presented it to a constitutional *Loya Jirga* for approval. Although President Najibullah was willing to allow the Islamists to partake in the constitutional process, the Islamist leaders refused to participate and continued to resist the regime through military means.<sup>167</sup> The *Loya Jirga* adopted the Constitution in 1987. The new constitution made considerable concessions to the groups who were fighting the government. It created a bicameral parliament whose members would be elected through popular election. The executive, legislative, and judicial branches were to be peopled by individuals who were not necessarily affiliated with the PDPA party.<sup>168</sup> The Constitution also denounced the single-party system and replaced it with political pluralism and revitalized constitutional commitments to Islam — something that was abandoned in the 1980 Constitution.

The concessions that the new Constitution made were genuine and were crafted as part of a national reconciliation process that the President had initiated.<sup>169</sup> The hope was that the new constitution would incentivize the armed Islamists to turn to peaceful discourse. Nevertheless, it was too late for such a conciliatory process to have a real impact. After all, inclusion proved unhelpful given the level of violence and mistrust that had plagued the country for nearly a decade. Additionally, these efforts for inclusion came at a time when the Kabul government had steadily declined. Its control was limited only to Kabul and its vicinities, with the Islamist parties waiting to be crowned the winners of the war against the Soviets and installing an Islamic government. President Najibullah did not give up; he made further attempts to amend the Constitution to incentivize obedience to its norms. In 1990, he appointed yet another commission to draft amendments to the

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<sup>165</sup> Decree of the Revolutionary Council of the Democratic Republic of Afghanistan on the formation of the Constitutional Drafting Commission of the Democratic Republic of Afghanistan, Official Gazette No. 615 (1985); Pasarlay, *supra* note 2 at 126.

<sup>166</sup> Decree of the Revolutionary Council of Democratic Republic of Afghanistan on the Amendment of the Fundamental Principles of the Democratic Republic of Afghanistan, Official Gazette No. 656 (1987).

<sup>167</sup> Pasarlay, *supra* note 47.

<sup>168</sup> Pasarlay, *supra* note 2, at 128.

<sup>169</sup> Pasarlay, *supra* note 47.

1987 Constitution.<sup>170</sup> The amendments were later ratified at a constitutional *Loya Jirga*. These changes were intended to further Islamize the Constitution to lessen opposition to the constitutional order.<sup>171</sup> By this time, however, Soviet assistance to the Kabul government had stopped, and the government of Najibullah had been sufficiently weakened and could not enforce the Constitution. Najibullah's government fell in 1992 and was replaced by an interim government formed by an alliance of the Islamist parties, known as the *mujahidin* (holy warriors).

#### IV. "CONFLICT CONSTITUTION-MAKING": THE FAILED (MUJAHIDIN) 1993 CONSTITUTION WRITING PROCESS

The Afghan *mujahidin* were a loose coalition of Islamist movements that had emerged in the 1960s. These groupings included seven prominent *Sunni* factions based in Pakistan and three significant *Shi'i* parties based primarily in Iran.<sup>172</sup> The *Sunni* parties included the following: *Jami'at-i Islami* (Islamic Society), headed by Burhanuddin Rabbani; *Hizb-i Islami* (Islamic Party), helmed by Gulbuddin Hekmatyar; *Harakat-i Inqilab-i Islami* (Islamic Revolutionary Movement), led by Mohammad Nabi Mohammadi; a breakaway faction of *Hizb-i Islami* (Islamic Party), headed by Mohammad Younus Khaled; *Jabha-ye Nejat-i Milli* (National Salvation Party), led by Sebghatullah Mojaddadi; *Mahaz-i Milli Islami* (National Islamic Movement), headed by Sayyid Ahmad Gilani; and *Ittehad-i Islami* (Islamic Unity), headed by Rasool Sayyaf.<sup>173</sup> Afghanistan's *Shi'i* communities had also organized political movements as early as 1979 in Hazarajat, a *Shi'i* stronghold.<sup>174</sup> Initially, three prominent *Shi'i* parties took central stage: Asef Mohsini's *Harakat-i Islam* (Islamic Movement), Sayyid Beheshti's *Shura-ye Inqilab-i Ittefaq Afghanistan* (Revolutionary Council of Afghanistan's Unity) and *Sazman-i Nasr-i Islami* (Islamic Victory Organization).<sup>175</sup> Throughout the Soviet occupation of Afghanistan, the *Shi'i* parties transitioned to more organized movements, shifting attention from the hitherto intra-*Shi'i* politicking and rivalries to national politics to

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<sup>170</sup> Presidential Decree No. 314 on the Formation of the Constitutional Amendment Commission, Official Gazette No. 719 (1990).

<sup>171</sup> Pasarlay, *supra* note 47.

<sup>172</sup> See ROY, *supra* note 156, at 69-83, for a complete exploration of these parties, their structure, organization, and ideological commitments; see also BASIR AHMAD DAWLATABADI, SHINASAMA-YE AHZAB WA JIRYANNAT SIYASI AFGHANISTAN [INTRODUCTION TO THE POLITICAL MOVEMENTS OF AFGHANISTAN] (1992); DORRONSORO, *supra* note 153.

<sup>173</sup> OLESEN, *supra* note 31, at 283-87; DORRONSORO, *supra* note 153, at 151. See ROY, *supra* note 156, for a detailed examination of the origins, structure, ideological background and recruitment of members; see also DAWLATABADI, *supra* note 172.

<sup>174</sup> DAWLATABADI, *supra* note 172, at 330; see NIAMATULLAH IBRAHIMI, THE HAZARAS AND THE AFGHAN STATE: REBELLION, EXCLUSION AND THE STRUGGLE FOR RECOGNITION 146-47, and chapters 4 through 6 (2017), for a thorough exploration of the *Shi'i mujahidin* political parties.

<sup>175</sup> OLESEN, *supra* note 31, at 285. See IBRAHIMI, *supra* note 174 for a detailed exploration of these parties.

compete against the growing *Sunni* domination of the political landscape in post-Soviet Afghanistan.<sup>176</sup> This forced them to rally around *Shi'i* Hazara identity and form the *Hizb-i Wahdat-i Islami* (Islamic Unity Party) in 1989. For ideological differences, however, Mohsini's party did not join the *Wahdat* party, but the rest of the smaller and fragmented *Shi'i* movements organized under the *Wahdat* umbrella.<sup>177</sup>

The *mujahidin* parties were diverse, profoundly divided, and subscribed to different (and rival) ethnic and ideological worldviews. Scholars have grouped the *Sunni mujahidin* parties into Islamist or "revolutionary" and "moderate" or "traditionalist." The former included the *Hizb-i Islami* Hekmatyar, *Jami'iyat*, the *Hizb-i Islami* Khales, and the *Ittehad* parties, while the latter included the remaining three *Sunni* parties.<sup>178</sup> For the traditionalists, *jihad* (the holy war) against the Soviets was to restore Afghanistan's liberty, defeat an invading power and revive the Afghan monarchy. The revolutionary parties, however, had far greater ambitions; they pursued an organized Islamist platform viewing the war against the Soviets not only as a struggle for Afghanistan's independence but also as an opportunity to lay the foundations of an "Islamic social and political order" in Afghanistan.<sup>179</sup>

The *Shi'i* parties were divided along primarily ideological boundaries. Mohsini's *Harakat* apparently subscribed to the politically quietist school in *Shi'ism*, whereas most of the other parties were affiliated with the thinking of Ayatollah Khomeini, the founder of the Islamic revolution in Iran, and the politically activist school.<sup>180</sup> Mohsini advanced the idea that *Shi'i* jurists should not actively partake in political affairs and focus on the religious guidance of the society, but the Khomeinists expounded the view that *Shi'i* jurists should actively be engaged in politics and guard the legitimacy of the political order — something akin to the Guardianship of the Jurist in neighboring Iran.<sup>181</sup> The divisions and

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<sup>176</sup> See SAYED ASKAR MOUSAVI, *THE HAZARAS OF AFGHANISTAN: AN HISTORICAL, CULTURAL, ECONOMIC AND POLITICAL STUDY* 179–88 (1998); see also IBRAHIMI, *supra* note 174, at 179–185.

<sup>177</sup> Niamatullah Ibrahim, *Divide and Rule: State Penetration in Hazarajat (Afghanistan) from the Monarchy to the Taliban*, CRISIS STATES RSCH. CTR, Working Paper Series, No. 2 (Paper 42) 8 (2009), available at <https://www.files.ethz.ch/isn/95939/WP42.2.pdf>. For a detailed elaboration of these ideological differences within the *Shi'i* movements and how they fractured or united the parties, see Robert Canfield, *New Trends among the Hazaras: From "The Amity of Wolves" to "The Practice of Brotherhood"*, 37 IRANIAN STUDIES 241 (2004).

<sup>178</sup> Shah M. Tarzi, *Politics of the Afghan Resistance Movement: Cleavages, Disunity, and Fragmentation*, 31 ASIAN SURV. 479, 480 (1991); Shahrani, *supra* note 153, at 45–46.

<sup>179</sup> SHAHRANI, *supra* note 153, at 45–46.

<sup>180</sup> IBRAHIMI, *supra* note 174, at chapter 4, 5; see also Shamshad Pasarlay, *Shi'i Constitutionalism in Afghanistan: A Tale of Two Draft Constitutions*, 20 AUSTRALIAN J. ASIAN L. 277 (2020).

<sup>181</sup> On these divisions and how these schools penetrated the *Shi'i* stronghold, see Niamatullah Ibrahim, *The Failure of a Clerical Proto-State: Hazarajat, 1979–1984*, CRISIS STATES RSCH. CTR., Working Paper Series, No. 2 (Paper 6) (2006) available at

conflict between these groups were so deep that they compelled these factions to go to war against each other in the pursuit of their preferred ideological state in the 1980s.<sup>182</sup> In the 1990s, the only factor that put a veneer of unity on these deep-seated ethnic and religious conflicts among the *mujahidin* factions was opposition to the Soviet-backed government in Kabul.

In 1987, when the Soviet-backed government weakened and its collapse seemed inevitable, the *Sunni* parties in Peshawar created an interim government. The Leadership Council of the interim government, which was peopled by the leaders of the seven founding *Sunni* parties, was tasked to draft a constitution in strict adherence to Islam and the *Hanafi fiqh*.<sup>183</sup> However, disagreements among party leaders drowned this interim government. In February 1989, when the Soviet withdrawal from Afghanistan was nearly complete, the *Sunni* parties convened a council (*shura*) to elect another interim government that would fill the looming political vacuum in Kabul.<sup>184</sup> This Council elected Sebghatullah Mojaddadi, leader of the *Jabha-ye Nejat-i Milli*, as president, and rewarded other offices of the executive branch to the rest of the founding parties. Like its predecessor, this interim government also succumbed to failure because of eternal squabbling among the *mujahidin* leaders over how power should be shared.<sup>185</sup> Specifically, the leaders of the *Sunni* parties were unable to resolve how to structure the executive branch, what powers its chief executive would wield, and how a new constitution should be written. Each party, including *Sunni* and *Shi'i*, had heavily armed fighters on the ground, and those with more fighters on the battlefield demanded more power in the interim government.<sup>186</sup> Establishing an inclusive government was daunting not only because of disagreements between the *Sunni* parties but also because the *Sunnis* were unwilling to share power with the powerful *Shi'i* factions.

While the *mujahidin* leaders in Pakistan were embroiled in endless bickering about how power should be shared, the fighters and commanders on the ground marched towards Kabul in 1992 after President Najibullah agreed to vacate the presidency. At this point, the *Sunni* parties formed yet another interim government, with Mojaddadi as its president. Under the founding agreement of this interim government, Mojaddadi was given a two-month term only, after which Rabbani, the head of the *Jami'yat-i Islami*, would assume the presidency for a four-month term.<sup>187</sup> When Rabbani's term ended, he declined to abandon the presidency

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<https://assets.publishing.service.gov.uk/media/57a08c47ed915d3cfd0012b4/wp6.2.pdf>; see also Canfield, *supra* note 177.

<sup>182</sup> Ibrahim, *supra* note 181.

<sup>183</sup> Article 37 of the Charter of the Islamic Interim Government cited in DAWLATABADI, *supra* note 172, at 280.

<sup>184</sup> Shah Tarzi, *supra* note 178, at 489; AMIN SAIKAL & WILLIAM MALEY, REGIME CHANGE IN AFGHANISTAN: FOREIGN INTERVENTION AND THE POLITICS OF LEGITIMACY 122–123 (1991).

<sup>185</sup> See LARRY GOODSON, AFGHANISTAN'S ENDLESS WAR: STATE FAILURE, REGIONAL POLITICS, AND THE RISE OF THE TALIBAN 71 (2001).

<sup>186</sup> SAIKAL, *supra* note 20, at 215.

<sup>187</sup> ABDUL HAMEED MUBAREZ, HAQAYIQ WA TAHLIL-I WAQA'I-YE SIYASI AFGHANISTAN: AZ SUQOT-I SALTANAT TA ZUHUR-I TALIBAN [THE REALITY AND ANALYSIS OF



and instead opted to appoint an assembly of his close loyalists, which reelected him president to a second, and longer term.<sup>188</sup> Rabbani's move enraged the leaders of other parties, who demanded that Rabbani must step down. When Rabbani refused, a wholesale civil war broke out between the *mujahidin* parties. The war compelled the *Sunni* parties to negotiate the terms of a mutually acceptable constitution that would give each group sufficient stakes to turn to peaceful politics and lay down arms. For this purpose, the *Sunni* parties concluded an agreement in Islamabad, Pakistan, in March 1993, under which Rabbani was permitted to complete an 18-month tenure as president. This time, the parties agreed that Hekmatyar, whose threats to use violence loomed large over Kabul, would be appointed as a prime minister whose term would also end within 18 months.<sup>189</sup> Crucially, the Islamabad Agreement stated that this consociational interim authority should, within eight months, appoint a constitutional assembly that would negotiate the terms of a new constitution,<sup>190</sup> preferably one that would substitute violent conflict with peaceful political disputation.

The newly reconfigured interim government did not alleviate tensions between the warring factions, and conflict remained highly flammable. Under these fraught conditions, Rabbani appointed a 44-member commission to draft a new constitution. The parties that inaugurated the constitutional process expected that the drafting of a constitution would give them an opportunity to create a power-sharing mechanism to address the causes of conflict and form institutions where conflict would be handled peacefully. Under the terms of the interim government agreement, the constitutional drafting assembly was expected to be inclusive and to represent all pertinent *mujahidin* factions. Rabbani, however, chose to appoint his own associates to the Constitutional Drafting Commission. It had no representatives from the *Shi'i* parties, which administered central Afghanistan and were supported by organized armed militias. The Drafting Commission was not inclusive sufficiently of the *Hizb* faction either, whose leader, Hekmatyar, effectively controlled the premiership and had rocket launchers pointed at Kabul.<sup>191</sup> Hence, the way the Commission was formed indicated that the process would only deepen ethno-religious and political conflict.

Unsurprisingly, the Drafting Commission produced a constitution that tilted heavily towards presidential powers and a highly centralized state dominated by *Hanafi* law. Factions who were not present in the Commission immediately rejected the draft and resentfully accused Rabbani of self-entrenchment.<sup>192</sup> Rabbani

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POLITICAL DEVELOPMENTS IN AFGHANISTAN: FROM THE FALL OF THE MONARCHY TO THE RISE OF THE TALIBAN] 70 (1999); GOODSON, *supra* note 185, at 73–74.

<sup>188</sup> GOODSON, *supra* note 185, at 74.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* See also OLESEN, *supra* note 31, at 293.

<sup>191</sup> Shamshad Pasarlay, *Islam and the Sharia in the 1993 Mujahideen Draft Constitution of Afghanistan: A Comparative Perspective*, 3 *INDON. J. INT'L. & COMP. L* 183 (2016) <https://azilliad.library.arizona.edu/illiad/pdf/2043113.pdf>.

<sup>192</sup> Anwar Iqbal, *Afghanistan's draft constitution comes under fire*, UPI (July 18, 1992) <https://www.upi.com/Archives/1992/07/18/Afghanistans-draft-constitution-comes-under-fire/7594711432000/>.

had orchestrated a presidential executive which had the power, among others, to appoint cabinet ministers, bypassing the prime minister. The *Hizb*, which had the premiership under its control, made it clear that it would not accept a constitution that weakened the prime minister. The *Hizb* desired a “constitution which create[ed] a balance of power between the president and the prime minister and not one that [gave] all the power to the president.”<sup>193</sup> The *Hizb* demanded that the prime minister must be granted the power to appoint ministers and should not be inferior to the president; but the Rabbani faction argued that if the power to appoint cabinet ministers were vested in the prime minister, the *Hizb* would exercise unwarranted advantage over other parties,<sup>194</sup> failing to notice, of course, that a powerful presidency unfairly put the Rabbani faction in a more advantaged position vis-à-vis all *mujahidin* parties. Further, the *Hizb* had another demand on the table: the Defense Ministry “should function at the behest of the Prime Minister.”<sup>195</sup> Because said ministry was already occupied by *Jami‘yat’s* military wing, it feared losing control of Kabul to the *Hizb* if it abandoned the Defense Ministry.

Other warring factions which were excluded from the process altogether proposed that executive power should be vested in neither the president nor the prime minister; instead, it should be granted to a consociational council that represented all *mujahidin* parties.<sup>196</sup> This way, they argued, the constitution would be easily ratified.<sup>197</sup> The *Hizb* highlighted that no disagreement existed on other aspects of the draft and that the only obstacle to ratifying the new charter was extensive presidential powers.<sup>198</sup> This claim, nevertheless, was not credible. The draft was not only ineffective in resolving the conflict between the *Sunnis* over the distribution of executive power, but it also failed outstandingly in giving stakes to the powerful *Shi‘i* parties.

In a hostile move towards *Shi‘i* interests, article 3 of the draft declared the *Hanafi* school as the official *maddhab* (official religious doctrine) of the state; article 5 obliged the state to legislate in line with the *Hanafi* school. Additionally, only the followers of the *Hanafi* school could become president and prime minister. The draft structured a highly centralized state, while the powerful *Shi‘i* groups had long embraced a federal state which would give them the right to continue governing the *Shi‘i* dominated regions that they had won by force and governed independently since the 1980s.<sup>199</sup> The *Shi‘i* parties thus had no impetus to accept the draft constitution. Predictably, they rejected the *Sunni* draft constitution and opted to craft a constitution of their own — one which would create a “Federal Islamic Republic” governed by both the *Hanafi* and *Shi‘i* law.<sup>200</sup>

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<sup>193</sup> *Id.*

<sup>194</sup> SAIKAL, *supra* note 20, at 215; Iqbal, *supra* note 192.

<sup>195</sup> SAIKAL, *supra* note 20, at 215.

<sup>196</sup> Pasarlay, *supra* note 191.

<sup>197</sup> Iqbal, *supra* note 192.

<sup>198</sup> *Id.*

<sup>199</sup> Draft Constitution of the Hezb-i Wahdat-i Islami Afghanistan (Wahdat Draft Constitution 1993) on file with the author.

<sup>200</sup> Pasarlay, *supra* note 180.

The *Sunni* draft constitution was signed by Rabbani and was set to be ratified at a constitutional *Loya Jirga*, but the way the draft was written and its failure to accommodate all pertinent interests suggested that the draft would not be ratified. Hekmatyar, whose demands were ignored by the Constitutional Commission, turned to force to compel the framers to enhance the powers of the prime minister and hit Kabul with relentless rocket attacks. The *Shi'i* parties, too, were ready to quell any constitutionally crafted provisions contrary to their identity and interests through military means.

Ultimately, the process for the drafting of the *mujahidin* constitution and the outcome only deepened ethnic, religious, and political conflict and added fuel to the civil war. This process was a textbook example of “conflict constitution-making” — processes that only worsen conflict instead of creating venues where political conflict can be resolved.<sup>201</sup> The drafting of the *mujahidin* constitution simply became another venue that armed actors wanted to use to maximize their interests. The process through which the *mujahidin* constitution was drafted shared none of the features of a successful constitutional process in Afghanistan. Put differently, the *mujahidin* constitutional process: (1) did not function as a venue where warring factions could negotiate a mutually advantageous constitution; (2) it exacerbated existing conflict and generated new sources of ethnic and religious tensions by entrenching the ideological underpinnings of the state championed only by the party in control of Kabul; and (3) failed to produce a written constitution.

As the *mujahidin* parties failed to peacefully resolve political conflict, they turned to violence to remove opponents through military means. As a result, the civil war entered a devastating phase in the mid-1990s. The *mujahidin* war created a breeding space for another fundamentalist Islamic movement, the Taliban. The Taliban rapidly took most of Afghanistan, but their leaders did not adopt a written constitution claiming, instead, that the *shari'a*, God’s commands, was all the constitution they needed.<sup>202</sup> Towards the end of their rule, the Taliban did draft a constitution, but before that constitution could be ratified, the Taliban were removed from power in 2001.

## V. THE MAKING OF THE 2004 CONSTITUTION: THE CENTRALITY OF INCLUSION AND INTERESTS ACCOMMODATION IN CONSTITUTIONAL CREATION

From 1994 to 2001, the Taliban governed Afghanistan through violence with no respect for laws and regulations that they, themselves, adopted.<sup>203</sup> They turned Afghanistan into a haven for global terrorists and did not heed calls from the

<sup>201</sup> Johnson, *supra* note 10, at 297.

<sup>202</sup> AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA 228 (2<sup>nd</sup> ed., 2010).

<sup>203</sup> For an English translation and detailed analysis of these laws, see M. Bashir Mobasher, Shamshad Pasarlay and Mohammad Qadamshah, *The Constitution and Laws of the Taliban (1994-2001): Hints from the Past and Options for the Future* (International IDEA, 2022).

international community to oust the world's most-wanted terrorist, Osama bin Laden.<sup>204</sup> On September 11, 2001, when al-Qa'eda terrorists attacked New York and Washington DC, the U.S. and its allies overthrew the Taliban regime, which continued to harbor bin Laden. Thereafter, the international community helmed by the U.N. assembled in Bonn, Germany, with the victors of the war against the Taliban, many of whom were the veterans of failed constitutions in the past, to map out a new political order in Afghanistan and to install a democratic government.

The winners of the Taliban war signed the Bonn Agreement and formed an interim government in late 2001. Hamid Karzai, a Pashtun leader from Kandahar, was appointed interim president, while other offices of the executive branch were given to other participating groups, chiefly the Northern Alliance, a coalition of non-Pashtun former *mujahidin* leaders and heavily armed military commanders. The Taliban, who had retreated to the countryside to keep clear of U.S. and coalition airstrikes and to treat their wounds, were not represented at the Bonn negotiations. A faction within the Taliban wished to participate in the process, but their request was denied by the Bonn participants.<sup>205</sup> The Afghan factions in Bonn, parties who had won the war against the Taliban, believed that the Taliban had been severely weakened and did not possess the ability to disrupt a constitutional order, while the international community did not welcome the Taliban because their leaders still maintained ties with al-Qa'eda terrorists.<sup>206</sup>

Besides providing for an interim government followed by a transitional administration, the Bonn Agreement also placed the groundwork for the drafting of a new constitution to be ratified before elections for permanent government institutions were held towards the end of 2004.<sup>207</sup> In October 2002, Hamid Karzai, then president of the Transitional Administration, appointed the Constitutional Drafting Commission (CDC).<sup>208</sup> Although Karzai exercised significant discretion in appointing the CDC, its members were committed to different constitutional visions, and some represented the powerful Northern Alliance, which wielded significant military power on the ground.<sup>209</sup> The CDC also included members who were associated with the *Sunni* and *Shi'i mujahidin* parties, factions that had tried but failed to write a constitution just a decade earlier. Islam, the structure of the

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<sup>204</sup> BARFIELD, *supra* note 155, at 268.

<sup>205</sup> Mark Fields and Ramsha Ahmed, *A Review of the 2001 Bonn Conference and Application to the Road Ahead in Afghanistan*, INSTITUTE FOR NATIONAL STRATEGIC STUDIES, STRATEGIC PERSPECTIVE, No. 8, at 18-19 (2011).

<sup>206</sup> ZALMAY KHALILZAD, *THE ENVOY: FROM KABUL TO THE WHITE HOUSE, MY JOURNEY THROUGH A TURBULENT WORLD* 166 (2016).

<sup>207</sup> Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (the Bonn Agreement) United Nations Security Council, S/2001/1154, at [https://peacemaker.un.org/sites/peacemaker.un.org/files/AF\\_011205\\_AgreementProvisionalArrangementsinAfghanistan%28en%29.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/AF_011205_AgreementProvisionalArrangementsinAfghanistan%28en%29.pdf)

<sup>208</sup> Thier, *supra* note 133, at 566.

<sup>209</sup> Barnett Rubin, *Crafting a Constitution for Afghanistan*, 15 J. OF DEMOCRACY 5, 6 (2004).

executive branch, and questions about national identity were among the most divisive issues.<sup>210</sup>

Karzai and his allies favored a strong presidential executive, whereas factions within the Northern Alliance championed a parliamentary executive in which a prime minister would share significant power with a president.<sup>211</sup> On the question of Islam, the former *mujahidin* factions demanded that the new constitution must commit to Islam sufficiently (i.e., declare Islam as a state religion, oblige the state to legislate in line with Islamic dictates, and subject the enforcement of international treaties to compliance with Islam and the *shari'a*) for them to approve the new charter.<sup>212</sup> The leaders of Afghanistan's ethnic minorities hoped that the new constitution would afford them recognition instead of imposing upon them an overarching national identity. Most of these issues were resolved only because the framers deployed incremental strategies (i.e., they used textual ambiguity and contrasting provisions with the constitution).

The CDC prepared a draft in which executive power was shared between a prime minister and a president. The prime minister chaired the Council of Ministers and had the power to implement the constitution, preserve the country's independence, and prepare the government's budget as well as design and implement economic development plans.<sup>213</sup> In the draft, the president had the right to appoint the prime minister who was required to pass a confidence vote in the parliament.<sup>214</sup> Karzai, however, objected to the draft's provisions outlining the responsibilities and the appointment of the prime minister. He and his associates argued that a prime minister as powerful as defined in the draft constitution would only lead to political gridlock, and that post-war Afghanistan required a unitary presidential executive to unite the country.<sup>215</sup> Conversely, Karzai's opponents, particularly non-Pashtun political elites, reasoned that only a collegial executive could promote political stability by dividing executive power among Afghanistan's ethnoreligious divided communities — a president from one ethnic group and a prime minister from another.

In April 2003, Karzai appointed a larger, 35-member Constitutional Review Commission (CRC) to examine the CDC draft. Like the CDC, the CRC was diverse and represented almost all prominent political factions except the Taliban. Karzai wanted the CRC to reduce the powers of the prime minister in favor of a powerful president; he particularly expressed the view that the president should be given the authority to appoint a prime minister with no parliamentary approval.<sup>216</sup> However, the CRC resisted the idea of a powerful presidential system, especially the proposal that the president should appoint the prime minister without the parliament's consent. The CRC agreed to drop some of the prime minister's

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<sup>210</sup> Pasařlay, *supra* note 2, at chapter 4.

<sup>211</sup> *See id.* at chapter 4, for details on these positions.

<sup>212</sup> *Id.* at 184–188.

<sup>213</sup> Draft of the Constitution prepared by Constitutional Drafting Commission (March 2003) art. 75 (on file with author).

<sup>214</sup> *Id.* art. 73.

<sup>215</sup> Rubin, *supra* note 209, at 11–12.

<sup>216</sup> Pasařlay, *supra* note 2, at 224.

powers (such as the chairing of the Council of Ministers), but it still required that the prime minister should be appointed after a parliamentary vote of confidence.<sup>217</sup>

Thereafter, a frustrated Karzai and his National Security Council conducted a review of the CRC draft. There, Karzai struck compromises with other political elites whose assent was needed to ratify the new constitution to buttress presidential powers and to remove the prime minister entirely. In its place, he orchestrated a presidential executive who had two vice presidents.<sup>218</sup> Karzai, who most inside Afghanistan and in international circles believed would win the presidency after the ratification of the constitution, added the second vice president and promised to run for president with an ethnic Hazara on his ticket to win the support of the Hazara leaders for the presidential system.<sup>219</sup> Those members of the Northern Alliance most capable of rivaling Karzai in his quest for super-presidentialism, turned their attention to the powers of the vice presidents and abandoned the idea of a prime minister. These figures believed that they were more likely to become vice presidents under Karzai than prime ministers.

Additionally, Karzai removed a constitutional court, which had the power to exercise constitutional review and interpret the constitution, from the CRC draft. At the request of the Islamists, the power to exercise constitutional review was vested in the Supreme Court, which was then dominated by the Islamists' affiliates. The Islamists in return ensured Karzai of their support for a powerful unitary presidential executive.<sup>220</sup>

After restructuring a strong presidency, Karzai issued a decree to elect the Constitutional *Loya Jirga* (CLJ) to ratify the new constitution. Afghans all over the country elected 450 members to the CLJ; most of these were notable ethnic and religious figures, including former *mujahidin* leaders and commanders. Karzai then appointed another 50 notables to the CLJ, who supported Karzai's constitutional vision. Again, no one bothered to lure the Taliban to join the constitutional process, even as a faction within the Taliban was ready to partake in ratifying Afghanistan's new constitution. On December 13, 2003, the CLJ began to debate the draft constitution that the president's cabinet had significantly rewritten.<sup>221</sup> Delegates at the CLJ objected to three important features of the constitution: (1) its strong presidential system; (2) its provisions that vested the power of judicial review in the Supreme Court; and (3) its articles that defined the role of Islam in the legal order (delegates complained that the draft constitution had incorporated Islam insufficiently and in vague terms).<sup>222</sup>

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<sup>217</sup> The 2004 Constitution of Afghanistan, draft prepared by the Constitutional Review Commission (November 2003), art. 73. On file with the author.

<sup>218</sup> The 2004 Constitution of Afghanistan, draft revised by the National Security Council (December 2003), art 60. On file with the author.

<sup>219</sup> PASARLAY, *supra* note 2, at 231.

<sup>220</sup> See, e.g., Shamshad Pasarlay, *Restraining Judicial Power: The Fragmented System of Judicial Review and Constitutional Interpretation in Afghanistan*, 26 MICH. STATE INT'L. L. REV. 245 (2018).

<sup>221</sup> Pasarlay, *supra* note 2, at 235–236.

<sup>222</sup> The draft constitution that the CLJ approved initially required in article 3 that state law should be consistent with the “basics of Islam.” Islamist delegates complained that this

The structure of the executive branch, however, proved the most contentious issue at the CLJ. Delegates, specifically those affiliated with the Northern Alliance and the *mujahidin* parties, demanded that the office of the prime minister be rewritten in the constitution. Ironically, figures associated with the *Jami'yat-i Islami*, including its leader, Burhanuddin Rabbani, who had strongly championed a presidential executive during the drafting of the *mujahidin* constitution in 1993, became the strongest and the most passionate proponents of a parliamentary executive at the CLJ. This change of attitude, however, was hardly surprising. In fact, Rabbani and his faction's opposition to a presidential executive were straightforward: in the 1990s, the *Jami'yat* controlled the presidency and expected to retain that prize for the foreseeable future. Therefore, its leaders engineered a powerful presidency in the draft constitution they prepared.<sup>223</sup> That calculus had changed during the drafting of the 2004 Constitution when Karzai was expected to win the presidency. Those associated with the *Jami'yat* reasonably believed that one of their own would be the prime minister if the president was a popularly elected Pashtun (Karzai). For this to have a chance in the actual post-constitutional political landscape, the new constitution must include a prime minister.<sup>224</sup>

Additionally, non-Pashtun delegates at the CLJ were troubled that they might lose all state power to a Pashtun president for the foreseeable future if the presidential system were adopted. The draft constitution provided that the president, with his two vice presidents, should be elected with 50-plus percent of the popular vote.<sup>225</sup> Because the Pashtun ethnic group constitutes 42 to 45 percent of the population, to many CLJ delegates, it seemed that a Pashtun presidential hopeful with vice-presidential candidates from two other ethnic groups would win the presidency with ease – assuming, of course, that Afghans voted along ethnic lines. Under this type of presidential politics, the prospects for non-Pashtun candidates winning the presidency appeared fairly dim, at least in the immediate post-constitutional moment. Non-Pashtun delegates wanted to rewrite the prime minister in the constitution, hoping that it would be occupied by a non-Pashtun political figure.<sup>226</sup> Nevertheless, Karzai and his associates were determined to save

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articulation was very narrow, and it allowed the state to make laws that would be consistent with a basic principle of Islam but would violate a ruling of Islamic *fiqh* (jurisprudence). Therefore, they changed the wording of article 3 reading that state law should not contradict the “beliefs and tenets of the sacred religion of Islam.” The second formulation of article 3 apparently restricted the state's discretion in drafting laws because it had to ensure that the law did not violate a single belief and a single tenet of the sacred religion of Islam.

<sup>223</sup> See discussions *supra* at 88–93

<sup>224</sup> Burhanuddin Rabbani, *Afghanistan Baray-i Rehave az Buhrān-i Kononi ba Yak Neẓām-e Parlamāni Neyaz Darad [Afghanistan Needs a Parliamentary System to get out of the Current Crisis]*, in MAQALAT-I DAR PIRAMON-I MABAHIS-I MOSAWIDA-YE QANUN ASSASI [OPINIONS ON THE PROVISIONS OF THE DRAFT CONSTITUTION OF AFGHANISTAN] (Abdul Shokor Waqif Hakimi ed., 2003).

<sup>225</sup> THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, January 2004, art.

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<sup>226</sup> Pasarlay, *supra* note 2, at 238.

the presidential system at all costs. Hence, deadlock struck the CLJ, and when Karzai felt that the CLJ delegates might succeed in resurrecting the prime minister, he announced that he would not participate and compete in the upcoming presidential elections if the *Loya Jirga* rejected or revised the presidential system.<sup>227</sup> Karzai's threats were important because he was favored by the West and had the support of the Pashtuns. No one, including Karzai's archrivals, wished for Karzai to leave the negotiations, fearing that it may force the Pashtuns to abandon the entire political process.

As divisions within the CLJ deepened and the prospects for consensus over explosive issues looked bleak, Lakhdar Brahimi, the U.N. Envoy, and Zalmay Khalilzad, the U.S. Special Envoy, decided to intervene. Favoring a presidential system themselves and fearing that the fragile agreement on Afghanistan's first constitution of the 21<sup>st</sup> century could collapse at any moment, these figures threatened that funding for the CLJ would end if it failed to reach a settlement soon.<sup>228</sup> The U.S. officials, who closely followed the debates on presidentialism and who were directly involved in brokering agreements on these questions, favored a presidential executive helmed by Karzai for two reasons: (1) they believed that their interests were best served by dealing with a clearly known and trusted powerful figure in the center, rather than by managing their relations with the new Afghan state through multiple sources of competing authority;<sup>229</sup> and (2) the U.S. and U.N.'s preference for a presidential system sprung from the belief that a strong president in Kabul would exercise unilateral discretion in signing bilateral agreements with foreign powers,<sup>230</sup> which was needed not only for strategic and security agreements but also for galvanizing Afghanistan's post-Taliban reconstruction because a powerful figure in the center will make all important decisions.

In this way, Karzai got what he wanted out of the constitutional process. As many expected, he became president in 2004 and went on to win reelection in 2009. One can reasonably suspect that without such bargaining over private interests and the awkward compromises that the political elites made, it would have been hard to adopt the 2004 Constitution. In fact, the constituent assembly (the CLJ) that ratified the 2004 Constitution had a "Big Tent" and a "Small Tent."<sup>231</sup> The latter included political elites whereas the former served as a warmer venue for the peoples' elected representatives and shielded them from Kabul's freezing cold winter weather. Decisions on important aspects of the new constitution, including, crucially, the presidential system, were all made in the small tent. In other words,

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<sup>227</sup> Shahbaz Iraj, *Karzai: Faqat Nizam-i Riyasti [Karzai: Only Presidential System]*, BBC (Dec. 24, 2003), [https://www.bbc.com/persian/afghanistan/story/2003/12/031224\\_mj-afg-karzai-loya](https://www.bbc.com/persian/afghanistan/story/2003/12/031224_mj-afg-karzai-loya); J Alexander Thier, *Big Tent Small Tent: The Making of a Constitution in Afghanistan*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 547 (Laurel Miller ed., 2010).

<sup>228</sup> *Id.* at 550.

<sup>229</sup> *Id.* at 551; *see also* Rubin, *supra* note 209, at 12.

<sup>230</sup> *See* Clark Lombardi & Shamsah Pasarlay, *Constitution-Making for Divided Societies: Afghanistan*, in CONSTITUTIONALISM IN CONTEXT 107 (David Law ed., 2022).

<sup>231</sup> Thier, *supra* note 227, at 535.



the small tent provided a necessary venue where some of the most explosive constitutional questions were resolved in a way that generated sufficient stakes for the new constitution to be ratified. It was a venue where interests were addressed and incorporated without which the constitutional process might not have produced a written pact.

The 2002–2004 constitutional process has been condemned as deeply flawed which produced an inherently problematic constitution.<sup>232</sup> Specifically, the process has been blasted because it pandered to Karzai’s wishes by granting him an extremely centralized state and a powerful presidency. These two design options, according to critics, eventually brought down the post-Taliban political order in August 2021.<sup>233</sup> However, as I have argued elsewhere, these two design options were necessary for the short term if the process was to produce a written constitution.<sup>234</sup> In other words, they were the result of the Constitution’s embrace of incremental elements — choices that enabled the framers to ratify a constitution under extremely fraught conditions. They were expected to be reformed in the long term to improve government performance and effectiveness. Therefore, the major flaw of the 2002–2004 constitutional process lay elsewhere: excluding the Taliban.

The exclusion of any powerful faction from processes through which post-conflict constitutions are written “can be fatal to the [final] result.”<sup>235</sup> By omitting the Taliban from the constitutional process, the 2004 Constitution had this major flaw. Feeling that they had been completely eliminated from the political process, the Taliban slowly began to regroup and challenge the constitutional order so much that they brought it down in August 2021. Admittedly, it cannot be said with confidence that had the Taliban been included in the constitutional drafting process, the 2004 Constitution would have fared better, or the Afghan state might not have collapsed. The Taliban insurgency was multidimensional, linked to broader geopolitical considerations and the decision by the U.S. government to negotiate a peace deal with the insurgents. The Afghan state that the 2004 Constitution created ultimately fell victim to external shocks — principally to an ill-starred peace process that the U.S. officially inaugurated with the Taliban in June 2018 and an extremely poorly executed U.S. withdrawal from Afghanistan. These decisions by the U.S. government bolstered the Taliban, who stormed back to power by taking

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<sup>232</sup> *Afghanistan’s Flawed Constitutional Process*, INT’L. CRISIS GRP., (June 12, 2003), <https://d2071andvip0wj.cloudfront.net/56-afghanistan-s-flawed-constitutional-process.pdf>; Jennifer Brick Murtazashvili, *Democracy Denied: The False Promise of Afghanistan’s Constitutional Order*, AFGHAN INST. FOR STRATEGIC STUD., (2021), [https://aiss.af/assets/aiss\\_publication/Democracy\\_Denied-Eng.pdf](https://aiss.af/assets/aiss_publication/Democracy_Denied-Eng.pdf).

<sup>233</sup> See John Carey & Andrew Reynolds, *The U.S. helped design Afghanistan’s constitution. It was built to fail.*, WASHINGTON POST (September 8, 2021), <https://www.washingtonpost.com/outlook/2021/09/08/afghanistan-constitution-failure/>; see also Jennifer Murtazashvili, *The Collapse of Afghanistan*, 33 J. OF DEMOCRACY 40 (2022).

<sup>234</sup> See Shamshad Pasarlay, *Fatal Non-Evolution: Afghanistan’s 2004 Constitution and the Collapse of Political Order*, VERFASSUNGSBLOG (September 9, 2001), available at <https://verfassungsblog.de/fatal-non-evolution/>.

<sup>235</sup> DONALD HOROWITZ, CONSTITUTIONAL PROCESSES AND DEMOCRATIC COMMITMENT 92 (2021).

Kabul in August 2021. At the same time, however, one cannot overlook the repercussions of the Taliban's omission from the Bonn negotiations and from the 2002–2004 constitution-making process. This exclusion seriously undermined the legitimacy and survival of the post-Taliban Afghan political order, which had steadily contributed to the Taliban's strength and to the collapse of the 2004 Constitution.

## VI. CONCLUSION

The making and breaking of constitutions have become an increasingly common sight. In recent years, the impact of processes through which constitutions are made and unmade have received ample scholarly attention. Within the scholarly academy, there is growing consensus that the constitution writing process “matters” and that the success or failure of a written constitution, at least in a divided society like Afghanistan, might largely depend on how it is made rather than on what is codified therein. To put it differently, in post-conflict societies, the dynamics of the process that produces constitutions, rather than the normatively attractive norms and values written in a constitution, may play a far greater role in begetting a constitution that endures and channels political conflict through peaceful mechanisms. The long (and understudied) history of constitution-making episodes in Afghanistan, described in this paper, should be thus viewed as a case study in this growing body of literature.

Crucially, this detailed, contextual account of the processes that created each of Afghanistan's constitutions over the past century offers crucial data points that should help us understand these important processes. The Afghan experience suggests that constitution-making processes matter most when they occur in extremely fraught, conflict-ridden settings. In these contexts, processes that are (1) inclusive, (2) incremental, and (3) responsive to private interests seem most likely to result in workable constitutional arrangements, although ones that may not be normatively attractive. Inclusion does not leave any faction, including those with questionable ideological commitments, outside the formal constitutional settlements; instead, inclusion gives these groups a formal platform to air their grievances. When included in the constitution-making process, groups usually tend to use that venue to process disagreement instead of bearing the costs of violence. Incrementalism serves a similar purpose; it avoids resolving explosive questions about the state's moral underpinnings and does not entrench a particular vision of the state during the constitutional founding.<sup>236</sup> Hence, it signals inclusion in substance which also creates reasons for working in the constitutional order. By contrast, processes that do violence to rival worldviews by excluding them from the drafting process only exacerbate existing conflict and produce fresh sources of ethnoreligious and political tensions. As the drafting process of the 1923

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<sup>236</sup> See LERNER, *supra* note 12, at 30.

Constitution suggests, social forces who are not included in the making of a constitution will try to bring it down by force.

Therefore, it should not be mysterious to us that some of Afghanistan's constitutions endured and ushered in relatively long periods of peace while others failed almost immediately, establishing regimes that provoked, from the outset, violent civil conflict. Afghanistan's successful constitutions were created through a process that did not exclude any powerful faction. Instead, they accommodated, both in process and substance, all those interests and parties who had the ability to credibly challenge any constitutional order that did not honor them.

Finally, not unlike the constitution-making process in other volatile political environments around the world, the story of the constitution-making processes in Afghanistan makes clear that excluding any powerful actor or group from the constitutional process would be counterproductive to the resulting constitution's endurance and performance. The processes that produced Afghanistan's constitutions in 1964 and in 2004 are exemplary in this regard and share this fatal flaw. The former excluded Daoud, who brought down the entire constitutional order, while the latter, punished the Taliban by omitting them from the entire political process — the result of that exclusion unfolded in the worst possible manner in August 2021 when the Taliban toppled the political order established under the 2004 Constitution. Hence, inclusion creates a type of constitutional order in which its participants have all the incentives needed to protect its basic elements.

