Constitution making has become part of the standard package for internationally sponsored peace operations in countries emerging from civil wars. In some cases, like Bosnia-Herzegovina or Burundi, peace agreements include detailed constitutional provisions. In others, such as Afghanistan, the process of constitution making forms part of an extended peace process that occurs after the signing of an agreement that commits parties to a process, but not to a particular outcome.

Both patterns have some advantages, but circumstances may not permit a choice in every case. The content of agreements is often dictated by the conditions under which they are negotiated and signed. The Bonn Agreement for Afghanistan may have set a record for the speed with which such agreements are concluded and hence for the number of important issues left unresolved. After twenty three years of civil war and both overt and covert foreign intervention by both global and regional powers, only nine days elapsed from the opening of the UN Talks on Afghanistan on November 26, 2001, to the signing of the agreement on December 5.

Once President Bush announced on October 1 that the US would support a political transition in Afghanistan and a framework for reconstruction coordinated by the United Nations, the pressure was on to cobble together a successor regime to assume authority in Kabul. Four Afghan groups participated in Bonn of which two were most important: The Islamic United Front for the Salvation of Afghanistan, commonly known as the Northern Alliance (NA), which received the bulk of US military assistance, and the "Rome group," representing the exiled former King of Afghanistan, Muhammad Zahir Shah, who had lived in exile in Rome since 1973.

The NA included various groups fighting the Taliban. Its components largely recruited from the ethnic groups of northern and central Afghanistan – Tajiks, Uzbeks, and Hazaras – who had armed and mobilized themselves during the past 23 years of war. Their Taliban opponents represented a harsh fundamentalist reassertion of the power of the historically dominant Pashtun ethnic group. Most of the NA groups had fought the Soviet occupation as mujahidin, though the main Uzbek group originated as a tribal militia of the communist regime.

The NA represented force on the ground and a mix of ethnic claims and political Islam, both Sunni and Shi’a. The Rome group, consisting of exiles mostly living in the West, brought with it the legitimacy of the former King, who had presided over the last period when Afghanistan was stable and at peace. The former King enjoyed great sympathy among the long-suffering Afghan population, but he had no political or military organization in the country or a concrete program. A frail 88-year old man with good intentions for his country, he had often been manipulated by others, and the Rome group recapitulated this pattern.

In the eyes of the US and UN, the former King also provided some Pashtun representation in a process that was leading to the overthrow of a Pashtun-dominated government. Of the couple of Pashtun-led groups in the NA, one was the Islamist extremist group led by Abdul Rabb al-Rasul Sayyaf, with no ethnic or tribal base of support, and the other was based solely in eastern Afghanistan, rather than the southern and southeast heartland of the Taliban. The Rome group thus both represented historical, national continuity and was supposed to bring Pashtuns into the new coalition.

Despite this attempt at ethnic inclusiveness, the group assembled in Bonn did not represent the people of Afghanistan, either directly or indirectly. The UN Special Representative of the Secretary-General, Lakhdar Brahimi, who chaired the talks, repeatedly emphasized that no one would remember how unrepresentative the meeting had been, if the participants made good decisions to create a process that would eventually lead to the formation of a legitimate and representative government.

The process they agreed upon aimed to accomplish that goal. The approval of a new
constitution and holding of “free and fair” elections to choose a “fully representative government” were to be the final steps. Under the conditions of insecurity and disarray of Afghanistan, it was impossible to hold direct elections immediately. Instead, the Bonn Agreement drew upon an institution that had figured in all of Afghanistan’s four previous constitutions (1923, 1931, 1964, and 1987), the Loya Jirga. To legitimate key decisions, previous rulers had summoned Great Councils (Loya Jirgas). Many of these assemblies were appointed and docilely approved rulers’ proposals. A few, such as the constitutional Loya Jirgas of 1923 and 1964, actively debated issues, and one, in 1928, rejected King Amanullah’s reform proposals and set the stage for the revolt that overthrew him.

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

The Bonn Agreement constituted an interim constitution for Afghanistan, and delegates debated issues about the structure of the state. The NA delegation pushed for a statement in the preamble that one of the purposes of the Agreement was to establish a “republican” form of government. The former king had stated that he did not wish to restore the monarchy, but some members of his delegation resisted precluding the option. Zahir Shah also remained popular in Qandahar, the southern Pashtun tribal region of Afghanistan where both the monarchy and the Taliban had originated, and winning support in this area was a key goal. Brahimi convinced the NA to withdraw its proposal by noting that there was no king in Afghanistan, that the former king had said he did not want to restore the monarchy, and that Afghans in the future could choose whatever form of government they wished.

The role of Islam was also an issue. The text drafted by the UN included “Islam” on a list of principles (including, democracy, pluralism, and social justice) on which the eventual permanent government of Afghanistan would be based. In one of the more emotional sessions of the conference, mujahidin commanders in the NA delegation insisted that “Islam” be listed first among these principles. This proposal followed negotiation within the NA caucus itself. Islamists had insisted that “Islam” be the only principle of the future government. Others, however, successfully argued that the Taliban, too, claimed to be Islamic, and that including the other principles the delegates would make clear what interpretation of Islam they meant.

The Bonn Agreement reinstated Zahir Shah’s 1964 constitution, except for the provisions on monarchy, government, and parliament. The Bonn Agreement vested both executive and legislative power in the cabinet, whose chair (president) was the head of state. The 1964 constitution followed its predecessors in making Afghanistan an officially Sunni Muslim state. State rituals were carried out in accord with the Hanafi sect. In cases where judges found no provision to resolve a case in the constitution or written law, they were required to use Hanafi jurisprudence “in such a way as to best realize justice, and within the bounds of this constitution.” Hence the constitution was supreme over a judge’s interpretation of Islam. No law could be contrary to the “basic principles of the sacred religion of Islam,” but the king, not the judiciary or ulama (Islamic scholars), had been the ultimate arbiter of this provision. The 1964 constitution also provided that Afghanistan was a unitary state organized according to the “principle of centralization.” This legal principle contradicted the fragmented nature of actual power in the country at the end of 2001, and the struggle to bring the legal and ground realities into harmony with each other defined much of the political and constitutional struggle of the succeeding years.

The participants in Bonn chose the personnel of an interim administration to serve under these provisions. Though the agreement claimed that the members of the administration were chosen for their “professional competence and personal integrity,” no one should be too surprised that they were mostly chosen to offer patronage to different factions and recognize the distribution of military power on
the ground. The chairman of the interim administration, Hamid Karzai, was a Pashtun from Qandahar affiliated with the king who had entered Afghanistan with US assistance to raise forces against the Taliban in their own heartland. The “power ministries,” however – Defense, Interior, and Foreign Affairs – were all allocated to leading faction of the NA, which also controlled the powerful intelligence service, developed in the 1980s on the model of the KGB. This group, the Supervisory Council of the North (Shura-yi Nazar, SN), based in the Tajik areas in and around the Panjsher Valley just north of Kabul, had been founded by the late Ahmad Shah Massoud, the NA military commander assassinated by al-Qaida on September 9, 2001. SN had occupied Kabul when its Taliban and al-Qaida defenders fled US bombing on November 17, and it had started installing its own candidates in key positions.

Many – probably most -- Afghans saw the government chosen at Bonn as unbalanced in favor of SN (in factional terms) and Panjsheris (in ethno-tribal terms). The Bonn process was designed gradually to make the government more representative. The first benchmark was the obligation of the interim administration to convene an Emergency Loya Jirga by June 2002, to elect a head of state and approve the structure and key positions of a “transitional” administration. With international help, the government held the ELJ on time. The indirectly elected body of about 1500 representatives re-elected Hamid Karzai for a term of two years. After long negotiation, Karzai named a government on the last day. Many delegates objected that the ELJ had not enabled them to vote on the “structure and key personnel” of the transitional administration, and that the new administration (named the Transitional Islamic State of Afghanistan) was not significantly more representative than its predecessor.

The ELJ witnessed turmoil over the role of Zahir Shah. Many of the delegates, largely but not exclusively Pashtun, came to the ELJ in the hope of electing the former king as head of state and overturning Panjsheri domination. While many blamed foreign manipulation for Zahir Shah’s withdrawal from candidacy and the failure to further weaken SN control, the ex-king’s own vacillation and manipulation by his entourage contributed to his loss of credibility and the eventual fading of the monarchist constituency.

The same factors that limited the accomplishment of the ELJ also bedeviled the subsequent constitutional process. Then as now, Afghanistan was not a country where the distribution of power can be determined by counting heads at a meeting. The US-led coalition armed and funded commanders to fight the Taliban. These commanders used these resources to remobilize patronage networks into armed groups. These groups were then able to seize control of assets such as customs posts; trafficking routes for drugs, timber, or gems; land; and businesses. The mutually reinforcing personal control of armed groups and economic assets created the phenomenon of warlordism. The opposite side of the power of warlords and commanders was the weakness of the state. Though the US military presence and international aid assured the persistence in office of the Karzai administration in Kabul, it did little in the first year of its presence in the country to extend that administration’s authority or help it in its state building efforts.

The inability of President Karzai to guarantee the security of voters during the elections to the Loya Jirga or of the delegates once elected limited the effect of the ELJ. Even more important was President Karzai’s limited authority over his own government, many of whose top officials led militias that had fought or were still fighting against the Taliban with US support. It was little wonder then that he hesitated to dislodge such leaders. A particularly obvious moment of orchestrated intimidation at the ELJ led to the renaming of the government. A Shi’a Islamist leader, Ayatullah Muhseni, gained the floor at one point and proclaimed that the new government should be called the “Transitional Islamic State of Afghanistan” rather than the “Transitional Administration of Afghanistan,” as provided in the Bonn Agreement. Only a single member of the ELJ, Gul Agha Sherzai, the governor and warlord of Qandahar, dared to oppose the proposal.

The atmosphere of intimidation at the Loya Jirga affected the way that the UN and government designed the constitutional process, which constituted the next benchmark in the Bonn Agreement. By August 2004 the government had to appoint a commission to draft a constitution to be presented to a Loya Jirga by December 2004. An ideal constitutional process might begin with public consultations to determine what people want. A representative commission or constituent assembly could then make the basic political decisions based on these consultations. Legal experts could then draft a text
reflecting these decisions.

The Afghan process, however, reversed these stages. The government first appointed a small technical commission to draft a confidential text. They worked primarily from the 1964 constitution, debating how to update it for current conditions. This commission, as well as the broader commission that succeeded it, was a government commission, not an independent one, headed by Vice-President Nematullah Shahrani, a former teacher at the Shari’a Faculty of Kabul University. The initial text, still secret from the public, was then submitted to a broader review commission. The review commission then conducted public consultations without revealing the text and revised the draft again based on these public consultations, work with international experts, and a review by the cabinet. The government then made the draft public and submitted it to the Loya Jirga, where it was debated, revised, and passed on January 4, 2004.

The reason for this closed procedure was that, after the experience of the ELJ, the UN and others feared that opening the process to general discussion would lead to intimidation and demagoguery, especially on the issue of Islam. Instead, they thought it better to present the public with a text to discuss and modify. By the time the constitutional Loya Jirga was finally convened, on December 14, 2003, however, it turned out that the warlords and jihadi leaders had lost some of their capacity to intimidate, and President Karzai’s genuine supporters were stronger. The result was a constitution that reflected to a considerable extent his agenda and that of those members of the cabinet who consider themselves “reformers.” The constitution was also drafted, however, in the fluid environment of post-conflict Afghanistan. It remains to be seen if the measures crafted to the needs of building a state will serve equally well the needs of long-term governance. We can examine these themes through a number of key issue areas: form of government; the place of Islam; the structure of the state; language and ethnic identity; and the judiciary.

The debate over these issues reflected not only the current dilemmas of power in Afghanistan, but the political history of the country. The state of Afghanistan descends from a Pashtun tribal empire. The kings led a coalition of Pashtun tribes and allied forces, which conquered areas inhabited by other groups. They taxed non-Pashtuns more heavily than Pashtuns, including territories outside of what is today Afghanistan. The state was controlled by several Pashtun dynasties, all from Qandahar. For much of the past two centuries, struggle for rulership took place among factions of the ruling clan, who allied with different tribes or ethnic groups, but as the state and ethnic identities developed, so did ethnic politics.

In its simplest form, the ethnic question in Afghanistan is whether the state is an instrument through which a mainly Pashtun elite rules or a mechanism through which all citizens govern themselves on a non-ethnic basis. Among Afghans with an ethnic perspective on politics, each group has a distinct perspective. Pashtuns want a strong centralized state controlled by them; Tajiks focus on power sharing; and Uzbeks and Hazaras focus on recognition of their identities and mechanisms of local self-government. Hazaras, however, have a historically unprecedented share in the current government, which has shifted their orientation from a demand for federalism to participation in the central government.

The state is not only an ethnic instrument, of course, and strengthening the central government was also a goal of those who saw the power of commanders as illegitimate and supported state-initiated reforms. As elsewhere, some opponents charged that a “non-ethnic” position disguised the power of the largest group. Especially since many of the strongest protagonists of reform were Westernized Pashtuns whose opponents were largely Islamist non-Pashtun commanders, the opponents of this group accused them of using reform as a disguise for a Pashtun agenda.

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1 While many international experts offered advice of one sort or another to the commission, the author was one of three who worked with it closely. The other two, Yash Pal Ghai of Kenya and Guy Carcassonne of France, are distinguished constitutional experts. The author provided the political expertise on Afghanistan and also recruited other international experts to draft papers on various issues identified by the commission. These papers are available at http://www.cic.nyu.edu/conflict/conflict_translations.html.
The struggle over the system of government reflected assumptions about how ethnic politics would be expressed in different institutions. While public consultations showed strong support for the revival of monarchy in the Qandahar region (the kings were always Qandaharis), this position was marginal nationally and finally did not figure in the debate at the Loya Jirga. Among the institutions of a republican government, everyone assumed that, for the foreseeable future, an elected president would be Pashtun, and, furthermore, a Pashtun approved by the US, i.e. Hamid Karzai. The parliament, however, would be much more up for grabs, and many assumed that, first, it would be predominantly non-Pashtun, and, second, that it would be the arena where local power holders, including commanders and warlords, would dominate. The parliament of the 1960s, with one representative from each administrative district, had a Pashtun majority, both because the state favored Pashtun local elites and because districts in the Pashtun parts of the country generally had smaller populations. All drafts of the new constitution, however, provided that the popularly elected lower house, the Wolesi Jirga, would be elected “in proportion to population.” This reflected a contentious debate as to whether Pashtuns constituted a majority of the Afghan population.

The final result, a purely presidential system with a bicameral parliament, emerged from a process that involved consideration of the semi-presidential and parliamentary alternatives. Until the very last stage of the pre-Loya Jirga process (review by the cabinet), the commission’s drafts provided for a semi-presidential system. Contrary to some rumors, this was not due to the influence of the French constitutionalist, Guy Carcassonne. The president made it clear that he wanted a system with a popularly elected president, and this sentiment was widespread among both the Afghan population and in the US government. Commission members argued for the semi-presidential system on grounds of ethnic power-sharing: the president would be a Pashtun (specifically Hamid Karzai), while the Prime Minister, reflecting the composition of the Wolesi Jirga, would be a non-Pashtun, presumably Tajik, and probably Panjsheri. Yunus Qanooni, one of the three principal successors to Massoud who served in the cabinet, aspired to this post.

The proposed structure of the semi-presidential system changed over time, in response to criticisms from both the palace and the international experts. The basic issue was how to reconcile a divided executive with the realities of an Afghan politics still based on armed factions. Since the commission saw the semi-presidential system as a mechanism primarily for power sharing among competitors rather than division of labor for effective governance, its leaders resisted making the prime minister fully subordinate to the president, an essential element of stable semi-presidential systems. The commission did not seem to appreciate the separate powers of the prime minister as the leader of the government in parliament and instead saw him primarily as sharing the duties currently held by the president of the transitional administration.

For a long time the commission insisted that the prime minister nominated by the president should also be subject to a vote of confidence in the Wolesi Jirga, essential to the concept of an ethnic “power-sharing” arrangement. The argument that this system would destabilize the government by creating two executives with competing bases of power – the popular vote and the support of the parliament – finally led in September 2003 to adoption of a more workable system. Under this proposal the president’s appointed PM could be removed by a vote of no-confidence but would not have to win a vote of confidence in order to serve. This draft still preserved a potentially very damaging provision, allowing for votes of no confidence on individual ministers. Such a provision allows parliamentary factions to conspire with ministers against their rivals and undermines cabinet government. The conservatives in Iran have used such a provision systematically to undermine President Khatami’s appointees. It nonetheless remains in the final text approved at the Loya Jirga.

In the final stage, during which the cabinet and commission jointly reviewed the draft, the president’s supporters in the cabinet insisted that the president should appoint ministers on the advice of the PM, not the reverse, and that the president, not the PM, should chair the council of ministers. Though the commission had long resisted these proposals, it now accepted them. When some members claimed that this would turn the PM into the president’s errand boy, a powerful minister suggested eliminating the PM altogether. The commission agreed.

Political changes had created the conditions for this shift. The major SN leaders in the cabinet
had taken different positions, while the broader NA bloc had split. While Qanooni still aspired to be Prime Minister, Defense Minister Muhammad Qasim Fahim, SN’s major military leader, was courting a promise from Karzai to make him the sole vice president (rather than one of four, as in the transitional administration) and hence a potential successor. These changes ultimately left Qanooni as the only supporter of the prime ministry in the cabinet, and the commission followed suit. Fahim’s position was so weakened among his own base, however, that at the Loya Jirga he could not deliver any delegates to the president, who then supported two vice presidents, one of whom is likely to be a Hazara.

The issue of system of government reemerged at the Loya Jirga, in a much clearer fashion. The semi-presidential system was no longer at issue; instead some delegates demanded a vote on presidentialism versus parliamentarism. The presidentialist draft gained the support of virtually all Pashtun delegates, as well as of some members of other ethnic groups. A bloc of non-Pashtun delegates, however, strongly supported a parliamentary system.

The arguments on both sides represented a mix of genuine public considerations and ethno-political ambitions. For Pashtuns and reformers, the presidential system provided a way for one of their own – initially, at least, Karzai – to emerge from the compromise with non-Pashtun military factions in the Bonn arrangement and stand alone as the popularly elected sovereign. Such a system clearly identified who held legitimate executive power. It also had the advantage for the US of clearly identifying who its Afghan partner was, and assuring it would be someone Washington preferred.

For the delegates on the other side, largely from the non-Pashtun groups, this system risked personal and ethnic dictatorship. A parliamentary system would vest power in a coalition government representing many, if not all parts of the nation, and also gave commanders and other local power holders more access to the executive. Such a system, they argued, would ultimately lead to more stability because it would be more inclusive and provide for greater checks against abuse of power by the executive.

To some extent, these arguments rehearsed standard arguments on the merits of the two systems. A feature of the debate in Kabul, however, was that it was taking place in a failed state, where the main responsibility of the new government would be not so much to enact policies as to create the institutions that would make it possible to enact policies, that is, build a state. The country had extremely weak security institutions, no rule of law, and no political parties. Hence an argument could be made that, while a parliamentary system might eventually serve a multi-ethnic country better, it could not function under current conditions. The parliament would be so fragmented and dominated by local warlord, factional, and even narco-trafficking interests that it would fail to establish a functioning government at a time when that was the country’s greatest need. Ultimately this argument gained the support of most delegates, to a certain extent across ethnic lines.

Another bruising issue concerned qualifications for office. This revolved around the difficult relations between the elites who had remained in Afghanistan and those who were returning after decades of exile, in many cases having become citizens of developed countries where they found refuge, most often the US. Two of the most powerful members of the cabinet, Minister of Finance Ashraf Ghani and Minister of the Interior Ali Ahmad Jalali, belong to the latter group. By virtue of their roles they have been on the front lines of building a state and opposing warlordism. Both are US citizens and lived in the Washington, D.C., area as officials of the World Bank and the Voice of America respectively. During the public consultations on the constitution, a powerful nativism surfaced, with people from all over the country calling for a ban on ministers’ holding dual citizenship. This feeling also crossed ethnic and partisan lines at the Loya Jirga, but the president and international actors voiced strong opposition to such a ban. The final compromise seemingly maintains the ban, but then provides that if the president nominates a minister with dual citizenship, the Wolesi Jirga will vote on it. Since the Wolesi Jirga has to confirm all ministerial appointments in any case, this does not seem to add anything substantive. The struggle over this issue, however, divided the cabinet and left more bruised feelings than any other question.

The debate on the role of Islam involved numerous elements of the constitution, and the final result was a kind of package deal that contains potential contradictions to spark future conflicts. More
than almost any other issue, this one involved a balance between the demands of external actors for international standards and those of domestic actors, notably Islamist politicians and the ulama, for a constitution that conforms to their understandings of Islam and empowers Islamic elites.

From the start of the drafting, international actors made it clear that, while they accepted that Afghanistan would be an Islamic state, they did not want any explicit reference to “shari’a” in the text. In addition, the emergence of Shi’a Afghans, mostly ethnic Hazaras, as influential political actors, as well as the insistence of neighboring Iran, required that the constitution for the first time make Islam alone, rather than the Hanafi sect, the state religion, and that it extend some recognition to Shi’a jurisprudence, as well as to Hanafi jurisprudence. The near-parity for Shi’a jurisprudence in the current constitution constitutes a milestone in national inclusiveness.

The final text passed at the Loya Jirga resulted from hard bargaining at the end among Islamist leaders, President Karzai, and international representatives, along with some adroit tactical moves. The commission’s draft named the government the “Islamic Republic of Afghanistan.” At the Loya Jirga, the Islamists did not oppose a suggestion from the president’s office to change the statement in article 2 that “the religion of Afghanistan is the sacred religion of Islam” to “The religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam.” They also accepted a presidential proposal to expand protection of non-Muslims from carrying out ceremonies to “exercis[ing] their faith.”

The Islamists strengthened article three, the standard “repugnancy” provision, by adding that laws could not contradict the “beliefs and provisions” of Islam, a close approximation of shari’a, rather than the “basic principles of the sacred religion of Islam and the values of this constitution” or simply, “Islam,” as in earlier drafts. This provision promises to be more central to political life than in the past, as the constitution for the first time grants the Supreme Court the power of review of the constitutionality of legislation, presidential decrees, and international treaties. The president’s team rejected the commission’s proposal for a separate constitutional court, expressing the fear that it would resemble the Council of Guardians in Iran, but by granting the same power to the Supreme Court, a body that has always been dominated by ulama trained in Islamic jurisprudence rather than constitutional law, they may have worsened their future predicament.

On the other side, besides agreeing to strengthen of rights of non-Muslims, the Islamists dropped their attempt to limit Afghanistan’s international human rights obligations by reference to Islam or shari’a. Article 7 unqualifiedly requires that the state observe the Universal Declaration of Human rights and all covenants to which it is a party, which includes the major human rights covenants. The constitution also recognizes the legal equality of men and women without any of the qualifications found in shari’a, stating in article 22 that “The citizens of Afghanistan – whether woman or man – have equal rights and duties before the law.” When, inevitably, a conflict arises between the requirement that no law may contradict the “provisions” of Islam and these human rights principles, politics, not parsing the text, will determine the outcome.

While the Islamists tried, and failed, to introduce a measure requiring that the president be a male, they did not oppose measures to assure the representation of women in the parliament. The constitution guarantees that at least 25 percent of the lower house and 16 percent of the upper house consist of women. The Loya Jirga doubled the required quota of women in the Wolesi Jirga in the commission’s draft, entirely because of campaigning by the women delegates.

The debate about the constitution at the Loya Jirga marked a new milestone in the recognition of cultural pluralism, though the government rejected demands by some delegates from ethnic minorities for greater decentralization of the state structure. The origin of the Afghan state in an empire is reflected in its de jure unitary, centralized character: the administration was supposed to be an instrument for the center to control the periphery, not for local communities to exercise self-government. This is expressed institutionally through the legal provision that all provincial governors and district commissioners be appointed by the center, and by the practice of naming administrators who are not natives of the places they govern. The commission draft and the final text retain this “principle of centralization,” though they also provide for elected councils at all levels, elected mayors of municipalities, and potential devolution of some powers to councils through legislation.
Despite the legal requirements, however, under the interim and transitional administrations, most governors and military commanders were appointed to their positions because they had power, rather than having power because of their official positions. A few, the major “warlords,” exercised power over several provinces. Uzbeks from northern Afghanistan, as well as Hazaras, though less insistently, wanted institutionalization of aspects of this less centralized administration. While they had retreated from earlier demands for federalism, at the Loya Jirga Uzbek delegates proposed that governors be elected rather than appointed. As a weaker alternative, they proposed that the center appoint governors from among a panel of candidates proposed by provincial councils. Uzbek delegates explained that these proposals were designed to prevent the center from imposing Pashtun governors on them. In the past such governors allocated land and assets to Pashtun settlers and engaged in other kinds of abuses.

The government rejected all of these proposals. While some insisted on the centralized system for ethnic reasons, many genuinely fear the disintegration of the country. During the decades of war, regional commanders developed close ties to patrons in neighboring countries, so that various parts of the country came under stronger influence from Iran, Pakistan, or Central Asia than Kabul. Given the power of these commanders, they feared that stronger local governments would be captured by corrupt or even criminal leaders. Many argued for a process of centralization now to overcome or incorporate extra-legal local powerholders as part of the state building process. Decentralization can come at a later stage.

Despite the refusal of administrative decentralization, the constitution made major steps forward in recognizing the cultural diversity of Afghanistan. During the drafting before the Loya Jirga, the major issue related to diversity was the relation of the two state languages, Pashto and Dari (Afghan Persian). In the past, while Pashto was the language of the dominant ethnic group, Dari was the language of urban life, high culture, and bureaucracy. While the rulers were Pashtuns, many could not speak Pashto. Hence the relation of Pashto to Persian resembled to a certain extent that of the indigenous languages of Central Asia to Russian. In practice the government was mostly conducted in the more cosmopolitan language, rather than the national one. In the 1964 constitution, “Pashto and Dari” were both defined as official languages, but, in a separate provision, the state was obligated to work to develop the “national language,” Pashto.

The commission’s draft had recognized more linguistic pluralism than previous constitutions by mentioning seven languages, among which Pashto and Dari were official, and stating that broadcasting and publishing were free in all. For the first time the draft also encouraged development and teaching of all languages in areas where they were spoken. The controversies on the commission and in the government involved the relation between Dari and Pashto. Before the Tajik-dominated mujahidin government of 1992-1996, the Afghan national anthem had always been in Pashto. The Pashto-speakers on the commission finally preferred to keep this provision than another, which would have required the state to train employees to work in both official languages. This would have mainly involved teaching Pashto to Persian speakers, and some Tajiks interpreted this as a threat to fire all functionaries who could not speak Pashto. The issue of the national anthem sparked a controversy at the Loya Jirga, when Pashtun delegates threatened to walk out of the opening if the Dari-language anthem of the mujahidin period was played. Playing a Pashto patriotic song and political work by some Pashtuns in the cabinet prevented such an incident.

Subsequently the issue became even more complicated, as the delegates from northern Afghanistan demanded the recognition of their languages – Uzbek and Turkmen – as official as well. The northern bloc of delegates that had demanded parliamentarism also demanded recognition of the multi-ethnic character of Afghanistan. Some of their leaders went so far as to raise demands for abolishing traditional characteristics of Afghanistan, raising again the issue of the meaning of “Afghan,” which originally meant Pashtun but is officially defined in the constitution as any citizen of the country. For instance, they demanded that citizens be called “Afghanistanis” and that the name of the currency be changed from “afghani” to paisa. These demands sparked a backlash from Pashtun delegates who then sought to give Pashto the status of the “national” language again.

The process of negotiating such a multifaceted issue deserves novelistic treatment, but here I
can at least sketch out the results. As a result of negotiations at the Loya Jirga, for the first time, the constitution recognizes both the ethnic pluralism and the political unity of the country by providing in article 4 that:

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

The word Afghan applies to every citizen of Afghanistan.

The constitution makes Pashto and Dari official languages. The language of the national anthem sparked a complex debate. Finally it was made mono-ethnic in form, multiethnic and Islamic in content: it would be in Pashto, but mention all the country’s ethnic groups as well as “Allahu Akbar” (God is great, the chorus of the mujahidin anthem). Pashtun delegates long resisted the pressure to make Turki languages official as well, partly out of a desire not to hand a victory to the ex-communist warlord Abdul Rashid Dostum. Several religious and political leaders finally convinced them to discuss the issue with other Uzbek delegates and prevailed upon them to accept not only the Turki languages, but also four other languages (Pashai, Baluch, Nuristani, and Pamiri) as third official languages in areas where a majority speaks them.

These concessions sparked renewed demands to make Pashto the “national” language. In order to avert a confrontation, government negotiators asked Pashtun delegates to define what they meant, which turned out to include the language of the national anthem (already agreed to) and the preservation of Pashto terms for institutions and offices. The Supreme Court and Attorney General, for instance, are always called by the Pashto terms “stara mahkama” and “loy saranwal” even in Dari. A new paragraph providing that such terminology be maintained was inserted. In the last-minute rush the secretariat failed to print it in the text given to delegates for voting, though it was written by hand in the copy signed by the chair. Some opposition delegates first saw it when the president promulgated the edited text on January 29, leading to charges of illegitimate tampering with the text.

One area about which there was unfortunately no controversy was the judiciary. The judiciary in Afghanistan has become a self-perpetuating caste. The Supreme Court is not only the ultimate appellate jurisdiction, now with the power of judicial review, but also the administrative head of the judiciary. It administers the budget, and appoints, pays, promotes, and disciplines the lower court judges. The president has to confirm the appointments, but the president has never refused to confirm any. During the public consultations on the constitution, judicial corruption was one of the people’s major complaints, and leaders of the constitutional commission privately admitted that the current system creates corrupt networks of judges. Nonetheless, they chose to maintain it. The judiciary is the main source of employment for the ulama, who have a vested interest in maintaining a strongly Islamic legal system, and neither the president nor the commission wanted to confront this influential constituency. Given the expanded powers of the Supreme Court, the failure to create more space for judicial reform in the constitution may prove an obstacle to future reforms.

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

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

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

Right now, the main challenge is creating a stable focus of authority. Later it may be broader inclusion and participation. Therefore, it may not be wise to lock up decisions dictated by a temporary situation in a constitution. Perhaps the two-year interim constitution of the Bonn Agreement should have been lengthened. Perhaps the new constitution should also have had a built-in review mechanism. Some post-conflict constitutions, such as that of East Timor, contain mechanisms for a review of the constitution after a period of time. Afghans to whom international advisors suggested such options, however, did not wish to undermine a document that would already be hard to turn into a reality.

In his final speech to the Loya Jirga, President Karzai said that the constitution is not the Holy Quran, and it can be changed if conditions change, through another Loya Jirga. It seems likely that such a revision will be necessary in five to ten years, if this document can last that long. That of course will depend on many factors, many outside the constitution itself, but including whether Afghans manage to evade the pitfalls and contradictions found in the text.