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For Ourselves and the Generations to Come:

Constitutional Law in Afghanistan, 1964-2004

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**For Ourselves and the Generations to Come:
Constitutional Law in Afghanistan, 1964-2004**

by

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Dedication

To my instructor and friend, Bari, who inspired me to continue on my path and introduced me to his beautiful language. Thank you.

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Abstract

For Ourselves and the Generations to Come: Constitutional Law in Afghanistan, 1964-2004

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In the context of modern Afghan political and legal history, the 1964 and 2004 constitutions were once lauded as promising steps toward the country's adoption of representative government, constitutionalism, and the equitable rule of law. However, the governments that instituted these documents —the Kingdom of Afghanistan and the Islamic Republic of Afghanistan, respectively— collapsed to political and social instability not long after adopting their constitutions. While historical and political commentary has blamed illiberal governance for the failure of these governments, relatively few projects have studied the 1964 and 2004 constitutions as potential contributors to this breakdown in governance. This thesis takes a comparative legal perspective to study the history of the 1964 and 2004 constitutions, their respective intellectual influences, and their effects on Afghan society in the 20th and 21st centuries. The first chapter centers on the pre-modern legal history of Afghanistan, including geographic and social influences on approaches to governance and the impact of the Barakzai monarchy on Afghan nationhood. The second chapter takes a comparative legal approach to analyze the contents of the 1964 and 2004 constitutions, the institutions both documents created, and their approaches to divesting and consolidating political power. The third chapter studies the practical application of the constitutions through the rule of law, their enumerated positions on religion, and the effect of the War in Afghanistan. This thesis argues that the 1964 and 2004 constitutions were greatly informed by authoritarian policies inherited from pre- and early modern Afghan political systems, particularly the primacy of centralized executive leadership. These practices incentivized autocratic political leadership, disincentivized strong representative governance, and undermined the rule of law under the 1964 and 2004 constitutional frameworks.

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Introduction: “For Ourselves...”

In 1925, twenty-two French and German architects gathered ten miles southwest of Kabul to construct what was envisioned as the new heart and soul of the Emirate of Afghanistan. Their patron, Amir Amanullah Khan Barakzai (r. 1919-1926), had seized Afghanistan’s independence from the United Kingdom only a few years prior in 1919, after over a century of direct and indirect British dominion over the country. Now, having thrown off the European yoke, the “reformist king” sought to make Afghanistan on par with the West through educational investment, legal reform, and Western-style engineering.¹ The amir’s architectural project, headed by French architect and archeologist André Godard and German engineer Walter Harten, would be the “smallest part and most visible symbol” of this modernization.² Its name was Dar ul-Aman, the “Abode of Peace,” and Amanullah Khan intended it to be the capital of a new Afghanistan organized legally, culturally, and architecturally along “rational and enlightened lines.”³

The only completed portion of the new capital would be its centerpiece, the German neo-classical Dar ul-Aman Palace. Two years after its formal completion in 1927, Amanullah Khan was ousted from power by the former army officer Habibullah Kalakani, who ruled tenuously for eight months until the Barakzais removed him from power in October 1929. Succeeding kings chose to reign from Kabul proper, in the Gulkhana and Tajbeg palace complexes, while Dar ul-Aman laid dormant, used intermittently as a warehouse by local merchants and as the seat of

¹ Faiz Ahmed, *Afghanistan Rising Islamic Law and Statecraft between the Ottoman and British Empires* (Cambridge, MA: Harvard University Press, 2017), 215.

² *A Brief History of Collapses (Excerpt)*, Mariam Ghani, 2012, 3:53.

³ *Ibid.*, 4:03.

Kabul University's medical faculty.⁴ The capital, intended as the seat of Amanullah Khan's government and a nascent parliament, went unfinished and abandoned.

Forty years later, in the first weeks of September 1964, Dar ul-Aman saw new life. From across Afghanistan, regional notables and tribal leaders gathered in the hastily renovated offices of the palace, echoing some ways the parliament Amanullah Khan had envisioned occupying the building's third floor. Louis Dupree, an American anthropologist and archeologist, described the conclave as varied as "the terrain [of Afghanistan]:"

gray-bearded mullah with neatly tied white turbans and long, flowing robes; young men in natty Western clothes and rich *qarakul* hats; others reflecting the transitional period in which Afghans found themselves wore turbans, Western jackets and vests, Afghan shirts, pantaloons, and pointed Italian shoes. Distinctively embroidered turban caps identified various Uzbek [sic], Tajik, Pushtun [sic], and other ethnic groups; some wore sandals, some, boots.⁵

These 452 delegates, including "Mongoloid Hazara" and "Mediterranean-looking Pushtun," were the members of a special loya jirga ("great council") convened by King Mohammad Zahir Shah (r. 1933-1973) to review and revise a new constitution for the Kingdom of Afghanistan.⁶ The project was the culmination of nearly a year of work by the seven-man Constitutional Committee, organized by the king and chaired by officials from the ministries of Justice, Education, and Information. Research and consultation from legal experts had begun in March 1963, drafting between March and May 1964, and the selection of jirgah delegates between then and September 9. In Dari and Pashto, and under the eye of the Constitutional Committee, the jirgah deliberated the articles of the proposed constitution for nearly a month in

⁴ Rod Nordland, "Saving an Afghan Symbol, with Afghans Only," *The New York Times* (A. G. Sulzberger, April 5, 2017).

⁵ Louis Dupree, *Afghanistan*, 3rd ed. (Princeton, NJ: Princeton University Press, 1978), 567.

⁶ *Ibid.*

Dar ul-Aman. On October 1, Zahir Shah ratified the draft as the Constitution of 1964 in Gulkhana Palace, seven miles away.

The Constitution of 1964, composed of 128 articles in eleven chapters and sixty pages, brought significant innovations to Afghanistan's administrative and legislative framework, which had remained largely unchanged since the preceding Constitution of 1931. The new constitution provided for extensive civil liberties, including free expression and nominal religious freedom for Afghanistan's Christian, Hindu, and Shi'a minorities. The framework organized a new bicameral legislature, elected through universal suffrage, and established an independent judiciary with the powers of judicial review and statutory interpretation. While the monarchy retained its position as head of state and had extensive power over the bureaucracy, the formation of a representative legislature and Supreme Court promised an end to the monarchical absolutism that dominated the country at the turn of the 20th century. Despite the instance of some contemporaneous observers that the constitution would only act as an "interim" document, the constitutional framers themselves seemingly desired to maintain the 1964 Constitution's promises far into the future.⁷ As the preamble reads, the drafters organized the constitution "four ourselves and the generations to come."⁸

Indeed, in modern Afghan history, the Constitution of 1964 was once —and, to an extent, still is— considered the most superb legal document the nation had ever seen. Scholars and observers have described it as "more liberal, enlightened, forward-looking" than its predecessors, "a promise of reforms to come," and "the finest in the Muslim world."⁹ So pervasive and positive

⁷ Theodore Gochenour, "A New Try for Afghanistan," *Middle Eastern Journal* 19, no. 1 (1965), 3.

⁸ Preamble (Constitution of 1964).

⁹ Donald Wilber, "Constitution of Afghanistan," *Middle East Journal* 19, no. 2 (1965), 216; Gochenour, 3; Dupree, 565.

was the 1964 Constitution's fanfare the document has since overshadowed the preceding 1923 and 1931 constitutions, which were the first to introduce constitutional monarchism and representative governance, respectively. In 2001, the British Broadcasting Company depicted the 1964 Constitution as transforming Afghanistan into a "modern democracy," and today, the International Institute for Democracy and Electoral Assistance (IDEA) erroneously credits the document as creating the country's first "constitutional monarchy."¹⁰

While the 1964 Constitution was not Afghanistan's first nor longest-lasting constitutional framework, it proved to be the country's most influential one and has acted as a template for succeeding constitutions long after the monarchy's fall in 1973. Following the U.S. invasion of Afghanistan in 2001, the United Nations "Bonn Agreement" enforced the 1964 Constitution as Afghanistan's interim legal framework, and the later Constitution of 2004 heavily borrowed from the former in terms of structure and style.¹¹ Indeed, the 2004 Constitution ratified by then-president Hamid Karzai (Pres. 2002-2014) seemed only to expand upon the liberal democratic values of its predecessor, increasing the powers of the bicameral legislature, replacing the monarchy with an elected president, and maintaining the strict independence of the judiciary. Even the Afghan Taliban, who overthrew the Islamic Republic in August 2021, appear similarly committed to the 1964 Constitution, having adopted portions of it in 2005 and using those provisions that "do not violate Shari'ah [Islamic law]" as an interim constitution now in 2022.¹²

¹⁰ "South Asia | Profile: Ex-King Zahir Shah," BBC News (BBC, October 1, 2001); "Constitutional History of Afghanistan," ConstitutionNet (International Institute for Democracy and Electoral Assistance, September 24, 2021).

¹¹ *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions ("Bonn Agreement")* [Afghanistan], S/2001/1154, 5 December 2001.

¹² Haroun Rahimi, "Remaking of Afghanistan: How the Taliban Are Changing Afghanistan's Laws and Legal Institutions" (Singapore, SG: NUS, 2022), 3.

Despite Afghanistan's political and social instability in the past sixty years, the provisions of the 1964 Constitution seem to withstand every political and social strife they face.

While the 1964 Constitution has been repeatedly praised and copied over the fifty years following its ratification, its longevity appears more likely to be in spite of its most famous provisions rather than because of them. Indeed, the celebration of the 1964 framework and its revival following the 2004 Constitution betray significant issues created by the former framework and inherited by the latter. Despite formal commitments to democratic governance and the separation of legislative and judicial powers, both constitutions contain explicit and implicit provisions that contradict these values. The Afghan executive, whether the monarchy in 1964 or the presidency in 2004, is afforded significant powers over the formation of the government, the command of the military, and the definition of civil liberties. In many cases, constitutional articles enumerate but do not mandate certain actions, leading to important civil liberties and government duties being unenforced throughout the lifetime of both constitutions. Despite the purported "liberal" values of the 1964 and 2004 constitutions, their provisions did more to legalize authoritarian practices than to introduce democratic governance.

The impact of these practices can be immediately seen in Afghan history, especially during the twilight of the Kingdom of Afghanistan and the Islamic Republic of Afghanistan. The consolidation of power within the executive eroded the ability of other government institutions like the legislature to effectively represent and address public needs. The ambiguous enforcement of civil liberties and constitutional articles disincentivized institutional commitment to the rule of law and, consequentially, public confidence in the governments of the Kingdom and the Islamic Republic. This was an ample environment for autocracy and corruption, both of which heavily contributed to the downfall of the 1964 and 2004 constitutional frameworks.

While these autocratic provisions may seem extraordinary in isolation, or a case of simple imitation between the 2004 and 1964 documents, Afghan political history reveals a significant and chronic trend toward political centralization and authoritarianism throughout the 19th and early-20th centuries. While certain geographic and social factors—including the indigenous Pashtun tribal system—dissuade centralization, Afghan elites pursued extensive political and legal centralization throughout the 19th century. The key driver of this centralization was increased imperial contact with British India and increased technological imports, both of which empowered Afghan political leaders to crush opposition and consolidate state authority. This consolidation united the country in the face of imperial aggression but disincentivized both contemporaneous and future efforts to share or divest political power from the executive. While some scholarly and popular discourse has derided Afghanistan as incapable of forming a modern nation-state, the country’s political and legal history clearly shows an authoritarian political system that created a consolidated state but dissuaded the notion of popular or representative government.¹³

This trend in Afghan political development, as well as its impact on the 1964 and 2004 constitutions, seems absent from the considerable breadth of scholarly and popular commentary on Afghanistan’s constitutional history. Scholars contemporaneous to the ratification of the 1964 Constitution make vague mention to “strong religious fundamentalism” and “inflamed voices of tradition,” but do not engage with Afghanistan’s tribal systems and centuries of consolidated absolutist rule.¹⁴ Modern political and scholarly commentary has primarily attributed Afghanistan’s political instability to specific individuals, social groups, or political movements,

¹³ Gareth Price, “Why Afghan Nation-Building Was Always Destined to Fail,” Chatham House – International Affairs Think Tank (Chatham House, September 10, 2021).

¹⁴ Gochenour, 1.

with scant mention of the legal systems these actors created, exploited, or toppled.¹⁵ When scholarship does center on the constitutions themselves, commentary often ignores or overlooks the explicit and implicit weaknesses in the frameworks' democratic values.¹⁶ The heritage, textual embodiment, and practical effects of the 1964 and 2004 constitutions' authoritarian practices have thus far remained absent from the present body of scholarship on modern Afghanistan.

This thesis argues that the 1964 and 2004 constitutions were direct and significant contributors to the political instability of modern Afghanistan, in particular the Kingdom of Afghanistan and the Islamic Republic of Afghanistan. The drafters of these respective documents, rather than being committed to democratic and representative governance, were more concerned with creating strong, centralized political systems that benefited executive leaders and hamstrung legislative and judicial bodies. Further, this thesis argues that the political and legal philosophies driving the 1964 and 2004 constitutional frameworks were inherited from the authoritarian political environment of pre- and early modern Afghanistan. This period, dominated by the violent political unification of Afghanistan and increasingly centralized political systems, incentivized authoritarian political practices that carried on into future constitutional frameworks. By extending these authoritarian practices into the 20th and 21st century, the 1964 and 2004 constitutions created inflexible political systems that incentivized illiberal practices and eroded the legitimacy of their respective governments.

¹⁵ Barfield, 168; Lynne O'Donnell, "What Went Wrong with Afghanistan's Defense Forces?," *Foreign Policy* (The Graham Holdings Company, August 11, 2021).

¹⁶ Sa'eed Amir Arjomand, "Constitutional Developments in Afghanistan: A Comparative and Historical Perspective," *Drake Law Review* 53 (August 7, 2005), 953.

This thesis presents the argument over the course of three chapters. The first chapter, set broadly in pre- and early modern Afghanistan, discusses the various factors that both dissuaded and contributed to political centralization. Some factors, such as the region's extreme geography and traditional Pashtun tribal structures, have historically made political centralization difficult for both foreign and domestic entities, but others, including religious beliefs and traditional political structures, streamlined the consolidation of state authority. However, it was not until the introduction of British imperial control in the mid-19th century and the rise of the Pashtun Barakzai dynasty that political centralization became achievable for indigenous rulers. Spurred by technological and financial imports from the British Empire, Afghan rulers united Afghanistan's disparate communities through strong military institutions until the country was formally united under Amir 'Abd al-Rahman Khan Barakzai in the 1880s and 1890s. This political centralization, beyond creating an Afghan state, also normalized the consolidation of political power among the royal elite and disincentivized negotiation and power-sharing.

The second chapter discusses the literal interpretation of the 1964 and 2004 constitutions, focusing on constitutional articles that echo the authoritarian political norms solidified during the late-19th and early-20th centuries. Using the preceding 1923 and 1931 constitutions as a foundation, this chapter analyzes the articles of the 1964 and 2004 constitutions through a comparative legal lens, focusing on statutes borrowed from the former two frameworks and on articles extended from the 1964 document into its 2004 successor. While both documents are commonly praised as democratic and liberal in comparison to their contemporaries, proper analysis of their articles reflects a continuation of 19th-century authoritarian practices. These include the consolidation of legislative and judicial power in the executive and the absence of constitutional mandates regarding political organization. Such articles betray the supposed

liberal-democratic motivations for the 1964 and 2004 constitutions and suggest political centralization was the primary objective of the respective drafting committees.

The third and final chapter focuses on the practical application of the 1964 and 2004 constitutions through the frame of the rule of law. Here, the “rule of law” is defined as a joint construction of Dicey (1952), Maley (1985 & 2011), and Krygier (2011), which defined the rule of law as “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power.”¹⁷ For the purposes of this thesis, “regular law” implies the statutes of the 1964 and 2004 constitutions, meaning any contradiction or violation of the Afghan constitutions would constitute a violation of the rule of law. Under the 1964 and 2004 constitutional frameworks, the lack of explicit or defined mandates regarding political expression and civil liberties created ample room for governments to abuse political power for personal or systemic gain. Resistance to the legalization of political parties and the ambiguous enforcement of free elections led to considerable distrust in the 1964 and 2004 governments and, by proxy, their constitutional frameworks. This chapter also studies the 2004 constitution’s approaches to religion, elections, and human rights violations in the context of the War in Afghanistan (2001-2021). The document, by affording the government considerable power over the interpretation of Islamic law and the organization of government elections, created space for the Islamic Republic to exploit its judicial and political authority despite constitutional limits on such exploitation. These abuses of the rule of law under both the 1964 and 2004 constitutions contributed to public

¹⁷ William Maley, in *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge, UK: Cambridge University Press, 2011), 62; While Maley problematizes Dicey’s definition of the rule of law by considering whether such rule but be by “just” or “good” law, and by questioning what constitutes an independent judiciary, these qualifications are arguably unnecessary. Evaluations of “just,” “good,” and “independent,” under Maley’s questions are ultimately subjective and suggest comparisons to international law, which are just as contentious as Dicey’s definition. For this paper, the importance is be placed on internal consistency between the governments and the constitutions, invoking international law only when relevant to the internal logic of the constitutional framework.

disinterest in existing governing systems and damaged the constitutions' legitimacy domestically and internationally.

While this thesis primarily focused on past events, its findings are significant to modern scholarship. First, challenging the praise heaped on the 1964 and 2004 constitutions may lead to greater scrutiny of the constitutions in modern scholarship. As mentioned earlier, most scholarship on these frameworks does not offer criticism of their respective contents or does not present critiques in the context of Afghan history and governance. This thesis hopes to improve scholarly criticism around the constitutions by establishing the authoritarian political heritage of the constitutions and the statutory expression of this authoritarianism. Such improvement may present new opportunities for Afghan constitutional scholarship, including extended analysis of the constitutions in the context of regional and international constitutional law.

This thesis also seeks to contribute to discussions surrounding constitutional law and the framing of Afghanistan's constitutions today. Despite the significant authoritarian provisions of the 1964 and 2004 constitutions, the basic framework had been repeatedly used in Afghan constitutional law for the last sixty years. Various governing bodies—whether monarchical, republican, Marxist-Leninist, or Islamist—continue to use the constitutional framework while failing to modify its authoritarian articles. While this is likely a deliberate choice on the part of some governments which may desire to retain that authoritarian control, it is clear many of these statutes are primary or secondary causes for regime change and collapse in Afghanistan. Further, the international community's political and academic support for such a framework, as the 2001 Bonn Agreement provided for the Islamic Republic, only perpetuates the fractious cycle. By pinpointing the excesses of the 1964 and 2004 constitutions, this thesis hopes to remove ambiguities regarding the “goodness” of these constitutions and problematize future drafts.

I. SCHOLARSHIP AND LANGUAGE

While comparative legal scholarship on the 1964 and 2004 constitutions is scarce, modern scholarship on Afghan history and law is rich in comparison. In fact, this scholarship features a wide array of interdisciplinary texts, combining sociology, political science, law, history, and economics. Early works from Vartan Gregorian (1967 & 1969) and *The Middle East Journal* provide important economic and legal insight into Afghanistan's development during the 19th and 20th centuries. These sources are also significant for their proximity to the ratification of the 1964 Constitution, revealing contemporaneous observations on the constitution from scholars. However, Gregorian's importance to this thesis is primarily his survey of pre- and early modern Afghan history, *The Emergence of Modern Afghanistan* (1969). This and Thomas Barfield's 2011 text *Afghanistan: A Cultural and Political History* are the primary foundation for the first chapter.

Regarding discussions of Afghan law and constitutional history, Faiz Ahmed (2007 & 2017), and Sa'eed Arjomand (2005) provide detailed research on Afghan constitutional history and the legal philosophies underpinning the country's constitutional frameworks. Arjomand is particularly for applying comparative legal analysis to the 1923, 1931, and 1964 constitutions, though his conclusions, though his conclusions only hint toward the authoritarian heritage of each constitution's statutes. Still, the research and analysis of these two authors are fundamental to the second chapter by outlining Afghanistan's constitutional history and the main intellectual influences behind their framing.

Outside of these scholarly works, this thesis relies upon the works of several governmental, nongovernmental, and supranational organizations for their analysis of contemporary Afghan politics under the Islamic Republic. While similar analysis is lacking for

the Kingdom of Afghanistan, statistical and investigative research by organizations like the United Nations and the World Justice Project provide substantial insight into how Afghan citizens perceived the Islamic Republic and the national rule of law. Sources from UN and U.S. organizations, such as the United Nations Assistance Mission in Afghanistan (UNAMA), are equally important to understanding the country's political order after 2001, in which both entities played a unique role in. Alongside these national and supranational archives, this thesis also makes significant use of online news media, with particular attention placed on their coverage and critique of political processes like the 2019 presidential elections.

At the center of this thesis are the 1964 and 2004 constitutions themselves, which have been preserved online by the University of Nebraska-Lincoln and the International IDEA's ConstitutionNET program, respectively. These are the central texts of this thesis but specifically relate to the second chapter, which explores and compares the articles of each document in depth. Unformatted versions of the 1923 and 1931 constitutions, archived online by the Archivio di Diritto e Storia Costituzionali at the University of Turin, also serve to elaborate on the constitutional history and heritage of Afghanistan prior to 1964. That these earlier documents are available for comparative analysis is a great boon for this thesis and substantially builds on the credibility of the second chapter's argument.

Related to the inclusion of these sources is a substantial concern of this thesis, that being the availability and language of key sources. As Ahmed states, to describe Afghanistan as being devoid of a legal history is wholly inaccurate, but it is true that legal texts related to Afghanistan are rare and often unavailable.¹⁸ The absence of a dedicated and extensive literary class in late-

¹⁸ Faiz Ahmed (2017), 3.

19th century Afghanistan means most indigenous Afghan sources from this period are rare, lost, or simply too fragile for public archival access. To further complicate matters, the frequent internecine conflicts of mid- and late-20th century Afghanistan destroyed many of the country's remaining archives, including this in urban centers like Kandahar and Kabul. Primary sources from the perspective of Afghan lawmakers, including commentaries on the 1964 constitution, are consequentially in short supply and remain out of the scope of this thesis.

For those texts available for this thesis, the issue of language and translation raises more concerns for comparative analysis. Those copies of the 1923, 1931, 1964, and 2004 constitutions that were available for this thesis are in English, and the provenance and accuracy of their translations are somewhat questionable. For example, the English copy of the 2004 Constitution used for this thesis states that it uses an “unofficial translation,” with the original text taking precedence. Thankfully, the 2004 Constitution is available in Dari and Pashto—the two official languages of the Kingdom of Afghanistan and the Islamic Republic— but the same cannot be said for the 1923, 1931, and 1964 documents. Any analysis of these documents is thus qualified by the reliance on English translations, but in the future, further research may not be so limited.

Chapter 1: “Under a Despot” – Afghan Governance into the 20th Century

At the turn of the 20th century, the British Government of India found itself in a precarious position. The Russian Empire had, throughout the late 19th century, consolidated its hold on Central Asia and reached the northern side of the Pamir mountains in the early 1890s. Though the British government publicly sought détente with Russia, the latter presented a considerable threat to the wealth produced in British South Asia. Crown rule administered almost 1.9 million square miles on the Indian subcontinent and claimed sovereignty over 315 million subjects. In 1901, the estimated GDP of India alone exceeded 395 million in 2022 USD.¹⁹ Should war break out, British India would be a significant and vulnerable target.

The Kingdom of Afghanistan, then a protectorate of the United Kingdom, was a natural buffer against Ottoman or Russian aggression in South Asia, and considerable British investment went towards ensuring Afghanistan’s support—or, at least, compliance—in resisting a potential Russian invasion. In exchange for the loyalty of Afghan amir ‘Abd al-Rahman Khan (r. 1881-1901), the British government provided weapons, construction aid, railway development, and, after 1893, a stipend of “eighteen lakhs of rupees annually”—the equivalent of about £17.2 million today.²⁰ Even if the Afghan army failed to stop a Russian attack, military planners in London and Calcutta at least hoped the investments would help support a British occupation and prolonged combat in the Afghan countryside.

British military planners overall had little confidence in Afghanistan’s internal stability and security. Prime Minister Arthur Balfour was especially concerned by the sectarian divisions

¹⁹ Angus Maddison, *The World Economy: A Millennial Perspective* (Paris, FRA: Development Centre of the OECD, 2001), 203.

²⁰ *Parliamentary Debates*, House of Lords, 2 June 1905, 547 (Sir Thomas Leigh, UK), <https://api.parliament.uk/historic-hansard/lords/1905/jun/02/relations-with-afghanistan>

of the country and the authoritarian responses they invoked from Amir ‘Abd al-Rahman Khan. “Heratees and Afghan Turcomans [sic],” as Balfour wrote in 1902, had little love for the government in Kabul, whereas the dominant Pashtun community was “divided by tribal jealousies, easily bursting into civil war.”²¹ Despite this instability, Afghanistan remained relatively whole through the 1890s and early 1900s, and many British officials attributed this peace to strong autocracy put in place by Amir ‘Abd al-Rahman Khan Barakzai. In Balfour’s words, Afghanistan was “under a despot whose methods are too thoroughly Oriental to harmonize with Western sentiment.”²²

While Balfour’s observations are undoubtedly colored by Orientalist sentiments, the authoritarian “methods” of Amir ‘Abd al-Rahman Khan certainly existed and represent a larger trend in Afghan governance during the 19th century. Historically, political authorities in Kandahar and Kabul struggled to extend their power beyond lowland population centers. Geographic barriers and powerful tribal communities frustrated attempts at centralization, forcing rulers into negotiation with regional powerbrokers in exchange for political power. Even professional military institutions, gradually developed by Afghan sovereigns as the backbone of their political authority, were reliant on provincial leaders for financial and material support. Far from a traditional nation-state, pre- and early modern Afghanistan more closely represented a feudal kingdom, held together by a network of obligations and decentralized powers.

However, political developments during the 19th century drastically changed the relationship between Kabul and the provinces. Political infighting and civil war, brought on by succession crises under the Durrani and Barakzai monarchies, normalized the use of military

²¹ The National Archives, CAB 38/2/26, “Defence of India: Relations with Afghanistan,” Committee of Imperial Defence: Photographic Copies of Minutes and Memoranda, 6.

²² *Ibid.*, 6-7.

force in securing political legitimacy. Further, as Afghanistan increased its contact with the West, industrial and technological imports gave the central government a significant advantage over its regional powerbrokers. Sovereigns began to rapidly replace their feudal obligations to the provinces with a powerful centralized government, supported by a modernizing army and industrial sector. By the end of the 19th century, nearly all political power had been consolidated in Kabul by subjugation or force of arms.

This chapter argues that the violent consolidation of power in Afghanistan during the late 19th and early 20th centuries was foundational to future conceptions of governance and political power. This centralization, concurrent with the larger state-building project in Afghanistan, led to the normalization of authoritarianism as successive governing bodies removed regional powers from positions of political authority and denied them representation. This chapter argues that the concentration of power in a strong executive body—dominated by Afghan Pashtuns—became the primary conceptualization of government amongst Afghan lawmakers and underpinned future legislation, including the 1964 and 2004 constitutions.

With reference to Afghan state-building, it is also impossible to divorce this consolidation of power from the political and legal influences of Afghanistan's neighbors. Contact with the British, Russian, and Ottoman empires during the 19th and 20th centuries incentivized the end of indirect and decentralized governance. For Afghan elites, centralizing power strengthened their ability to restrict foreign influence on internal politics and further brought the country into line with the European conception of the nation-state, which envisioned a singular central governing authority in each state. For imperial powers—the British, in particular—an empowered, centralized Afghanistan safeguarded the most vulnerable boundaries of their respective empires as it reduced the number of authorities with whom they needed to

contend. The imperial and international demands placed on Afghanistan necessitated a stronger form of government than a decentralized system could provide.

I. “LAWLESS SPACES” IN PRE- AND EARLY MODERN AFGHANISTAN

Of Afghanistan’s barriers to internal development, its mountainous and arid geography has been one of its most challenging. Though Afghanistan’s modern borders cover a total land area of over 650,000 sq. miles, the United States Agency for International Development (USAID) estimates over forty percent of the country consists of mountainous highlands or arid deserts.²³ Vast mountain ranges—including the Hindu Kush, Pamir, Paropamisus, and Spīn Gar mountains—dominate a country whose average height above sea level is 1800m, twice that of neighboring Pakistan and almost 600 meters more than alpine Switzerland. Though the country contains over 150,000 sq. miles of agricultural land, only twelve percent is accessible to Afghan communities, and even less is currently presumed to be under cultivation.²⁴ Afghanistan’s population centers, concentrated in arable valleys and plateaus, are geographically and agriculturally isolated. Lacking either stable infrastructure or sufficient food sources, most of Afghanistan remains sparsely populated and agrarian to this day.

The extremes of Afghanistan’s geography have also historically made the country difficult to conquer and expensive to control, even for the most powerful empires. In the early 320s BCE, Alexander the Great’s invasion of Bactria—which occupied what is now eastern Iran and western Afghanistan—required the complete destruction of seven cities, the death of an estimated 120,000 Bactrian civilians, and a permanent military occupation of nearly 25,000

²³ “Afghanistan,” LandLinks (United States Agency for International Development, June 14, 2018).

²⁴ *Ibid.*

Greek soldiers.²⁵ As a more contemporary example, the American Central Intelligence Agency (CIA) estimated that the Soviet Union spent the modern equivalent of over \$131 billion USD on its occupation of Afghanistan between 1979 and 1987, not including the cost of its material aid to the Democratic Republic of Afghanistan during and after the war.²⁶ Though Afghanistan's reputation as the "graveyard of empires" may be exaggerated, it is impossible to ignore the difficulties conquering states have faced in exerting authority over the disparate, mountainous, and sparsely cultivated Afghan countryside. So tenuous has this control been that many of Afghanistan's mountainous communities have historically been labeled as yagistans, or "lawless spaces."²⁷

For centuries, these "lawless spaces" have been the primary obstacle for Afghanistan's would-be conquerors. While the region's productive centers were concentrated in arable lowlands, most of the country's physical space consists of valleys, highlands, and mountainous divides. Without sufficient infrastructure, campaigning armies struggled to reach highland communities. Beyond hampering communication and transportation, these geographic features also made protracted military conflicts costly at a time when professional standing armies were rare. Even if a military campaign succeeded in subduing a community, attempts to change or exploit it created further difficulties for conquerors. Reorganizing local leadership and economic relationships, for instance, risked provoking resistance from the local population. When Alexander's army began to seize cattle from the newly conquered Bactrian countryside, it instigated a prolonged insurgency by Bactrian herders and escalated into a campaign of ethnic

²⁵ Frank L. Holt, *The Treasures of Alexander the Great: How One Man's Wealth Shaped the World* (New York, NY: Oxford University Press, 2018), 62; Frank L. Holt, *Into the Land of Bones: Alexander the Great in Afghanistan* (Berkeley, CA: University of California Press, 2012), 107.

²⁶ "The Costs of Soviet Involvement in Afghanistan: An Intelligence Assessment," § (1987), pp. 2483-2484.

²⁷ Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton, NJ: Princeton University Press, 2010), 69.

cleansing.²⁸ Between the geographic and societal limitations of warfare, it was far easier for campaigning armies to ignore or bypass resistant highland communities entirely.

To avoid these obstacles of conquest, many pre-modern rulers chose to extend symbolic authority, rather than direct authority, over Afghanistan's rural and highland communities. Knowing military conflict with highland communities would be materially costly and unpopular, governing bodies negotiated their sovereignty over these groups. As Thomas Barfield notes, bribes and compromises were far more common than any armed confrontation.²⁹ Offers of land, political concessions, protection, and monetary gifts were more palatable for both parties, who feared a prolonged conflict might weaken themselves economically and materially. In the rare instances in which conflict did occur, the preexisting landed elite were often allowed to remain as intermediaries between the conquerors and the newly conquered, affording a degree of dignity for the defeated in exchange for indirect access to land and resources. Through these agents, foreign powers could exert some limited authority over rural Afghanistan and avoid prolonged military confrontation.

As centuries and empires passed, little about this symbolic representation of authority changed. Between the 11th and 17th centuries, successive invasions brought new rulers but left in place the system of bribes, feudal contracts, and negotiated sovereignty. Iranian and Turkic polities, like the Ghaznavid and Seljuk dynasties, even expanded these relationships. Seeking a bulwark against Central and South Asian rivals, these empires established an extensive system of military fiefdoms, granting Afghan elites wealth and land in exchange for their material support

²⁸ Holt (2012), 61-62.

²⁹ Barfield, 70.

in war.³⁰ As long as they could depend on warriors to secure imperial borders, many pre- and early modern invaders were content to let the Afghan countryside rule itself.

Yet, under these conditions, there were places outside even the symbolic extension of authority. As empires came and went, “lawless spaces” in the Afghan highlands persisted outside of the lowlands and strategic production centers. Negotiation and tribute, though effective, was a delicate and unreliable process, and most conquerors simply chose to ignore these independent holdouts. Even under the Mongol, Timurid, and Mughal empires, most rural and highland communities remained at the periphery of their authority.

II. GOVERNANCE THROUGH SOCIAL AND RELIGIOUS INSTITUTIONS

The ability of these communities to remain outside direct authority, beyond geographic advantages, was largely due to the traditional organization of Afghan society—an organization that continues, to an extent, to this day. Most prominently for Pashtuns, the predominance of the tribe or qawm created a unit of social organization that challenged contemporaneous political institutions. The tribal networks, their conceptions of hierarchy, and their cultural practices presented governing bodies with challenges to incorporation and assimilation. For both foreign and domestic rulers, achieving political centralization would require the subjugation or incorporation of historically independent tribes.

The initial hurdle of challenging the tribal network was the tribes’ identity as genealogical organizations, rather than political or legal unions. The composition of the tribe was not built upon economic or ideological interests but upon familial relationships that were inseparable from daily life in the tribe. The German ethnologist Bernt Glatzer describes most

³⁰ Gregorian (1969), 15.

Pashtun tribes as “neither corporate nor political entities,” instead characterizing them as kinship networks.³¹ The basis of the tribe was the relation of its members to a common ancestor, which in turn could connect the tribe to other groups through older genealogical ties. In practical terms, these relationships allowed communities to react to agricultural pressures more easily, such as allotting grazing land and resisting economic difficulties. In the context of a familial unit, inter-tribal support systems simplified the transfer of resources and property. Tribal affiliation could, and often did, influence political relationships in pre- and early modern Afghanistan, but tribal organizations were rarely synonymous with political organizations like political parties.

The immediate impact of this perception was the formation of what Barfield calls “egalitarian lineage systems,” wherein tribal leadership was a process of cooperation, negotiation, and temporary alliance.³² On the basis of their shared ancestry in the tribe, tribal Pashtun communities enjoyed at least nominal equality amongst those of their own clan. Though hierarchies of age, gender, and experience permeated tribal society, birth alone did not convey any explicit economic or social advantages. Pashtun jirgahs, or tribal assemblies, are cogent examples. Mountstuart Elphinstone, a representative of the British East India Company (EIC) to Afghanistan in 1809, observed the emphasis of merit over hierarchy at a judicial jirgah, which was “composed of Khauns [sic]...elders, assisted by Moollahs, and even by grave and experienced persons of inferior rank to those.”³³ So ingrained is this commitment to nominal

³¹ Bemt Glatzer, “The Pashtun Tribal System,” in *Concept of Tribal Society*, ed. Georg Pfeffer and Deepak Kumar Behera, vol. 5 (New Delhi, IN: Concept Publishers, 2002), 271.

³² Barfield, 78.

³³ Mountstuart Elphinstone, *An Account of the Kingdom of Caubul and Its Dependencies in Persia, Tartary, and India; Comprising a View of the Afghaun Nation and a History of the Dooraunee Monarchy* (London, UK: Longman, Hurst, Rees, Orme, and Brown, 1815), 167.

equality that jirgah members sit in circles or crescents to avoid creating a “head” of the assembly.³⁴

The prevailing culture of equality also created was a fierce resistance to hierarchy, whether internal or external. The constituent clans of egalitarian Pashtun tribes rarely recognized established leadership, and tribal leaders had little tangible authority over their brethren. Authority was again negotiated and attained through alliances with powerful clans within the tribe. Tribal authority was only partly centralized during times of hardship, but once the problem passed, this centralization quickly dissipated.³⁵ Such conflicts could even transcend tribal affiliation, resulting moreso in regionalism than tribalism. Access to water, grazing land, and economic opportunities could as easily draw fellow tribesmen against each other as it did against competing tribes.³⁶

Over time, successive campaigns by Turkic and Mongol conquerors after the 11th century began to challenge the egalitarian lineages systems of Pashtun tribes. These Central Asian communities, originating from modern-day Uzbekistan and Turkmenistan, adopted “hierarchical lineages,” wherein authority was concentrated in a ruling family and radiated outward based on relation and seniority.³⁷ More than facilitating the creation of centralized authority, these systems also provided these systems with stability and longevity. While leadership of an egalitarian tribe was a negotiated and temporary position, command of a hierarchical tribe passed only through the familial relatives of the ruler and was therefore less negotiable and more durable. Further, succession in the tribe depended on martial ability and leadership, which Central Asian nomadic

³⁴ Barfield, 79.

³⁵ *Ibid.*

³⁶ Gregorian (1969), 42.

³⁷ Barfield, 80-81.

communities greatly valued. Violent succession crises fought among descendants were common, but they theoretically guaranteed that strong military leaders would attain leadership. Even if succession raised an incompetent ruler to tribal—or, later, imperial— authority, it was easier for advisors and powerbrokers to rule through the dynasty than to overthrow it. Thus, a single family or clan could secure its longevity even if it lacked political power.

As Seljuk, Mongol, and Uzbek invaders popularized hierarchical tribal systems, Afghan Pashtuns gradually adopted the lineage system to support their own authority. Over time, many tribes gradually replaced their decentralized leadership for the hereditary, centralized authority of their Turko-Mongolian neighbors. When the Abdali Pashtun leader Ahmad Shah Durrani (r. 1747-1773) established the Durrani Empire in the mid-18th century, his dynasty eschewed tribal negotiation of ruling authority in favor of patrimonial lines of succession.³⁸ Despite several succession crises and civil wars, Ahmad Shah's descendants retained political authority for several decades and supplanted traditional tribal strongmen with pliable dependents, who served as governors and advisors.³⁹ While this adaptation was never complete, and egalitarian systems persisted and continue to persist in Afghanistan under the Durrani and succeeding Barakzai dynasties, the hierarchical tribal system gradually became a powerful institution within Afghanistan.

However, whether negotiations of authority were performed by clan leaders or tribal aristocracy, they were left almost entirely to the elites of Afghan society. Unlike their subjects, landowners had the economic and political capital to organize military forces, and landowners had the most to lose in wars of conquest. While a conqueror might use the existing elite as

³⁸ Gregorian (1969), 43; Barfield 89.

³⁹ *Ibid.*, 106; Elphinstone, 559.

intermediaries for their authority, such an arrangement was never guaranteed. When the peasantry did engage in these conflicts of authority, it was more likely as warriors or unarmed civilians than as commanders or negotiators. Between negotiating or warring elites, the lower classes were “passive” targets, Barfield notes.⁴⁰

Accordingly, elites conceived legitimacy more as a matter of military or political victory than as cooperation with conquered populations. As long as conflicts left economic and social structures relatively untouched, rulers presumed that the lower strata would accept new authority without complaint. Elite literature from the 11th and 12th centuries, such as the writings of the Seljuk Sultan Ahmed Sanjar, goes further with this conception, arguing that non-elite resistance to conquerors was either misguided or altogether inconceivable.⁴¹ Elites perceived the peasantry’s primary concerns to be access to life needs and economic processes, not political processes or methods of government.

The lionization of elite conflict and negotiation gradually led to the military becoming the focal point of political centralization. This militarization, too, is potentially a holdover from Turkic and Mongolian empires, which viewed the legitimacy of the ruling dynasty as contingent on its ability to expand and provide for its tribal constituents, consequently chaining tribal prosperity with military conquest. The Durrani Empire under Ahmad Shah boasted a strong professional army, the first of its kind for a native Pashtun power. At its height, it numbered over 120,000 soldiers and attracted even more mercenaries from the historically independent tribes, who followed Ahmad Shah on conquests into northern India and Iran.⁴² As the army expanded, the Durrani dynasty expanded its ability to police the countryside and tax the productive centers

⁴⁰ Barfield, 75.

⁴¹ *Ibid.*

⁴² *Ibid.*, 99.

of Afghanistan. Further, the violent methods of succession adopted by Ahmad Shah's descendants incentivized a strong, loyal military. Dynastic heirs with established military power were more likely to triumph over rivals who looked to competing, egalitarian tribes for support.

As Islam entered Afghanistan between the 7th and 11th centuries, rulers also began to rely on Islam and religious institutions to manage rebellious communities. Fitna, translated as sedition or civil conflict, played an important role in dissuading rebellion and equating secular authorities with divinity. While resistance to unjust or heretical rule was a foundational tenet in early Islam, the ambiguity of what constituted an "unjust" rule made legitimate rebellion difficult. Even if a revolt developed around legitimate grievances, such legitimacy might easily be undermined by political authorities offering concessions.⁴³ Ayalon argues that the anarchy of rebellion "proved to be the worst of all political options" to early Muslims, and jurisprudence incentivized quiet accommodation to any Muslim rule, no matter how authoritarian it was.⁴⁴

Government cooptation of religious institutions, often with monetary or material compensation, also worked to consolidate political authority. Beginning with Timur Shah (r. 1772-1793), the court of the Durrani dynasty employed an extensive bureaucracy of religious experts and jurists. While many Muslim clerics derived patronage from tribal leaders, the Durrani Emperor appointed and employed scores of regional mullahs, or religious teachers. These teachers and their students benefited from state stipends and property grants, but these privileges could easily be revoked if either the mullahs or their communities acted in opposition to the central government.⁴⁵ Islamic jurists, or Qazis, were similarly appointed by the Durrani

⁴³ Josef Van Ess, "Political Ideas in Early Islamic Religious Thought," *British Journal of Middle Eastern Studies* 28, no. 2 (November 2001), 158.

⁴⁴ Ami Ayalon, "From Fitna to Thawra," *Studia Islamica*, no. 66 (1987), 146.

⁴⁵ Elphinstone, 540.

Emperor and enforced both civil and religious law throughout the country. So entangled was political authority with religious practice that the khutbah, or Friday sermon, was frequently given in the name of the regional or central ruler.⁴⁶

In the struggle for political authority, tribal and religious institutions served as both obstructive and advantageous to Afghan rulers. On one hand, the traditional egalitarian culture of Pashtun tribes evoked strong opposition to authority and made centralization difficult for tribal leaders. However, the introduction of hierarchical lineage systems, the culture of elite powerbrokers, and the cooptation of Islamic legal systems gave rulers methods to legitimize, centralize, and expand their authority over the countryside. It is with these institutions that the Durrani dynasty pacified competing tribes and established a powerful, well-armed empire and southern and eastern Afghanistan.

Despite the shifts toward centralization that occurred by the time of the Durrani dynasty in the late-18th and early 19th century, Afghanistan as a state was still only a distant dream. The Durranis, despite their considerable military and political power, still relied on semi-autonomous tribes to fuel their armies and maintain security along the borders. Further, the repeated infighting of Durrani heirs and the appointment of incompetent governors began to destabilize the empire as it entered the 19th century. The conception of Afghan statehood would ultimately develop under a competing Abdali subtribe —the Barakzais— and the expanding British presence in India.

⁴⁶ Barfield, 73.

III. EUROPEAN IMPERIALISM AND CENTRALIZING AFGHANISTAN

At the dawn of the 19th century, Afghanistan was entering a period of uncertain transition. Despite Ahmad Shah's considerable exploits, his heirs —Timur Shah, Zaman Shah, Mahmud Shah, and Shah Shuja— rapidly eroded the financial and political stability of the Durrani Empire. In theory, the violent succession style of hierarchical tribal systems assured strong martial leaders, but the frequency and brutality of Durrani succession wars hampered further attempts to centralize the country. Tribal cohesion eroded as the ruling Sadozai clan marginalized fellow Abdali subtribes, including the influential Barakzai clan that had aided Zaman Shah's (r. 1793-1801) ascension to the throne. These wars, and attempts by successors to recapture Ahmad Shah's military success in India, created greater tax burdens on urban centers and imperial tributaries in Baluchistan.⁴⁷ The semi-autonomous tribes remained outside the monarchy's direct authority and even directly challenged the emperors by supporting dynastic rivals.

Trans-Asian trade, once a lifeblood of the Afghan economy, was also beginning to falter. The increasing autonomy of regional and tribal units made travel through Afghanistan slow, expensive, and dangerous. Tribal communities levied taxes and customs on trade independent of official imperial taxes. The Ghilzai Pashtuns, historical tribal rivals to the Abdali Durrans, began extracting "transit" and "entertainment or hospitality fees" from caravans traveling between Kandahar and Kabul. A similar practice occurred as caravans left territorial Afghanistan, as customs officials taxed merchants and travelers for their purchased goods, personal items, and carried wealth. These harsh duties, followed closely by economic reprisals from Afghanistan's neighbors, began to choke both the income made from trade and the availability of critical goods

⁴⁷ Gregorian (1969), 51-52.

like clothing, food, medicine, and weapons. The effects were crippling to the Afghan economy; between 1812 and 1826, the annual revenue of Jalalabad fell by over fifty percent.⁴⁸

The political instability and economic degradation of the Durrani Empire ultimately led to the ascension of the Barakzai subtribe as Afghanistan's dominant political leaders. The Barakzai Muhammadzai clan had been instrumental in placing Timur and Zaman Shah on the throne, but as their influence in the imperial court grew, their activities drew greater and greater suspicion from the ruling Sadozais. In 1799, Zaman Shah humiliated and executed the clan patriarch, Payinda Khan, and in 1818, Mahmud Shah imprisoned Payinda's successor, Fatih Khan.⁴⁹ Both times, the Sadozais provoked ferocious resistance from the Barakzais and their tribal allies, and by 1826, the remnants of the ruling family had either been forced into exile or made wholly dependent on Barakzai political support. It was in this atmosphere that Dost Mohammad Khan (r. 1826-1838, 1842-1863), a son of Payinda Khan, declared himself the Amir of the Kingdom of Kabul.

However, by seizing the Durrani throne, Dost Mohammad inherited its many economic and political challenges. Decades of economic stagnation and administrative mismanagement had led to tax revenues falling nearly ninety percent in the previous forty years.⁵⁰ Important urban centers —Herat, Peshawar, Balkh, and Mazar-i-Sharif— had either fallen to foreign invaders or declared independence from the new monarchy. Even the heartland of the new Kingdom, stretching from Kandahar to Jalalabad, was controlled by semi-autonomous tribes that were fiercely resistant to the authority and taxes of Dost Mohammad. Indeed, despite the decline

⁴⁸ Gregorian (1969), 56.

⁴⁹ Barfield, 108.

⁵⁰ *Ibid.*, 112.

of the Durrani Sadozai dynasty, the Barakzai Muhammadzais proved incredibly unpopular to many Afghans, who viewed Dost Mohammad as a usurper and a pale imitation of Ahmad Shah.

Like the Durranis before him, Dost Mohammad secured his new rule through the rapid expansion and institutionalization of the military. Through the 1830s, the army became instrumental in enforcing and collecting the harsh taxes Dost Mohammad was levying on the urban centers. Rural communities, including Tajik- and Hazara-dominated regions that Durrani tax collectors had previously ignored, were frequently patrolled by cavalry brigades from Kabul.⁵¹ The Kingdom also began an ambitious program of modernization, introducing European military equipment, organization, and training. At the behest of European and American “adventurers” hired after 1835, Dost Mohammad introduced modern European weaponry, a standardized uniform, and a theoretically regular system of pay for soldiers.⁵² However, these advances were overall limited in impact and scope; the army still consisted mostly of tribal irregular up to 1840, and the economic poor economic situation meant pay and equipment were in short supply.

The political, financial, and military situation in Afghanistan did not go unnoticed by the British Empire. Throughout the first quarter of the 19th century, Afghanistan hosted a series of British military officers and agents who acted as official observers for the empire and the East India Company, like Elphinstone. Independent explorers, like the veterinarian William Moorcroft and the EIC deserter Charles Masson, wrote primarily as amateur ethnographers and published their accounts for public consumption.⁵³ Following Elphinstone’s *An Account*, official observations were at first strictly informative; writers focused on their observations and rarely

⁵¹ Barfield, 113.

⁵² Gregorian (1969), 76-77.

⁵³ *Ibid.*, 67.

provided recommendations for political or diplomatic action. Their role in British colonial knowledge was understanding the *terra incognita* on the empire's borders, but later writings in the mid-1800s began to view Afghanistan as a target of imperial expansion. British authors, perceiving Afghanistan as itself a "lawless space" dominated by loose tribes, advocated the great need for control by "a strong body of loyal and civilized men."⁵⁴

Despite the number and frequency of British visits to Afghanistan, official observations of the country were flawed and incomplete. Importantly, British agents privileged Pashtun political power and social organization over the identity of other Afghan ethnic groups, which were largely relegated to passive and unthinking subjects. As Hopkins notes, most British agents limited their travels to the politically important regions of Kabul, Kandahar, and modern-day Khyber Pakhtunkhwa, where Abdali and Ghilzai Pashtun power was predominant.⁵⁵ The frequency of Anglo-Pashtun encounters, such as Elphinstone's visit to the Durrani court, essentialized European knowledge of Afghan politics and fixated on Pashtun identity over other governed communities. The perceived Pashtun dominance encountered by the British in the southeast was in stark contrast to political power elsewhere in Afghanistan, where Turkic communities were the norm.

In addition to giving outsized importance to the Pashtuns, many of these writers observed Afghanistan as an extension of British South Asia rather than as a distinct region. Official travels to Afghanistan, such as Elphinstone and Burnes', were conducted by agents whose experiences were limited to the peoples, social structures, and politics of India and the Sikh Empire. Indian

⁵⁴ Richard Temple, *Report showing the relations of the British government with the tribes, independent and dependent, on the North-west frontier of the Punjab, from annexation in 1849 to the close of 1855*, Calcutta, IN: Thos. Jones, Calcutta Gazette Office), 124.

⁵⁵ Benjamin D. Hopkins, *The Making of Modern Afghanistan* (Basingstoke, UK: Palgrave Macmillan, 2014), 16.

merchants and texts formed the core of pre-colonial knowledge of Afghanistan, and visitors primarily employed Pashto-speaking Indians as interpreters. The EIC even employed Indian Muslims as their representatives and informants in Kabul and Peshawar in the 1840s.⁵⁶ Later British interests in Afghanistan were thus informed by the idea that the country was an extension—culturally and politically—of the empire’s Indian dominions. Some authors went further by relating their observations to their understanding of European tribal history. As Elphinstone observed Shah Shuja Durrani’s court in 1808, he compared the country “Scotland in ancient times.”⁵⁷ Throughout early British reports, Afghanistan was depicted as a Pashtun-dominated, tribalized successor of the Mughal Empire, simultaneously noble in its independence but lacking in civilization.

Despite the considerable flaws in these observations, they formed the foundation for British colonial knowledge of Afghanistan as it began to contend with imperial rivals in South Asia. In 1804, the Russian Empire began expanding into the Iranian Caucasus with the Fourth (1804–1813) and Fifth Russo-Persian Wars (1826–1828), simultaneously expanding Russian influence over Iranian military reforms in the 1830s. Khiva and Bukhara, Afghanistan’s northern neighbors, were also facing Russian colonialism in Central Asia as the empire annexed the Kazakh Khanate in 1847. The United Kingdom viewed these imperial expansions, along with French political interest in Iran during the Napoleonic Wars, as threats to the security of British India. In fact, the threat of a Franco-Persian assault on India following the 1798 French invasion of Egypt formed the foundation for Elphinstone’s diplomatic mission to Afghanistan in 1808.⁵⁸

⁵⁶ Hopkins, 22-23.

⁵⁷ Elphinstone, 173.

⁵⁸ Gregorian (1969), 93-94.

Thus, as the East India Company dramatically restructured itself in the 1820s, imperial rivalry and Indian security were important planks in its Afghan policies. Under later governors-general of India, Lord Bentinck (1828-1835) and Lord Auckland (1836-1842), these policies increasingly focused on the subjugation of the Afghan borderland. Their advocacy for an “aggressive posture on the frontier” —whether in the form of military force or political negotiation— promised to tame Afghanistan’s troublesome tribes and open trade across the Indus River, which had historically been infrequent and costly.⁵⁹ Implicitly, such a posture would extend the political and territorial extent of British India far into Central Asia, providing strategic depth for any British forces resisting French or Russian aggression in Central Asia. In the language of free trade liberalism, officials in London and Calcutta began pushing for increased political and economic contact with Afghan leaders.

The marriage of incomplete ethnography, imperial rivalry, and shifting EIC policy culminated in the First Anglo-Afghan War (1839-1842). Afghan resistance to British diplomatic and commercial overtures stoked British fears that competing Russian commercial enterprises would, in the words of Lord Ellenborough, “prepare the way for Russian armies.”⁶⁰ Forcing, rather than negotiating, Afghan dependency on the British Empire became the primary goal of future British policy toward the Afghans. When attempts to indirectly influence the tribal system failed, British and EIC officials considered placing the more pliable Shah Shuja Durrani on the throne. In the spring of 1839, a force of twenty-thousand British, Indian, and Sikh soldiers entered the Kingdom of Kabul and forced Dost Mohammad Khan’s surrender in August of 1840.

⁵⁹ Hopkins, 39.

⁶⁰ H.W.C. Davis, *The Great Game in Asia (1800-1844)* (London, UK: Oxford University Press, 1928), 230, quoted in Gregorian (1969), 95.

British forces swiftly and easily won on the battlefield, but their occupation of Afghanistan ran into numerous issues. First, while the EIC occupation initially retained most of the indigenous socio-political order, Shah Shuja's British advisors viewed the larger feudal-tribal network as a threat to the EIC's economic and political domination. Within a year, Company representatives replaced Afghan tribal irregulars with a professional standing army and cut payments to the tribes by nearly a quarter.⁶¹ When communities threatened rebellion, the British circumvented their client shah and repressed the civil unrest directly without consultation. Even the Abdali Pashtuns, Shah Shuja's strongest supporters, felt alienated and maligned by the use of Anglo-Indian soldiers to tax and repress the tribes.

The wars and the follow free-trade economic regime had also crippled Afghanistan economically. The opening of the Afghan market flooded the country with goods and capital from British India, sharply raising inflation and forcing local businesses into bankruptcy as they failed to remain competitive. Urban centers declined as their unemployed and impoverished inhabitants looked elsewhere for work. The immediate military activities also took a toll on economic and social cohesion, as British forces began to seize and redistribute farming land, religious endowments, and government stipends amongst the advisors in Shah Shuja's court.⁶² By curtailing feudal privileges and disrupting the local economy, British officials alienated the communities most receptive to their overthrow of the Barakzais.

Though Dost Mohammad Khan would return to the Afghan throne in 1843, the fallout of the British occupation forever changed the local political and social order. For one, in sharp contrast to pre-modern conceptions of elite-commoner relations, the series of rebellions that

⁶¹ Barfield, 119.

⁶² *Ibid.*, 121.

finally ousted the British in 1842 had not been organized by elite landowners but by peasants and religious leaders. The “universal antiforeign, pro-Islamic, popular rebellion,” organized by urban clerics and rural tribal communities, showed Afghan elites that the peasantry was more than capable of resisting the political authority of Kabul, however disorganized such rebellion was.⁶³ That non-Muslims upheld Shah Shuja’s unpopular regime also challenged the Islamic political conception of fitna and made the Muslim religious establishment more influential in civil society and more independent of Kabul’s political direction.

However, far from eroding central authority, the First Anglo-Afghan War introduced a series of technological and administrative innovations that Afghan rulers would exploit in centralizing Afghanistan. The professional army instituted by the British administration remained, and increased contact with British military advisors in the 1850s led to the increased adoption of European weaponry and training techniques. Dost Mohammad’s successors — Mohammad Afzal, Mohammad Azam, and Sher ‘Ali Khan Barakzai— expanded local arms industries by duplicating British equipment abandoned in 1842. Sher ‘Ali Khan (r. 1863-1879) proved the most successful of the post-war in modernizing the military, as he created a guaranteed system of cash payments for soldiers and expanded Afghanistan’s arsenal with British assistance.⁶⁴ For the first time, the central Afghan government had numerical and technological superiority over its autonomous tribal rivals, and between 1843 and 1878, the Barakzai Muhammadzais began to reclaim territories lost during the 1830s. While Gregorian argues that the war strengthened tribal and feudal autonomy, the military reforms ushered in by the British made such autonomy inconsequential to the expanding political authority of Kabul.⁶⁵

⁶³ Barfield, 122.

⁶⁴ Gregorian (1969), 87-88.

⁶⁵ *Ibid.*, 127.

IV. AFGHANISTAN'S POLITICAL TRANSITION INTO THE EARLY 20TH CENTURY

Despite the considerable gains made by Dost Mohammad and Sher 'Ali, Afghanistan still faced considerable internal challenges into the 1870s. The Durrani tradition of violent succession continued with the Barakzai monarchs, and their civil wars did little to change the poor economic situation left by the British in 1843. Educational, intellectual, and political reform remained secondary to expanding the military establishment. The first public school, founded by Sher 'Ali at Bala Hissar palace, was limited to the Afghan elite and lacked qualified instructors until 1869.⁶⁶ The military remained the primary concern of Afghan reformers and would be instrumental in further centralization in the country's western provinces.

Increasing Anglo-Russian competition in Central Asia further complicated Afghanistan's geopolitical position. Though the Russian government officially recognized Afghanistan as part of the British sphere, its military commanders in Central Asia saw military expansion as paramount to imperial security. Between 1873 and 1878, Russian forces annexed Afghanistan's northern neighbors, Khiva and Bukhara, and conducted patrols dangerously close to the Afghan border.⁶⁷ The United Kingdom and the British Raj, established in the aftermath of the 1857 Indian Revolt, responded by increasing their political pressure on Kabul. British troops occupied Baluchistan and the Viceroy of India, Lord Lytton, demanded considerable diplomatic and political concessions in exchange for continued British patronage. By 1878, British agents had begun directly approaching the Barakzai monarchy's tribal vassals, undermining Sher 'Ali's hard-won internal authority.⁶⁸

⁶⁶ Saifullah Gharwal and Asmatullah Ziar, "Political, Economical and Cultural Reforms in the Government of Amir Sher Ali Khan," *International Journal for Research in Applied Sciences and Biotechnology* 9, no. 2 (March 14, 2022), 59-60.

⁶⁷ Barfield, 140.

⁶⁸ Gregorian (1969), 113.

In these uncertain times, Afghanistan found a new ally in the Ottoman Empire, which similarly found itself under Russian threat. Through the 1870s, instability in the Balkans had upset the delicate balance between Russia and the Ottomans, especially after the latter refused to grant Bulgarians and Serbs greater autonomy in the empire. Ottoman Sultan Abdülhamid II (r. 1876-1909), hoping to mobilize Central and South Asian Muslims in the event of war, increased diplomatic and economic contact with Indian and Afghan Muslims. Ottoman dignitaries in Bombay regularly corresponded with local Muslim societies, or anjumans, and extended grants to religious schools and universities.⁶⁹ As Russo-Turkish tensions escalated, religious leaders in both the Ottoman Middle East and British India began to emphasize solidarity with the government in Istanbul. In December of 1876, Muslim scholars in Ottoman Baghdad issued and distributed a fatwa in support of Ottoman military action against the Russian Empire, and the document was enthusiastically received amongst Indo-Afghan Muslim communities.⁷⁰

However, popular Muslim support for the Ottomans failed to materialize during the Russo-Turkish War (1877–1878), and Afghanistan faced its own problems with British India. The British government, seeing Russian influence expand in the Barakzai court, had begun to lose faith in Sher ‘Ali’s commitment to neutrality. When the Afghan monarch turned away a British diplomatic mission in 1878, Viceroy Lord Lytton of the British Raj dispatched a force of 10,000 British and Indian soldiers to seize Kabul. As with the first war, hostilities ended within a year, with Sher ‘Ali succumbing to illness in February of 1879 and passing the throne to his reluctant son, Mohammad Yaqub Khan, who quickly made peace with the British that May. The United Kingdom assumed responsibility for Afghanistan’s foreign affairs and once more opened

⁶⁹ Ahmed, (2017), 45 and 47.

⁷⁰ *Ibid.*, 47.

the country to Indian trade, which the empire enforced with a permanent diplomatic mission in Kabul.⁷¹

However, as with the First Anglo-Afghan War, British success was short-lived. Mohammad Yaqub had been imprisoned by Sher 'Ali prior to the latter's death and was unpopular even among his own tribe. Three months after Mohammad Yaqub's surrender, a civilian mob led by unpaid soldiers assaulted the British diplomatic compound at Bala Hissar and murdered the British envoy, Sir Louis Cavagnari. A reprisal led by Frederick Roberts ousted Mohammad Yaqub that October, but logistical problems and local resistance hampered the expedition's ability to exert control outside of Kabul.⁷² Worse still, Barakzai claimants had begun to raise new armies to support the popular resistances the British were already facing from Ghilzai Pashtuns and Afghan Tajiks. In July of 1880, Sher 'Ali's son, Ayyub Khan, laid siege to a British force at Kandahar, while the former's nephew, 'Abd al-Rahman Khan Barakzai, had begun marching north from Bukhara with an army of loyal Uzbek and Tajik soldiers.⁷³

Rather than face both armies, the British Government of India reached a compromise with 'Abd al-Rahman Khan and left him to contend with Ayyub Khan. As 'Abd Al-Rahman Khan's army reached Kabul, Roberts' expedition surrendered the city and headed south to relieve Kandahar. In April 1881, all British military and political officials were evacuated from the city and retreated east into Baluchistan. 'Abd al-Rahman Khan portrayed the withdrawal as a resounding Afghan victory and used this narrative to mobilize the eastern Pashtun tribes against Ayyub Khan. The combined army crushed Ayyub Khan's 14,000-man force at Kandahar in

⁷¹ Barfield, 141.

⁷² Rob Johnson, "General Roberts, the Occupation of Kabul, and the Problems of Transition, 1879–1880," *War in History* 20, no. 3 (July 2013), 305.

⁷³ Barfield, 143 and 144.

August, and as the disgraced Barakzai heir sought asylum in Iran, ‘Abd al-Rahman Khan consolidated his power as the next Amir of Afghanistan.⁷⁴

In Afghan historiography, ‘Abd Al-Rahman Khan’s ascension to power represents the beginning of the modern Afghan state. Indeed, while Ahmad Shah Durrani may have begun the process of indigenous centralization, scholars generally credit ‘Abd Al-Rahman Khan with centralizing Afghanistan and ending the “anarchy” his ancestors struggled to tame.⁷⁵ However, the amir’s methods of centralization were almost identical to the practices of the Durranis, Dost Mohammad, and Sher ‘Ali: the subjugation of the tribes, driven by a strong military. Any tribes that threatened the new administration were violently suppressed, especially those that had supported Ayyub Khan or otherwise resisted the British invasion in 1879. For example, the Ghilzai tribe became the target of high-profile arrests, executions, and tax burdens between 1883 and 1888.⁷⁶ When the tribes rebelled in 1886, the amir’s response was swift and exemplary violence. By the winter of 1887, ‘Abd al-Rahman Khan’s armies had killed nearly 24,000 Ghilzai tribesmen and forcibly resettled 10,000 Ghilzai families in the northwest, far from their traditional powerbases in Jalalabad and Laghman.⁷⁷ A similar campaign took place against the Hazaras, who rebelled between 1888 and 1893.

British financial and material support was also crucial to ‘Abd al-Rahman Khan’s wars of internal consolidation. When Roberts retreated from Kabul in 1880, his forces left behind Mohammad Yaqub’s treasury and the limited arsenal the former amir had assembled. Along with an annual monetary stipend, the British Government of India provided ‘Abd al-Rahman with the

⁷⁴ Barfield, 146.

⁷⁵ Gregorian (1969), 129.

⁷⁶ Barfield, 148.

⁷⁷ *Ibid.*, 149; Gregorian (1969), 133.

technical and industrial expertise necessary to expand the country's infrastructure and, more importantly, its military arsenal. Between 1881 and 1889, the British delivered to Kabul nearly 37,000 rifles and about seventy-four modern artillery pieces, which the amir did not hesitate to employ against his tribal adversaries.⁷⁸ In exchange, 'Abd al-Rahman Khan entrusted the country's foreign affairs to the British government and relinquished Afghan claims to Peshawar and Quetta, historical Pashtun cultural and economic centers.

Alongside this program of centralization and industrialization was a complete restructuring of the Afghan government bureaucracy. For example, 'Abd al-Rahman Khan expanded a cabinet system established under Sher 'Ali Khan into a select executive body, or "khilwat," and created a civil bureaucracy with professional, appointed servants.⁷⁹ Perhaps most important to these reforms was the formation of a consultative body under the throne's supervision, constituted jointly of Afghan aristocrats, landed commoners, and members of the 'ulemā, or religious scholars. Current records indicate this was one of the first bodies of its kind in Afghanistan. This said, neither the khilwat nor the consultative assembly had any significant powers independent of the amir. The assembly was, as its name suggests, primarily an advisory council with no legislative powers, whereas the khilwat had no substantial agency over national policy.⁸⁰ Regardless, the reforms to the cabinet and to government representation provided a foundation for future Afghan governmental innovations.

Less recognized by scholars are the legal systems the amir introduced in the aftermath of his conquests. As his armies pacified the tribal territories, 'Abd al-Rahman Khan introduced

⁷⁸ Gregorian (1969), 131.

⁷⁹ *Ibid.*, 134.

⁸⁰ *Ibid.*; On a related note, democracy and popular sovereignty were not unheard of in Afghan intellectual discourse at this time. During the late 19th century, many Islamic modernists like Jamal al-Din al-Afghānī and Muhammad 'Abduh debated the efficacy of presidential democracy in Afghanistan. For more, see Soage (2014).

novel administrative divisions and a countrywide civil code based on Hanafi fiqh, a school of Islamic jurisprudence. A national police force enforced a new criminal code, which covered both religious and civil offenses. Municipal police chiefs also held judicial power over petty crimes like offensive language or gambling, but more serious crimes and civil disputes could be referred to a system of district and provincial courts.⁸¹ Despite this legal infrastructure, ‘Abd al-Rahman Khan retained final authority over the interpretation and enforcement of this infrastructure, to some extent. For instance, the amir personally appointed both secular and religious justices and presided over cases of national interest. Like religious leaders under the Durrani, Muslim jurists were dependent on Kabul for patronage and law enforcement, making the power of the amir inseparable from the interpretation of Afghanistan’s secular and religious law.

Perhaps the greatest inspiration behind these reforms was the Ottoman Empire, whose diplomatic missions to South Asia in the 1870s involved considerable intellectual exchanges with Afghanistan. In 1878, as part of a mission to enlist Sher ‘Ali’s aid against the Russian Empire, Sultan Abdülhamid II dispatched the Ottoman jurist Ahmed Hulusi Effendi. Between 1849 and 1878, Effendi rapidly climbed the Ottoman judicial hierarchy, becoming the chief justice of Anatolia in 1868. More notably, Effendi was one of fifteen judges selected to compile the *Mecelle-i Akham-‘i ‘Adliye*, known informally as the Ottoman Civil Code, and was instrumental in compiling all but two of the Code’s sixteen volumes.⁸²

While there is no evidence of Effendi’s direct influence on the Afghan legal system, legal scholar Faiz Ahmed argues that the amir’s legal reforms were heavily inspired by Effendi and the larger Ottoman Empire. A cogent example is the *Asas al-Quzat*, or “Fundamental Rules for

⁸¹ Gregorian (1969), 136-138.

⁸² Ahmed, (2017), 51.

Judges,” which ushered in the codification of Hanafi fiqh. Published in 1886 by the Hanafi scholar Mawlawi Ahmad Jan Khan Alakozai, it imitated much of the Ottoman Civil Code’s organization, methodology, and even aesthetic values.⁸³ The text standardized both the use of Hanafi jurisprudence and which opinions from the school justices were expected to follow. As ‘Abd al-Rahman Khan expanded and reformed the civil code, *Asas al-Quzat* became the foundation for legal education and judicial practice.

The legal influences of the Mecelle and Effendi did not end at the “Fundamental Rules.” Between 1886 and 1891, ‘Abd al-Rahman Khan commissioned two more books from the government press in Kabul: *Sarrishtih-‘i Islamiyyih-‘i Rum*, “The Islamic Administration of the Ottoman Empire,” and *Kitab-i Jang-i Rum wa Rus*, or “The Russo-Ottoman War.”⁸⁴ Beyond simple historical texts, these publications drew parallels between the experiences of the Ottoman and Afghan governments. Indeed, the authors of *Sarrishtih-‘i Islamiyyih-‘i Rum* make direct comparisons between the Ottoman Empire’s struggle with European imperialism and ethnic tensions, claiming Afghans should look to the Ottoman Turks as a successful model of Islamic governance.⁸⁵ In commissioning this text, ‘Abd al-Rahman Khan seemed to emphasize Ottoman governance as the next step in Afghan state-building.

While ‘Abd al-Rahman Khan would pass in 1901, his military policies and legal reforms had ushered in an unprecedented period of political centralization. Building on the reforms of Dost Mohammad Khan and Sher ‘Ali Khan, the “Iron Amir” translated significant military advancements into strong government power. The new army, equipped with modern British weaponry, decimated the feudal-tribal system that had dominated rural Afghanistan. The legal

⁸³ Ahmed (2017), 61.

⁸⁴ *Ibid.*, 61 and 63.

⁸⁵ *Ibid.*, 63.

codes these campaigns introduced, inspired by the Ottoman judicial system, further strengthened Kabul's group over historically independent regions like Herat and Bamiyan. These administrative innovations, coupled with the post-war rise of Afghan national and religious identity, became the foundation for the modern Afghan state.

However, the violent origins of this centralization would remain in Afghan governing norms long after the birth of the modern state. While Afghan rulers had sought to expand their political authority for centuries, the institutionalization of the military after Ahmad Shah Durrani and the influence of European imperialism dramatically upended traditional systems of Afghan governance. Between 1839 and 1901, Afghan rulers increasingly associated their political authority and legitimacy with the expansion, modernization, and employment of the military. This policy of "rule of might," while successful in erasing the yagistans, had also centralized Afghan political power in an autocratic executive resistant to sharing its newfound strength.

Chapter 2: “Unity, and Unity Alone” – The Constitutions of Afghanistan

When ‘Abd al-Rahman Khan died in 1901, he left behind a complicated legacy for his successors. Afghanistan was outwardly united under the Barakzai monarchy in Kabul and the power of the state —taxation, standardized law, and law enforcement— was being felt throughout the provinces. The military has especially benefited under ‘Abd al-Rahman’s reign, being instrumental in expanding his domain and maintaining public order. Throughout the 1880s and 1890s, the army’s size and professionalism grew exponentially. The army suffered from insufficient funds and outdated armaments for most of the amir’s tenure, but they proved adequate to crush local revolts and maintain the country’s territorial sovereignty against the Russian Empire and Qajar Iran. ‘Abd al-Rahman Khan had so thoroughly centralized political authority that “no city or province outside Kabul” could realistically challenge his agenda.⁸⁶ When the amir passed, the ascension of his son Habibullah Khan (r. 1901-1919) was the first peaceful transition of power in over a century.

Under the surface, the late Barakzai monarch had also left Afghanistan in a tenuous position. The country was industrially weak and economically underdeveloped despite the vast expansion of the military. Though ‘Abd al-Rahman Khan had united his territorial claims, the new Afghanistan was deeply divided along ethnic and linguistic lines. Education was mostly ignored in favor of military expansion, resulting in widespread illiteracy and no common linguistic education among the country’s various Pashtun, Tajik, and Turkic populations. Intellectual reformers, like the newspaper publisher Mahmud Tarzi, believed that ‘Abd al-Rahman Khan had not done enough to create appropriate institutions and foster an “Afghan”

⁸⁶ Barfield, 165.

national identity.⁸⁷ One such institution that many reformers desired was a constitutional monarchy with a representative government, under which all Afghans —Pashtun or otherwise— could unite.

Uncharacteristically for the “Iron Amir,” such an institution was at the forefront of his mind in his later years. In “The Life of Abdur Rahman,” a two-volume autobiography published in London in 1900, ‘Abd al-Rahman Khan claims the “foundation stone of a Constitutional Government has been laid by me.”⁸⁸ He cautions his successors not to rush into adopting any radical forms of government, erring instead on gradual reform, but claims that the “best principle of governing” was that of the Prophet’s leadership of Medina, whose residents (“Ansar”) had an equal voice to the Prophet’s followers (“Muhagir”).⁸⁹ Similarly, ‘Abd al-Rahman Khan suggests his successors transform the court into a representative government, whose three houses —one each for the aristocracy, the commoners, and the religious leaders— will be formed through both royal appointment and popular election.

This is not to say that the amir believed wholeheartedly in democratic governance. “I must strongly urge my sons and successors,” he writes, “never to make themselves puppets in the hands of these representatives.”⁹⁰ He claims the monarchy must have final and ultimate authority in all government actions, including the organization of the army and the ratification of legislation. His successors must take care to ensure the people do not “abuse the privileges and reforms given to them,” for they had “not yet attained the ability nor the education” to hold any

⁸⁷ Vartan Gregorian, “Mahmud Tarzi and Saraj-Ol-Akhbar: Ideology of Nationalism and Modernization in Afghanistan,” *Middle East Journal* 21, no. 3 (1967), 350.

⁸⁸ ‘Abd al-Rahman Khan, *The Life of Abdur Rahman: Amir of Afghanistan*, ed. Sultan Mohammad Khan, vol. 2 (London, UK: John Murray, 1900), 187.

⁸⁹ *Ibid.*, 188.

⁹⁰ *Ibid.*, 189.

real authority.⁹¹ Above all notions of democracy and constitutional government, “unity...and unity alone” is what would ensure the prosperity and safety of Afghanistan.⁹²

While the succeeding governments of Afghanistan would go on to create the constitutional governments ‘Abd al-Rahman Khan purportedly admired, political “unity” and the ultimate authority of the executive would become prevailing themes throughout the 20th century. Perhaps inspired by the late amir, his descendants and political successors would ratify constitutions with scant room for popular sovereignty and ample space for executive authoritarianism. For example, though the 1964 Constitution guaranteed citizens the right to form political parties, there were no provisions for how a party should be registered and the monarchy never expanded upon the right in legislation.⁹³ Similarly, the 2004 Constitution failed to establish a legally binding timeframe for provincial and municipal elections, to infrequent and delayed elections up to 2019.⁹⁴ Despite public appeals to constitutional and representative governance, the governments of Afghanistan repeatedly used their constitutions to reinforce autocratic powers and allow for illiberal governance across the 20th and 21st centuries.

Through a formal textual analysis of constitutional statutes, this chapter argues that the 1964 and 2004 constitutions—in particular, their vague wording and lax enforcement—were the result of authoritarian precedents of Afghan political history and practice, which the constitutions then enabled in kind for their corresponding governments. This authoritarianism, inherited from the 19th and early 20th centuries, continued to influence Afghan political processes

⁹¹ ‘Abd al-Rahman Khan, 189-190.

⁹² *Ibid.*, 178.

⁹³ *Afghanistan’s Flawed Constitutional Process*, International Crisis Group (ICG), Asia Report N°56 (June 12, 2003), 5.

⁹⁴ Ali Yawar Adili, “Afghanistan's 2019 Elections (31): A Review of the Disputed Presidential Election and Its Aftermath,” Afghanistan Analysts Network (September 28, 2020).

into the Cold War, despite increased demand for political liberalization. As Afghan elites continued to champion the need for a strong executive authority into the 1960s, the 1964 Constitution came to reflect this need through the text of its ratifiers. The 2004 Constitution, which used its 1964 predecessor as a framework, further perpetuated these norms under the Islamic Republic. This chapter argues that these impulses for authoritarian centralization and control—not democratization and political liberalization— were key influences on both constitutions and had serious consequences on the legal stability of the Kingdom of Afghanistan and the Islamic Republic.

I. THE LEGAL HERITAGE OF THE 1964 AND 2004 CONSTITUTIONS

Any comparison between the 1964 and 2004 constitutions must first begin with the structures and powers those documents enumerated, which in turn were inspired by decades of previous constitutional debate in Afghanistan. Indeed, between 1901 and 1963 and between 1964 and 2003, the country underwent several constitutional adoptions, revisions, and replacements. These constitutions made significant contributions to Afghan political structures, including the country's first representative legislature and the abolition of the monarchy. This rich constitutional history of Afghanistan, while outside the scope of this thesis, is vital to understanding the perseverance of authoritarian political thought after 'Abd al-Rahman Khan's death and to understanding the governmental structures the 1964 and 2004 frameworks created. As a result, any comparative analysis of the 1964 and 2004 constitutions must begin with a brief overview of their predecessors and the administrative institutions they created.

As the previous chapter described, the turn of the century brought little substantial change to the organization of Afghanistan's central government. Habibullah Khan maintained most of

the structures first introduced by Sher ‘Ali Khan and ‘Abd al-Rahman Khan, including the former’s cabinet government and the latter’s consultative assembly. Except for a brief expansion of the assembly’s powers in 1904, legislative and executive power remained exclusively the prerogative of amir and his ministers, while provincial administration was the domain of executive appointed governors and military administrators.⁹⁵ Constitutional reform —such as that advocated by the “Young Afghans” (Jawanan-i Afghani)— was too “radical” for Habibullah Khan’s administration, and the amir persecuted these constitutionalists up to his assassination in February 1919.⁹⁶

The first two constitutions of Afghanistan —the 1923 Basic Code introduced by Amanullah Khan and the 1931 Constitution of Mohammed Nadir Shah (r. 1929-1933)— outwardly promised to address the desire for constitutional reform, and this was true to some extent. Contrary to the common discourse around the 1964 Constitution, these frameworks were the first to establish a representative government in the form of consultative and, later, legislative assemblies. Further, these constitutions enumerated the requirements of Afghan citizenship, the specific civil liberties those citizens enjoyed, and the definitive powers of government institutions. However, the organization and duties of these institutions also served to solidify the monarchy’s power, maintaining in most respects the absolutism of ‘Abd al-Rahman Khan and Habibullah Khan’s governments.

The clearest example of this solidification in the 1923 Code and the 1931 Constitution are the enumerated powers of the monarch and his cabinet ministers, which mirrored pre-

⁹⁵ Ahmed, (2017), 212; Gregorian, 134.

⁹⁶ Ahmed, (2017), 115-116 and 149.

constitutional powers.⁹⁷ For example, under Art. 7 of both documents, the monarch maintained all previous powers enjoyed by pre-constitutional amirs, including the ratification and enforcement of laws, command of the armed forces, the declaration of war, and the ratification of international treaties.⁹⁸ The monarch also possessed broad powers of appointment over the executive and the legislature, including the right to appoint a full half of the Council of State (Shura-yi Dawlat) under the 1923 Code, and the entire House of Nobles, the upper legislature of the 1931 Constitution.⁹⁹ The prime ministers and cabinet ministers, which were also appointed by the monarch, had broad legislative powers under both constitutions and were effectively the primary legislators of the 1923 Code, as the Council of State had no inherent legislative power.¹⁰⁰ Even after the 1931 Constitution established a representative legislature in the form of the, ministers could withdraw any legislation from legislative debate, “however much it may have been discussed by the Council.”¹⁰¹

Despite providing these broad executive powers, the 1923 Basic Code and the 1931 Constitution did innovate by introducing some outlets for popular sovereignty, including representative legislatures. The 1923 Council of State, while effectively an extension of the past consultative assemblies, had specific powers to scrutinize proposed legislation, petition the government on policy matters, and review “all contracts and treaties and agreements” made between the government and international entities.¹⁰² The 1931 National Assembly (Shura-yi

⁹⁷ As Afghanistan transitioned from an Emirate to a Kingdom between the reigns of Amanullah Khan and Mohammed Nadir Shah, and as only male heirs could inherit this title under law, this chapter will refer to the chief executive as the “monarch” and with male pronouns, when necessary.

⁹⁸ Untitled (Basic Code of 1923 art. 7); Rights of the King (Constitution of 1931, art. 7).

⁹⁹ Provisional Councils and State Council (Basic Code of 1923 art. 40 & 41); The House of Nobles (Constitution of 1931, art. 67).

¹⁰⁰ Ministers (Basic Code of 1923, art. 28 & 29); Duties and Rights of Ministers (Constitution of 1931, art. 73).

¹⁰¹ Shura-yi Milli: Duties (Constitution of 1931, art. 54).

¹⁰² Provisional Councils and State Council (Basic Code of 1923 art. 49).

Milli), formed jointly of the House of the People (Wolesi Jirga) and the House of Nobles or Elders (Meshrano Jirga), had greater legislative powers than its predecessor, including the right to draft, scrutinize, and pass legislation.¹⁰³ This was especially significant in Afghan political history, as it was the first recorded instance of the government adopting a form of a democratically elected law-making body.

The introduction of consultative and representative legislatures was a considerable step toward political liberalization in Afghanistan, but it did not come without significant flaws. Neither the 1923 Code nor the 1931 Constitution provided for how representatives would be elected, instead leaving this to separate legislation.¹⁰⁴ Further, while the 1931 framework provided for inter-legislative checks between the House of the People and the House of Nobles, neither constitution provided their assemblies with the ability to overrule the monarch's veto power.¹⁰⁵ As previously mentioned, ministers under both constitutions had significant legislative authority, and while the 1931 constitution described ministers as "responsible to the National Council as regards the policy of the Government in general," the monarch's right to appoint and dismiss ministers at his discretion meant the 1931 legislature had no substantial input on the selection or removal of ministers.¹⁰⁶

As a final note on the 1923 Basic Code and the 1931 Constitution, neither framework established a permanent high court. Both constitutions provided for the convention of a supreme court, but these bodies were to only be "temporarily, as required" by the state.¹⁰⁷ As enumerated in the frameworks, the supreme courts dealt exclusively with the trial of ministers on criminal or

¹⁰³ Shura-yi Milli: Duties (Constitution of 1931, art. 41 & 44); House of Nobles (Constitution of 1931, art. 68).

¹⁰⁴ Provisional Councils and State Council (Basic Code of 1923 art. 41).

¹⁰⁵ Rights of the King (Constitution of 1931, art. 7).

¹⁰⁶ Duties and Rights of Ministers (Constitution of 1931, art. 76).

¹⁰⁷ Supreme Court (Constitution of 1931, art. 96).

corruption charges. Indeed, both the 1923 Code and the 1931 Constitution afford the supreme court only two articles each, with the second article of each document referring to future legislation outlining the structure of the courts. As a result, judicial review and statutory interpretation are absent in both constitutions and there is no enumerated system for challenging the constitutionality of laws. Instead, the 1931 Constitution describes that bills must not “not contravene the canons of the religion of Islam or the policy of the country,” and records suggest Mohammed Nadir Shah consulted the Afghan ‘ulemā regarding the compatibility of proposed legislation with Islamic law.¹⁰⁸

Despite Afghanistan’s turn toward constitutionalism, the Basic Code of 1923 and the Constitution of 1931 introduced few significant changes to the country’s political life. The limited introduction of popular sovereignty and representative law-making were novel, but the constitutions were closer to creating a “veritable oligarchy” than parliamentary democracy.¹⁰⁹ The 1923 Council of State and the 1931 National Assembly were both effectively consultative bodies with little authority beyond the proposal, revision, and passage of bills. The executive, including the monarch and his ministers, had few regulations regarding their administrative power and almost no accountability to the popular legislature they purportedly served. Further, both constitutions relied on future legislation to address vital processes like legislative elections, the structure of the supreme court, and the legality of royal family members in the government, with no constitutional mandate for the passage of said legislation.¹¹⁰ Despite the adoption of representative legislatures, the 1923 and 1931 constitutions primarily served to preserve royal authority and provide the monarchy with the legitimacy of constitutional frameworks.

¹⁰⁸ Arjomand, 950.

¹⁰⁹ Louis Dupree, *Afghanistan*, 3rd ed. (Princeton, NJ: Princeton University Press, 1978), 464.

¹¹⁰ Arjomand, 949.

II. SEPARATION AND BALANCE IN THE 1964 & 2004 CONSTITUTIONS

In contrast to their predecessors, the 1964 and 2004 constitutions moved more formally toward political liberalization and the separation of political power in the government. The power and size of the bicameral legislature, the weight of the electorate, and the independence of the judiciary all expanded under the new constitutional frameworks. As will be discussed in the next chapter, Afghans—both men and women—began to enjoy greater personal and political liberties under both frameworks. Overall, the 1964 and 2004 constitutions appeared to make significant steps toward a formal separation of powers and a greater commitment to democratization—both clear innovations when compared to the 1923 Basic Code and the 1931 Constitution. However, despite significant improvements, the new constitutions were still ill-equipped to create an effective separation of powers. As will be discussed in the next two sections, the textual content and legal enforcement of the 1964 and 2004 constitutions left ample room for the executive to dominate both the legislature and the new judiciary.

First, it is important to understand the structure of the Afghan government under the 1964 and 2004 constitutions. The former, which began its drafting process in mid-1963, established a parliamentary constitutional monarchy. The 1964 framework, like its 1931 predecessor, provided for the monarch as the head of state and his prime minister—appointed by the monarch—as the head of government. Unlike contemporary parliamentary systems, such as the government of the United Kingdom, the prime minister held no legislative power in the 1964 National Assembly and ceased to function as a member of the assembly following his appointment.¹¹¹ While the prime minister could propose and review legislation, the prime minister and the cabinet ministers did not have the same powers of veto and withdrawal as outlined in the 1923 and 1931

¹¹¹ The Government (Constitution of 1964, art. 86).

frameworks. The 1964 Assembly was a continuation of the 1931 bicameral legislation, including the lower House of the People and the upper House of Elders. While the election of lower house legislators was unchanged from 1931, a full two-thirds of the 1964 House of Elders was elected through popular and provincial council elections, as opposed to exclusive royal appointment under the 1931 Constitution.¹¹²

The 2004 Constitution, in contrast to the 1964 framework, established a presidential republic with the president as both the head of state and head of government. The president, elected through a simple majority in popular elections, assumed nearly all the powers formerly held by the monarch under the 1964 Constitution, save those powers once held by the monarch but now requiring the “endorsement of the House of the People,” such as the appointment of ministers and the declaration of war.¹¹³ In the absence of the office of the prime minister, the president also served as chairman of the government, formed by appointed ministers and two vice-presidents, which were to be selected by candidates during presidential elections and served as successors in the event of the president’s death, resignation, or impeachment. The National Assembly under the 2004 framework was largely identical to the 1964 Assembly in electoral processes, duties, and structure, though with new enumerated powers that will be discussed later.

As a short tangent, the replacement of the monarchy with the office of the president in the 2004 Constitution was not a new evolution of the document. Since the 1977 Constitution, instated by Mohammed Daoud Khan following his 1973 coup, the monarchy effectively ceased to exist as a government entity. The 1977 framework makes no mention of the monarchy, the royal family, or the former king, Zahir Shah; instead, the constitution established Afghanistan as

¹¹² The Shura (Constitution of 1964, art. 45 sec. 2).

¹¹³ The President (Constitution of 2004, art. 64 sec. 4 and 11).

a “republican, democratic” state headed by the president, who was elected by a vote of a loya jirga consisting of the legislature, the governing party, the supreme court, and commanders of the armed forces.¹¹⁴ Following the 1978 Saur Revolution and during the Soviet-Afghan War, monarchism became a popular alternative amongst Afghan refugees in Pakistan, with one survey by the Afghan nationalist Dr. Sayed Bahauddin Majrooh suggesting nearly seventy percent of refugees favored the return of the monarchy.¹¹⁵ However, international support for the mujahideen primarily benefited Islamist groups like Jamiat-i Islami (Islamic Society) and Hizb-i Islami (Islamic Party), consequentially limiting monarchist presence in the 1992 Peshawar Accords and the 2001 Bonn Agreement following the U.S. invasion of Afghanistan. Rather than return the monarchy to power, the 2004 Constitution simply recognized Zahir Shah as “Father of the Nation.”¹¹⁶

Returning to the 1964 and 2004 constitutions, both frameworks made the important addition of a permanent and independent supreme court. The court justices, appointed by the monarch in 1964 and by the president with the Assembly’s confirmation in 2004, had explicit powers for judicial review and statutory interpretation if the constitutions did not provide a clear resolution to a case brought before the court. The constitutional enumeration of judicial review was especially novel considering such did not formally exist under the 1923 and 1931 constitutions. Under the 1964 Constitution, the Supreme Court also held some legislative power,

¹¹⁴ The State (Constitution of 1977, art. 20); The Loya Jirga (Constitution of 1977, art. 65); The President (The Constitution of 1977, art. 75 and 76).

¹¹⁵ Steve Coll, *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden from the Soviet Invasion to September 10, 2001* by Steve Coll (New York, NY: Penguin Books, 2004).

¹¹⁶ Transitional Provisions (Constitution of 2004, art. 158).

with the capacity to draft and present legislation to the National Assembly for consideration.¹¹⁷ Curiously, this is a power missing from the 2004 Supreme Court.

The final institution native to both constitutions was the Loya Jirgah, or Great Council. As discussed in the previous chapter, loya jirgahs were traditionally local or tribal councils in Pashtun communities, often used for the adjudication of crimes or disputes. Under the 1964 and 2004 Constitutions, the government Loya Jirgah consisted of the entire National Assembly and the chairmen of provincial or district assemblies, with the President of the House of the People acting as head of the 1964 body and the 2004 body electing a head from among its members.¹¹⁸ Both Loya Jirgahs were temporary bodies, convened for the purpose of trying impeached ministers, justices, and other officials, the extension of the state of emergency, and the approval of constitutional amendments. While it is notable that both Loya Jirgahs were comprised primarily of elected officials, excluding those of the House of Elders selected by the executive, there are several flaws within the organization of the Loya Jirgah that will be discussed later.

While there is a fair degree of legal continuity between the 1931 Constitution and the 1964 Constitution and between the 1964 and 2004 frameworks, the most important break among the four constitutions is the separation of powers within the government. Some legislative powers, such as the power to approve and review the national budget, were continuations of 1931 and 1923 statutes, but others represented significant expansions of the legislature's legal and political authority. For example, the 1964 Constitution granted the National Assembly the power to ratify international treaties, authorize or deny the international deployment of the military, and authorize the issuing of money and loans.¹¹⁹ The 2004 Constitution extended these

¹¹⁷ The Shura (Constitution of 1964, art. 70 and 71).

¹¹⁸ The Loya Jirgah (Constitution of 1964, art. 78 and 82); The Loya Jirga (Constitution of 2004, art. 110 and 112).

¹¹⁹ The Loya Jirga (Constitution of 2004, art. 64).

same powers to its own National Assembly, alongside the power of the legislature to confirm or reject presidential nominations to government ministries, the central bank, and the Supreme Court. These powers, either once exclusive to the monarch or nonexistent under the 1923 and 1931 frameworks, divested some executive powers and added important checks under the 2004 Constitution.

Perhaps the most important checks afforded to the 1964 and 2004 assemblies were their ability to interrogate and remove members of the executive. If the 1964 Assembly considered the government was ineffective, a two-thirds majority vote in the House of the People would result in a vote of no-confidence in the present government and the removal of all ministers from their offices.¹²⁰ Similarly, if the prime minister were accused of treason, a vote of one-third of the lower house and two-thirds of the upper house would result in a government inquiry and the removal of the prime minister from office regardless of his guilt or innocence regarding the charge. The House of the People could level a similar impeachment process against cabinet ministers and Supreme Court justices, though the House of Elders was not involved in these cases.¹²¹

The 2004 Assembly had similar powers against the president and his ministers, including impeachment and veto nullification. Under Art. 69, should one-third of the House of People accuse the president of committing capital crimes, and should two-thirds of the house agree, the accusation will be passed to the Loya Jirga, who may then remove the president from power by a two-thirds majority vote.¹²² The House of the People may also conduct a vote of no-confidence against cabinet ministers should they demonstrably fail in their duties, though the requirements

¹²⁰ The Government (Constitution of 1964, art. 92).

¹²¹ *Ibid.*, art. 93; The Judiciary (Constitution of 1964, art.106).

¹²² The President (Constitution of 2004, art. 69).

and effects of this vote are not enumerated in the constitution. Finally, the 2004 Constitution provided the House of the People the power to overrule presidential vetoes by a two-thirds majority vote.¹²³ In comparison to legislative powers from the previous constitutions, which provided the head of state unchallenged veto power over proposed legislation, this provision for bypassing presidential vetoes was a significant step toward checking the power of the executive.

If the 1964 and 2004 constitutions were to be evaluated solely on their pursuit of the separation of powers and the divestment of executive authority among the branches of government, such evaluations would arguably be quite positive. The expansion of legislative powers, the establishment of a Supreme Court, and the inclusion of the Loya Jirgah as a government body transferred many powers formerly exclusive to the executive amongst the legislature and the judiciary. The powers of impeachment and veto nullification in the legislature and the court's power of judicial review and interpretation specifically removed the executive's power to have a stranglehold over legislative action and, in the case of the courts, leave the power of constitutional interpretation and review to personal interpretation. However, these powers do not represent a total divestment of executive power. While some of the executive's rights and duties constitute what one might argue to be valid checks on the legislature and the judiciary, other powers more closely represent a continuation of pre-constitutional absolutism and authoritarianism in the government.

III. THE CONSOLIDATION OF THE EXECUTIVE AND THE UNITY OF POWERS

Under both the 1964 and 2004 constitutions, the executive assumed extensive powers regarding the legislative process, the judicial system, and the conduct of government policy. In

¹²³ The National Assembly (Constitution of 2004, art. 94).

either a parliamentary or presidential system, such extensive powers are arguably fundamental and necessary to the conduct of government, so that powers outside the purview of the legislature or the judiciary might be easily and swiftly dealt with by officials in the executive. The aggregation of these powers in the executive, described as a unity or fusion of powers by Bagehot (1867) and Verde (200), is a significant aspect of modern executives such as those of the United States and the United Kingdom. However, in the case of Afghanistan, the unity of powers within the executive more often echoed the unity of powers exemplified by the pre-constitutional governments of Sher ‘Ali Khan, ‘Abd al-Rahman Khan, and Habibullah Khan. Rather than promote a balance of government power, the 1964 and 2004 constitutions promoted the primacy of the executive as an overwhelming and domineering force in government with little practical accountability to the other branches of government.

Perhaps the most overt example of this consolidation of executive power is the case of the monarchy under the 1964 Constitution. Like the 1923 and 1931 frameworks, the 1964 framework provided the monarch supreme command of the military, the power to declare war and peace, the ratification or rejection of proposed legislation, and the appointment of the prime minister, ministers, Supreme Court justices, judges, and other civil and military officials.¹²⁴ The powers of legislative veto and appointment were especially noteworthy, as neither the legislature nor the courts had enumerated powers to bypass this veto or regulate appointments. Further, under the text of the constitution, impeachment processes are not applicable to military and civilian officials below the level of the cabinet nor to judges below the Supreme Court. While the legislature could forward a vote of confidence against the prime minister and the cabinet, such action must be “specific and direct” regarding the grounds for such a vote, though how these

¹²⁴ The King (Constitution of 1964, art. 9 sec. 1-14).

terms are defined by the constitution is ambiguous.¹²⁵ Further, in the explicit text of the constitution, there is nothing to suggest the monarch is barred from simply reappointing the prime minister and ministers of a government dissolved by a vote of no-confidence, making the legislature's power theoretically moot. While the government was officially responsible to the representative legislature and the courts, the power to create and modify the government ultimately fell to the monarch.

The 2004 Constitution, while tempering the appointment power of the president and granting the legislature the power to nullify vetoes, still maintained many strong executive powers. While the president now required the consent of the legislature regarding cabinet and Supreme Court appointments, he retained the exclusive power to appoint judges, national security and law enforcement officials, and civil servants at levels below the cabinet ministries.¹²⁶ Regarding the process of impeachment, while the direct impeachment of the head of state was novel, the text of the constitution states impeachment was only possible if the president were accused of "crimes against humanity, national treason, or crime."¹²⁷ By the literal interpretation of the text, what falls under the category of "crime" is unclear, and whether the interpretive power of that crime fell to the legislature, the judiciary, or the Loya Jirgah is unclear. Further, in the event a president is impeached and removed from office during the impeachment process, leadership of the government falls to his First Vice-President, whose duties are explicitly defined by the outgoing president.¹²⁸ While the vice-president was barred from amending the constitution or dismissing ministers, there is no evidence to suggest the acting

¹²⁵ The Government (Constitution of 1964, art. 92).

¹²⁶ The President (Constitution of 2004, art. 64 sec. 13).

¹²⁷ *Ibid.*, art. 69; In Dari, "...جرائم ضد بشری، خیانت ملی یا جنایت...". In the unofficial English translation, art. 69 lists one impeachable offense as "crimes against the President," though whether this means against the Office of the President or if it is simply a translation error is unclear.

¹²⁸ The President (Constitution of 2004, art. 64 sec. 13).

president could not appoint new ministers or otherwise continue the agenda of the impeached president unimpeded by the legislature. Indeed, under Art. 68, the constitution, the only explicit instances in which the office of the vice-president changes is in the case of resignation or death.¹²⁹

Another curious addition to the powers of the president under the 2004 Constitution is Art. 64, Sec. 4: that the president may “make the necessary decisions in defense of territorial integrity and maintaining independence.”¹³⁰ No reference is made to this power elsewhere in the constitution, including either clarification of what “decisions” can be made or how the necessity or applicability of those decisions is evaluated. By a strict interpretation of the constitution, this statute grants the president exceptional authority regarding national security separate from the declaration of a state of emergency. As this statute is missing from the powers of the monarch under the 1964 Constitution, it is possible this power was meant to address the executive office’s ability to counter the then-ongoing Afghan Taliban insurgency following 2004, though this would imply the statute applied both to national and domestic security, thus extending these powers further.

Regarding the state of emergency clause, both constitutions afforded the executive considerable authority in declaring and extending the state of emergency. Under the 1964 Constitution, the monarch could call a state emergency without any input from the legislature or the judiciary and could assume the Assembly’s powers unchallenged.¹³¹ Further, with the assent of the justices of the Supreme Court—which the monarch exclusively appointed—the executive could suspend constitutional rights, including the right to free expression and protections against

¹²⁹ The President (Constitution of 2004, art. 68).

¹³⁰ *Ibid.*, art. 64 sec. 5; In Dari, "اتخاذ تصمیم لازم در حالت دفاع از تمامیت ارضی و حفظ استقلال."

¹³¹ State of Emergency (Constitution of 1964, art. 113 and 114).

the government confiscation and utilization of private property. The 2004 Constitution tempered this exclusivity by requiring the National Assembly's consent to the declaration and extension of the state of emergency, the president retained the ability to assume legislative powers and suspend constitutional rights if given assent by the President of the Assembly and the Chief Justice.¹³² Under both frameworks, there is no enumerated consequence for heads of state ignoring the dissent of their legislatures regarding the declaration or extension of the state of the emergency, and such consequences would be theoretically powerless against the 1964 monarch due to his primacy in the government.

The organization of the 1964 and 2004 Loya Jirgahs also reveals loopholes in its powers and accountability to the executive. First, while the Loya Jirgah could convene independently for the impeachment of the president under the 2004 Constitution, all other conventions of the Loya Jirgah were at the monarch or president's powers. Under the 1964 Constitution, a strict interpretation of this power theoretically allows the monarch to stall processes that require the Loya Jirgah's input, including the impeachment of ministers and Supreme Court justices, the extension or conclusion of a state of emergency, and debates on proposed constitutional amendments.¹³³ Except for Art. 69 of the 2004 Constitution, the same provisions applied to the 2004 Loya Jirgah, though deliberately stalling the body may warrant impeachment under Art. 69. Regardless, the Loya Jirgah's literal responsibility to the executive under most constitutional statutes warrants questions as to whether the body could convene without the executive's behest and whether such a meeting would be constitutional or legal.

¹³² State of Emergency (Constitution of 2004, art. 143-145).

¹³³ Amendment (Constitution of 1964, art. 121).

Finally, although not specific to the executive, both constitutions leave key powers and processes of government left to be decided by future legislation, with no enumerated mandate for when that legislation must be passed or what should happen if it is not passed. For example, while Art. 32 of the 1964 Constitution grants Afghan citizens the right to form political parties “in accordance with the provisions of the law,” Zahir Shah never signed clarifying legislation into law and purportedly refused to sign related bills toward the end of his reign.¹³⁴ Under the 2004 Constitution, the organization of elections fell under the purview of future legislation and under the power of the executive and the Independent Elections Commission (IEC), which operated with institutional support. However, the lack of a mandate requiring the organization of provincial elections, coupled with no enumerated timeframe for those elections, led to the IEC frequently canceling elections due to fraud or executive interference. Ghazni, for instance, did have polls during the 2018 Assembly elections due to political disputes, and elections for some district councils did not occur until 2019.¹³⁵ While drafters were correct to specify the relationship between the constitution and future legislation, the lack of specificity of accountability regarding these future laws left ample room for exploitation and dismissal.

Despite the promising steps toward political balance and the divestment of executive authority, the 1964 and 2004 Constitutions did not diverge considerably from their 1923 and 1931 predecessors regarding the letter or spirit of the law. The 1964 Constitution, popularly proclaimed to be the country’s first democratic constitution, extended the absolutist powers of the monarch with only slight concessions to the growing legislature and the nascent judiciary. Similarly, while the 2004 Constitution significantly limited the president’s powers to appoint

¹³⁴ The Basic Rights and Duties of the People (Constitution of 1964, art. 32); Barfield, 211; M. Hassan Kakar, “Constitutional History of Afghanistan,” Encyclopaedia Iranica, Online Edition, 1992.

¹³⁵ Adili, “Afghanistan's 2019 Elections (31): A Review of the Disputed Presidential Election and Its Aftermath.”

officials and veto legislation, the unqualified lettering of some statutes left ample room for the abuse of executive authority in the legislature and national security. Neither constitution provided binding mandates, whether for political party organization in 1964 or election organization in 2004, leading to general apathy from legislators and the heads of state. Despite appeals to democratic governance and political liberalism, the 1964 and 2004 constitutions did not effectively enshrine those appeals into effective, binding law.

Chapter 3: “What Sort of System is This?” – Rule of Law in Constitutional Afghanistan

The 2019 presidential elections were set to be a critical moment for the Islamic Republic of Afghanistan. Of a field of eighteen candidates, incumbent president Ashraf Ghani and former Chief Executive Abdullah Abdullah were the expected frontrunner in what would be the country’s fourth presidential election under the 2004 Constitution. Ghani, a Columbia-educated anthropologist and former World Bank official, was seeking his second term with a broad coalition of former critics and ethnic minorities, including Tajik politician Amrullah Saleh and Uzbek and Hazara running mates.¹³⁶ Abdullah, who had been a prominent member of Ahmed Shah Massoud’s Northern Alliance prior to the 2001 U.S. invasion of Afghanistan, was running for the third time, having previously challenged Hamid Karzai in 2009 and Ashraf Ghani in a close 2014 run. Despite accusations of voter fraud in previous presidential and assembly elections, the Afghan Independent Election Commission (IEC) was confident new technology and voter verification would minimize irregularities.¹³⁷ With negotiations with the Afghan Taliban reaching a turning point in 2018, and the possibility of the insurgent group joining the national government on the horizon, the 2019 presidential elections were Afghanistan’s opportunity to prove the health of its democracy into the next decade.

Unfortunately, as with many previous presidential and parliamentary elections, the 2019 elections proved disastrous for public and international confidence in the Islamic Republic. The IEC delayed the elections twice —first from April 20 to July 20 and then to September 28— and

¹³⁶ Frud Bezhan, “Who’s Who among the Afghan Presidential Candidates,” RadioFreeEurope/RadioLiberty (RFE/RL, Inc., September 27, 2019).

¹³⁷ Mats Staffan Darnolf, “Reducing Voter Fraud in Afghanistan,” United States Institute of Peace (USIP, November 2, 2017).

took six months to hand-count ballots after issues arose with the Commission's new biometric identification system. Although the IEC wouldn't release the results until February 2020, even preliminary studies of the polls suggested historically low voter turnout, with only 1.1 million of the country's 9 million registered voters casting ballots.¹³⁸ The Afghan Taliban, as they had in previous presidential and assembly elections, dissuaded voters by targeting campaign rallies throughout the year and promising to strike polling locations on election day despite the ongoing peace talks in Qatar with the U.S. and Afghan governments. As initially expected, Ghani and Abdullah were the election frontrunners, with Ghani officially winning with 50.6-percent of the vote in February, but accusations of voter fraud were so rampant that Abdullah refused to accept the results. So contentious were the results that Ghani and Abdullah both held competing inaugurations on March 9 and required the United States to mediate a settlement in May.¹³⁹

Regardless of the election results, the real loser was the Afghan public. The IEC's inability to provide swift, transparent elections and the government's inability to provide adequate security on election day crippled public confidence in the Islamic Republic. While nearly five hundred polling locations were closed in response to Taliban threats, workers at the remaining locations struggled with verifying voter identities and, in some instances, attacked voters on suspicions of committing fraud.¹⁴⁰ Even unimpeded voters were skeptical that the results would ever be properly verified by the IEC. "I will never believe that it was a fair

¹³⁸ Michael Safi, "Afghanistan Election: Turnout May Have Been as Low as 20% amid Taliban Threats," *The Guardian* (Guardian News and Media, September 29, 2019).

¹³⁹ Mujib Mashal, Fatima Faizi, and Najim Rahim, "Ghani Takes the Oath of Afghan President. His Rival Does, Too," *The New York Times* (A. G. Sulzberger, March 9, 2020).

¹⁴⁰ Rahim Faiez and Kathy Gannon, "Fraud, Misconduct Threaten Afghan Presidential Election," *AP News* (Associated Press, September 28, 2019).

election,” said one voter, Hajji Faqir Bohman, told AP News on election day.¹⁴¹ “What sort of system is this?” asked another, Ahmad Shah; “it’s a mess.”¹⁴²

While the mismanagement of the 2019 presidential elections was severe, it was only one of a multitude of issues the Islamic Republic and the earlier Kingdom of Afghanistan faced regarding public expression and representative government under their respective constitutions. Leading up to and after the 1964 Constitution, the monarchy repeatedly suppressed public speech critical of the government, banned opposition parties, and flaunted constitutional statutes. Similarly, the Islamic Republic frequently overstepped its constitutional limits to power and, as the 2019 elections showed, failed to uphold its legal responsibilities to election management. In both cases, corruption and the abuse of power eroded public support for both governments. The rule of law—that is, the primacy of the constitution, its enforcement by the judiciary, and its primacy over arbitrary rule—was either abused or ignored by institutions.¹⁴³ Within ten years of the 1964 Constitution’s ratification and almost twenty years after the 2004 constitution, both the Kingdom of Afghanistan and the Islamic Republic of Afghanistan would fall to armed opposition groups.

While the previous chapter focused on the formal, textual weaknesses of the 1964 and 2004 constitutions, this chapter is concerned with how those constitutions—and their weaknesses—were practically applied in governance. In both cases, government leaders abused their political positions to pursue unpopular and authoritarian agendas. Even ignoring the weaknesses of certain constitutional statutes and mandates, as explained in the previous chapter, Afghan lawmakers often flaunted statutes that were explicitly designed to limit government

¹⁴¹ Faiez and Gannon (2019).

¹⁴² *Ibid.*

¹⁴³ Maley, 62.

power and expand representative governance. Such failure to follow constitutional statutes represents a deeper issue of how the rule of law was embodied in Afghanistan and how government institutions failed to police themselves regarding unconstitutional actions. Effectively, the governments of 1964 and 2004 neglected—or refused—to uphold the rule of law under their respective constitutions.

This chapter studies the rule of law under the 1964 and 2004 Afghan constitutions and how its application was handled by the Kingdom and the Islamic Republic. Despite constitutional promises of religious freedoms, civil liberties, free expression, and transparent elections, institutional and political struggles failed to uphold most of these promises, if any. As a result, public and international confidence in both constitutional frameworks severely decreased over time. By disregarding the rule of law and important constitutional statutes, the Kingdom of Afghanistan and the Islamic Republic of Afghanistan failed to institutionalize their constitutional frameworks and legitimize their governments in a legal sense.

Importantly, one cannot definitively say that the failure to uphold the rule of law directly led to the fall of the Kingdom of Afghanistan in 1973 or the Islamic Republic in 2021. Numerous international and domestic factors—political, economic, religious, and social—contributed to the instability of the 1964 and 2004 frameworks. Indeed, a complete review of these factors is far outside the scope of this thesis and is potentially impossible without further research. However, it is crucial to recognize that the governments' inability or reluctance to honor their respective constitutions. As the AP News interviews showed in 2019, public distrust in the legitimacy and authority of the Islamic Republic was directly tied to its incompetence in upholding constitutional provisions for transparent elections and public safety. Consequentially, the

downfall of the 1964 and 2004 constitutional governments in inextricably tied to each government's approach to the rule of law.

I. ISLAM AND SECULARIZATION AFTER 1964

Before discussing the institutional approaches to civil liberties and elections under the 1964 and 2004 constitutions, it is important to first discuss how both constitutions approached the question of religion in the public sphere. This is an often-overlooked facet of not only the 1964 and 2004 constitutions but also of the 1923 and 1931 frameworks as well. In particular, while all four constitutions had various approaches to religion and secularization, all sought greater institutional power over religion, its definition by legal authorities, and its place in the public sphere. Considering the difficult relationship between Afghanistan's political institutions and religiously motivated movements like the mujahideen and the Afghan Taliban, religion's relationship to the 1964 and 2004 constitutions is vital to discussing the country's rule of law.

As discussed in the first chapter, Islam had historically been crucial for the normalization and institutionalization of political authority in Afghanistan. This relationship continued, to some extent, into the constitutional period after the ratification of the 1923 Basic Code. For example, the reading of the ruler's name during the khutba in mosques and religious schools was one expression of this relationship, and the practice continued under the constitutions. Art. 7 of the 1923 and 1931 constitutions and Art. 11 of the 1964 Constitution state the reading of the monarch's name during prayers as an exclusive right.¹⁴⁴ Further articles required the monarch to be "a Muslim and a follower of the Hanafi doctrine" and stipulated Islamic law as the foundation

¹⁴⁴ The Rights of the King (Constitution of 1931, art. 7); The King (Constitution of 1964, art. 11).

for all law and constitutional amendments.¹⁴⁵ A cursory reading of the constitutions would thus suggest Islam was inseparable from Afghan constitutional law.

In a way, such a suggestion would be correct. Since ‘Abd al-Rahman Khan’s reign reform movement, institutional commitment to Islamic practices —specifically Islamic Modernism— was a key plank in the platform of constitutional reformers like the Young Afghans. The nationalist intellectual Mahmud Tarzi described modernization, meaning political and scientific modernization along Western lines, as not only compatible with “the spirit of Islam” but inherent in Islamic history and theology, citing scientific and philosophical development under early Islam.¹⁴⁶ The supposed backwardness of Afghan Muslims lay not with the religion, he argued, but with the ‘ulemā, who “parroted” theological texts and levied charges of heresy against reformers.¹⁴⁷ When Amanullah Khan came to power in 1919 and began courting constitutional reformers in the government, Tarzi’s arguments in favor of Islamic Modernism were at the forefront of his mind. The amir called upon “Afghan, Ottoman Turkish, and Indian Muslim jurists” to draft the 1923 Code and personally described the document as a “triumph of Islamic Modernism.”¹⁴⁸ As Arjomand describes, Nadir Shah was even more explicit in his appeals to Islamic law and the ‘ulemā in the 1931 Constitution, which required the monarch to rule in accordance with Hanafi fiqh and consult religious officials regarding constitutional amendments.¹⁴⁹

¹⁴⁵ The King (Constitution of 1964, art. 8).

¹⁴⁶ Gregorian, “Mahmud Tarzi and Saraj-ol-Akhbar,” 352.

¹⁴⁷ *Ibid.*, 353; Tarzi’s accusation of the ‘ulemā relates to a larger debate in Islamic law about the closure of the “gate of *ijtihād*, or interpretation (“independent reasoning”). For more, see Hallaq (1984) and Peters (1980).

¹⁴⁸ Ahmed (2017), 207.

¹⁴⁹ Arjomand, 949.

Despite these overt appeals to Islamic law and governance, it would be unwise to consider constitutional Afghanistan as anything but secular in its governance and politics. Instead, it is perhaps best to read these statutes and statements as a cooptation of Islamic law for the purposes of extending political authority, just as was done in pre-modern Afghanistan and under Art. 7 of the 1923 and 1931 constitutions. Hussein Ali Agrama, Associate Professor of Anthropology at the University of Chicago, recognized a similar ambiguity in modern Egyptian law, which also recognized Islamic law as the foundation of the state's legal regime. In this case, Agrama argues that secularism "hopelessly blurs" the line between public and private life, the latter of which religion has been largely relegated to in liberal political discourse.¹⁵⁰ While liberal political discourse outwardly describes secularization as a process of divorcing religion from public spaces, this creates ambiguities as to what is religion, what doctrines are included within certain religions, and what constitutes public and private spaces. Agrama argues that these ambiguities, rather than undermine secularism, "consolidate and extend the state's sovereign power of decision over social life."¹⁵¹ In the case of Egypt's judicial system, this gives judges a degree of power in defining what is or is not religious and what is or is not legal under Egyptian constitutional law.

The primary contention in Afghanistan, as it is in Egypt according to Agrama, is the role of the Supreme Court and the judiciary in interpreting and defining Islamic law and legal statutes. After, the 1964 Constitution stipulated that no law shall be "repugnant to the basic principles of...Islam" while the 2004 Constitution no law shall "contravene the tenets and

¹⁵⁰ Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt*, (Chicago, IL: University of Chicago Press, 2012), 105.

¹⁵¹ *Ibid.*

provisions” of Islam.¹⁵² Further, both frameworks —Art. 102 and Art. 130, respectively— state that Islamic law as interpreted in Hanafi jurisprudence will take precedent in cases or disputes that are not governed by existing legislation. Coupled with the power of judicial review and statutory interpretation, these statutes give judges exceptional authority over the interpretation of Islamic law and how it applies to cases brought before the courts. This is especially curious given that the 2004 Constitution does not require justices of the Supreme Court to be knowledgeable of Hanafi jurisprudence, only providing it as a possible qualification.¹⁵³ Consequentially, should legislation or disputes come before the Supreme Court under either the 1964 or 2004 constitutions, justices could be called upon to interpret Islamic law and Islamic practices potentially without any training in related jurisprudence.

This judicial authority over doctrinal interpretation extends beyond government legislation. For instance, both constitutions require that proposed political parties and organizations do not contradict the practices of Islam or Islamic law. Art. 32 Sec. 1 of the 1964 Constitution, for instance, states that the platforms of political parties must oppose “the values embodied in this Constitution,” but the provision that Islamic law and Hanafi fiqh are the basis for legislation suggests that parties must not contravene those practices.¹⁵⁴ The 2004 Constitution is more explicit, stating under Art. 35 Sec. 1 that parties must not “contravene the holy religion of Islam.”¹⁵⁵ The 2004 Constitution is overall more explicit and far-reaching in its entanglement with religion. Arts. 63, 74, and 119 require the president, cabinet ministers, and Supreme Court

¹⁵² The Shura (Constitution of 1964, Art. 64); The State (Constitution of 2004, Art. 3); While the 1964 Constitution is at present unavailable in Dari or Pashto, the use of “repugnant” in official translations has historically been challenged by some scholars. Arjomand and Khaled Abou el Fadl, writing for the RAND Corporation, argue a more accurate translation would be “contradict” or “contravene,” as is used in translations of the 2004 Constitution.

¹⁵³ The Judiciary (Constitution of 2004, art. 118 sec. 3).

¹⁵⁴ The Basic Rights and Duties of the People (Constitution of 1964, art. 32 sec. 1).

¹⁵⁵ Fundamental Rights and Duties of Citizens (Constitution of 2004, art. 35 sec. 1).

justices to take oaths affirming their intent to “protect the holy religion of Islam,” while Arts. 45 and 54 mandate the government to create educational systems and family laws founded on Islamic principles.¹⁵⁶ Effectively, these statutes give the judiciary and the state considerable authority over defining the constitutionality of issues by referring to Islamic law, which the courts may interpret without qualification under the power of judicial review.

Even before the ratification of the 2004 Constitution, there was some worry that the judiciary’s considerable interpretive power over Islam might be destabilizing or authoritarian. The RAND Corporation, seeking to advise the Afghan Constitutional Review Commission, published a conference presentation in 2003 that advised against significant state involvement in religion. Conference members, including Islam legal scholars like Khaled Abou El Fadel and Saïd Arjomand, warned that the constitution should “prevent particular groups from maintaining an exclusive right to interpretation [of Islamic law],” citing the Taliban’s “eccentric interpretation of Islam” as enforced by a small, exclusive class of scholars.¹⁵⁷ Indeed, the conference participants stated explicitly that bestowing the judiciary with interpretative powers regarding Islam “carries real risks.”¹⁵⁸ Citing Pakistan as an example, the participants noted that such powers could allow the judiciary to strike down legislation or constitutional statutes on the basis of their compatibility with Islam. The participants suggested providing this power to the executive and legislature exclusively, but the 2004 Constitution did no such thing. Instead, the 2004 Constitution granted interpretive powers to the judiciary.

¹⁵⁶ The President (Constitution of 2004, art. 63).

¹⁵⁷ Khaled M. Abou El Fadel et al., *Democracy and Islam in the New Constitution* (Washington, DC: RAND Corporation, 2003), 3.

¹⁵⁸ *Ibid.*, 5.

While the next section shall touch on how this interpretive power related to civil liberties, a further example of the power's consequences laid in its effects on the Afghan 'ulemā. In pre-modern Afghanistan, the power of doctrinal interpretation laid exclusively with the country's religious literati, which included both state-sponsored scholars and independent local clerics. The legal reforms of 'Abd al-Rahman Khan began to erode this power in the late 19th century, and in constitutional Afghanistan, the legal and constitutional codification of Islamic law has only further alienated religious scholars. Ahmed described this codification as an "inherent threat" to the juridical authority of the 'ulemā and noted that scholars were resistant to the adoption of Western-inspired legal systems, such as the 2004 criminal code.¹⁵⁹ Further, according to interviews with regional scholars, the 'ulemā had no confidence in the government to follow its recommendations regarding Islamic law or Pashtun tribal law, Pashtunwali.¹⁶⁰ By establishing the state judiciary as the exclusive interpreter of Islamic law, and failing or refusing to include the Afghan 'ulemā in the process of interpretation, the government alienated a significant and influential part of Afghan society.

Overall, the codification of Islamic law in the 1964 and 2004 constitutions presented a significant overstep in state power and a significant challenge to the rule of law. By placing Islamic law as the foundation of constitutional statutes, and by making the judiciary the sole interpreter of the constitution, the 1964 and 2004 frameworks provided the state with significant authority in the definition, interpretation, and application of Islamic law. Beyond consolidating doctrinal interpretation within a purportedly secular institution, the codification of Islamic law

¹⁵⁹ Faiz Ahmed, "Shari'a, Custom, and Statutory Law: Comparing State Approaches to Islamic Jurisprudence, Tribal Autonomy, and Legal Development in Afghanistan and Pakistan," *Global Jurist* 7, no. 1 (March 6, 2007), 11.

¹⁶⁰ Rajan, Jha, "Political Legitimacy in Afghanistan: The Role of Islam," *World Affairs: The Journal of International Issues* 17, no. 4 (2013), 117.

also weakened and alienated Afghan religious scholars, who were influential in doctrinal interpretation on a communal level. Further, this alienation served to problematize the rule of law as defined by the judiciary and regional religious scholars. While formal interpretive authority rested with the judiciary, this did not legally strip the ‘ulemā of their qualifications to interpret Islamic law, potentially creating situations in which religious scholars interpreted state actions as contradictory to the rule of law under Islamic law or vice versa.

II. CIVIL LIBERTIES, POLITICAL ORGANIZATION, AND LEGAL PROTECTIONS

Further casualties of Afghanistan’s institutional excesses were the constitutionally protected rights of Afghan citizens, hereon referred to as the country’s civil liberties. While both the 1964 and 2004 constitutions were notable for including enumerated rights for citizens, both constitutions lacked critical rights for religious minorities and for women. Further, the executive and security institutions of both the Kingdom and the Islamic Republic frequently violated important rights to expression and assembly. These accusations were especially frequent after 2004, as the Islamic Republic and the Afghan National Security Forces (ANSF) began assuming responsibility for combatting the Taliban insurgency. These abuses eroded domestic and international support for the 1964 and 2004 frameworks and the institutions they created.

Reading the 1964 and 2004 Constitutions reveals that both enumerated specific and extensive civil liberties, for which both documents should be credited. Both identify liberty as the “natural right of human beings,” and that it could not be regulated except to protect the liberty of others and the public interest.¹⁶¹ Both constitutions state that citizens suspected of crimes are presumed innocent until convicted and that such conviction will only come from an

¹⁶¹ Fundamental Rights and Duties of Citizens (Constitution of 2004, art. 24).

authoritative court. Perhaps most importantly, Arts. 31 and 34 of the 1964 and 2004 Constitutions, respectively, recognize the freedom of thought and expression as “inviolable.”¹⁶² These protections extend expression in assemblies, public media, and political organizations. Beyond the qualification that most of these constitutional rights may be amended by further legislation, these civil liberties theoretically provide Afghan citizens extensive protection from government prosecution and abuse.

Unfortunately, such a reading does not reflect the practical application of these rights, as evidenced by the history of political parties. The previous section has already touched upon the ambiguities under Arts. 32 Sec. 1 and 35 Sec. 1 of the 1964 and 2004 constitutions, respectively, which require proposed parties to not contravene the values of the constitutions as defined by the judiciary, including Islam. However, of greater importance here is the governments’ attitudes toward political parties, including their marginalization. As discussed in the previous chapter, the monarchy never fulfilled its mandate to legally recognize political parties, even after such legislation was passed through the House of the People and the House of Elders in 1969.¹⁶³ The result was what Weinbaum described in 1972 as “nonparty parliamentary democracy,” wherein the lack of autonomous political organizations left the “burden for aggregating political demands” on the shoulders of the bureaucracy itself.¹⁶⁴ While parties organized after the 1964 Constitution was ratified, especially Islamist and Marxist-Leninist organizations, these organizations had no standing before the law, had no official presence in the legislature, and

¹⁶² Basic Rights and Duties of the People (Constitution of 1964, art. 31); Fundamental Rights and Duties of Citizens (Constitution of 2004, art. 34)

¹⁶³ Anna Larson, “Political Parties in Afghanistan” (Washington, DC: USIP, 2015), 3.

¹⁶⁴ Marvin Weinbaum, “Afghanistan: Nonparty Parliamentary Democracy,” *The Journal of Developing Areas* 7, no. 1 (1972), 57 and 63.

were not listed on ballots during national or provincial elections.¹⁶⁵ The executive resistance to political parties in the 1960s was, as Weinbaum argues, a reaction to the anti-monarchism — actual or imagined— of certain parties, including Marxists and liberal democrats. Such anxieties had led to the dissolution of the 1949 “liberal parliament” under Prime Minister Shah Mahmud (PM 1946-1953), which had allowed minority parties to participate in elections for the first time. Many of these parties became fiercely critical of Zahir Shah’s administration, resulting in the arrest of opposition party leaders, the banning of those parties, and the fall of the government in 1952.¹⁶⁶

A crucial facet of the 1964 Constitution relating to political organization is its articles regulating the royal family’s place in politics. Art. 24 of the constitution defines the role of the royal family and its members in government, including its protocol and expenditure as part of the national budget. The key points of this article state that, one, royal family members may not participate in political parties or hold positions in the legislature, executive, or judiciary; and two, that the membership in the royal family is permanent until death.¹⁶⁷ At face value, such an article could be beneficial to Afghan democracy, as it limits the royal family’s entrenchment in the representative government. However, some scholars have criticized the statute as a deliberate attack on Daoud Khan, who had resigned as prime minister in 1963 and had significant popular support. Shamsbad Pasarlay, a lecturer at the University of Chicago School of Law, argues that the statute gave Daoud Khan “no peaceful route to participate in the political process” and, coupled with the questionable legal status of political parties, allowed for Daoud Khan to attract

¹⁶⁵ Faridullah Bezhan, “The Emergence of Political Parties and Political Dynamics in Afghanistan, 1964–73,” *Iranian Studies* 46, no. 6 (November 2013), 925; Amin Tarzi, “Islam and Constitutionalism in Afghanistan,” *Journal of Persianate Studies* 5, no. 2 (January 2012), 221.

¹⁶⁶ Weinbaum, 59; Barfield, 211.

¹⁶⁷ The King (Constitution pf 1964, art. 24).

other political groups excluded by the government.¹⁶⁸ As Daoud Khan would lead a military coup against the monarchy in 1973, Pasarlay argues that Art. 24 directly led to the end of the 1964 constitutional framework and incentivized violent opposition.

While the institutional approach to political parties changed after 2004, the constitution still disincentivized the creation of political parties. While parties were constitutionally protected, initial legislation did not recognize parties as anything more than social organizations.¹⁶⁹ Election laws did not require political candidates to be affiliated with a party, to register affiliation, or to list party affiliation on election ballots. The Afghan electoral system, the Single Non-Transferable Vote (SNTV) system, further hampered the ability of parties to organize and effectively participate in elections. Under contemporaneous election systems, such as proportional representation or transferable vote systems, candidates may pool their votes to support their entire political alliance, rather than the individual candidates. However, under Afghanistan's SNTV system, votes applied only to single candidates and could not be used to support broad political alliances among candidates. For example, while three allied candidates may collectively garner a plurality or even a majority of the popular vote in an election, they would still lose the election if their individual votes are fewer than a singular candidate.¹⁷⁰ Such a system incentivizes electoral self-interest and disincentivizes cooperation—and political parties—in national and provincial elections. As Larson argues, this system was a deliberate construction of the 2003-2004 Afghan government, as parties held a negative reputation following the Afghan civil wars and legislators feared organized opposition would harm the

¹⁶⁸ Shamshad Pasarlay, "The Myth of a Constitution's 'Goodness': What We Get Wrong about Afghanistan's 1964 Constitution," *I-CONnect* (International Journal of Constitutional Law, January 26, 2022).

¹⁶⁹ Larson, 3.

¹⁷⁰ Andrew Reynolds and John Carey, "Fixing Afghanistan's Electoral System: Arguments and Options for Reform" (Kabul, AF: AREU, 2012), 4-5.

nascent government.¹⁷¹ While some issues, such as party affiliation registration, changed in later years, the SNTV system's "winner takes all" approach to elections remained unchanged.

Rights for religious minorities were also lacking in both the 1964 and 2004 constitutions. Afghanistan's Shi'a community, which comprises between ten and fifteen percent of the country's population, has historically been ignored under constitutional law. While both constitutions protect the freedom of religious practice, both establish Hanafi fiqh—a Sunni school of jurisprudence—as the basis for legislation and adjudication. The 1964 Constitution specifically makes no mention of Afghan Shi'a as being beholden to a separate juridical system, implying Shi'a are beholden to Hanafi fiqh in cases lacking preexisting legislative precedent.¹⁷² The 2004 Constitution rectifies this under Art. 132, requiring the courts to use relevant Shi'a fiqh in cases involving Afghan Shi'a.¹⁷³ However, as mentioned in the previous section, there is no constitutional requirement for judges to be knowledgeable or qualified in Islamic law in general, nor Shi'a fiqh specifically. Consequently, the application of Shi'a fiqh in the judiciary comes down to the state's interpretation of Islamic law.

The 1964 and 2004 Constitutions also ignored important protections for women, with the former framework excluding textual mentions of women from statutes entirely. On a positive note, the 2004 Constitution required fifty percent of the president's nominations to the House of Elders to be female and guaranteed educational and nominal legal equality to women.¹⁷⁴ However, this legal equality did not explicitly extend to the protection of property nor did the constitution elaborate on women's legal standing in relation to Islamic law. Torunn

¹⁷¹ Larson, 3.

¹⁷² The Judiciary (Constitution of 1964, art. 102).

¹⁷³ The Judiciary (Constitution of 2004, art. 132).

¹⁷⁴ Fundamental Rights and Duties of Citizens (Constitution of 2004, art. 44).

Wimpelmann of the Chr. Michelsen Institute noted that the constitution was ambiguous on whether Islamic or international human rights law took precedence in court cases and that it was unclear if punishments enumerated under Islamic law —such as the stoning of women convicted of adultery— could be applied in criminal cases.¹⁷⁵ Resistance to expanding and defining women’s rights was, in part, institutional. When the Assembly gathered a Joint Commission to debate the Eliminate Violence Against Women Act (EVAW) in 2008, numerous representatives accused the proposal of being “un-Islamic.”¹⁷⁶

Despite significant textual appeals to civil liberties and protected freedoms under law, the 1964 and 2004 constitutions failed to sufficiently define these protections or mandate their recognition by the government. The ambiguous and incomplete protections afforded to religious minorities and women excluded a substantial portion of Afghan society from the standard course of law. However, the treatment of political parties under both constitutions especially hampered the health of Afghanistan’s democracy. By failing to recognize the legal standing of parties and crafting electoral systems designed to limit cooperation, government institutions disincentivized political cooperation and limited the public’s ability to organize effective opposition movements through legal means. These deficiencies regarding political organization were especially harmful to the Islamic Republic, whose legitimacy and proposed appeal in opposition to the Afghan Taliban were based on representative government and democracy.

¹⁷⁵ Torunn Wimpelmann, *The Pitfalls of Protection: Gender, Violence, and Power in Afghanistan* (Oakland, CA: University of California Press, 2017), 42.

¹⁷⁶ Wimpelmann, 58.

III. ELECTIONS, GOVERNANCE, AND THE WAR IN AFGHANISTAN

Any discussion of Afghan rule of law is incomplete without also discussing its relationship with the War in Afghanistan (2001-2021). While this necessarily excludes the 1964 Constitution from consideration, the war was so influential on the construction and application of the 2004 Constitution that a dedicated section is necessary. The opening of this chapter discussed one such effect of the war, that being armed interference in government elections, but further effects include the composition of the initial 2004 Afghan government and human rights violations conducted by the Afghan armed forces and law enforcement. While constitutional and international law required these abuses to be prosecuted by the state, there was no institutional interest to hold violators accountable. This was, in part, driven by the consolidation of military and security authority within the Afghan presidency and by international pressures regarding the conduct of the war.

Before discussing the violation of human rights, it is important to return to the issue of elections during the war. As AP News and the Guardian reported in 2019, one of the greatest threats to the Islamic Republic's electoral system was the Taliban, who disrupted elections with acts of terrorism. Violence and threats of violence frequently led to the closure of polls and the effective disenfranchisement of Afghan voters. During the 2009 presidential elections, the IEC reported nearly a seventh of the country's six-thousand polls were closed due to poor security or active attacks.¹⁷⁷ The Taliban were also responsible for the assassination of at least four candidates and attacks on political campaigns throughout the election year. Due to these security threats, voter turnout in presidential and assembly elections decreased exponentially between

¹⁷⁷ Tim Gaynor, "Graft and Threats of Violence Cloud Hopes for Afghan Vote," Reuters (Thomson Reuters, September 6, 2010).

2004 and 2019. In 2004, turnout for the presidential election was nearly 70%, over three times the level of turnout for the 2019 elections.¹⁷⁸

The Afghan Taliban cannot be solely blamed for the poor performance and legitimacy of Afghan elections. As early as 2004, fraud and other illegal practices became rampant in the electoral process. The IEC reported that vote-buying, bribery, and the sale of voter registration were widespread throughout the 2009 election year. Over seventy presidential candidates for that election were disqualified due to their connections with private militias and warlords, which served to intimidate and coerce voters in provincial elections.¹⁷⁹ The SNTV system also fractured the legitimacy of Afghan elections by creating theoretically unrepresentative results. In 2010, elections in Ghazni led to ethnically Hazara candidates winning eleven lower house seats that had previously been evenly split between Hazaras and local Pashtuns. While security concerns undoubtedly impacted the elections, the electoral division among the province's twenty-two Pashtun candidates led to the Hazara candidates winning the election.¹⁸⁰ The results outraged local Pashtuns, and many questioned the legality of these elections even after the IEC verified the results. Even without Taliban involvement, the widespread fraud and poor organization of the Afghan electoral system significantly damaged the Islamic Republic's credibility.

Despite the considerable faults in the electoral system, the government of the Islamic Republic and its international supporters ignored and often exploited these weaknesses. During the 2004 and 2009 elections, reports indicate that the United States, the United Nations, and other state actors covered allegations of electoral fraud. According to the Middle East Institute,

¹⁷⁸ Roshni Kapur et al., "The International Community and Afghan Elections: Helping or Hobbiling Democratic Development?," Middle East Institute (MEI, April 19, 2012).

¹⁷⁹ Gaynor, 2010.

¹⁸⁰ Reynolds and Carey, 2012.

this was to stop international donors from rescinding development aid for Afghanistan, which included over \$38 billion USD from the United States between 2001 and 2009.¹⁸¹ In late 2009, the United Nations went as far as to remove its Deputy Special Representative to Afghanistan, Peter Galbraith, after he voiced concerns about fraud in the presidential elections.¹⁸² The Afghan government itself also participated in electoral mismanagement, with the ACE Electoral Knowledge Network noting that the executive placed considerable pressure on the IEC and election officials to commit unconstitutional actions. In 2005, the Karzai administration incentivized the IEC to remove candidates from Assembly and provincial elections, and in 2009, the president's office frequently contacted IEC officials regarding the outcome of the election.¹⁸³ International and executive interference in elections and election transparency plagued every major election under the Islamic Republic, damaging both the government's domestic legitimacy and its image abroad.

The abuse of executive authority specifically extended far beyond elections, and these abuses were largely driven by the post-2001 political regime created by the Bonn Agreement. In the 2002 Afghan Interim Government (AIG) and the later 2004 Karzai administration, former mujahideen and Northern Alliance commanders dominated the cabinet and the National Assembly with U.S. and UN approval. Muhammed Qassem Fahim, Muhammad Yunus Qanooni, and Abdullah Abdullah—former lieutenants under Ahmed Shah Massoud and leaders in the Northern Alliance—served as a vice-president and as the minister of Defence and Foreign

¹⁸¹ Kapur et al., 2012; “Timeline: U.S. War in Afghanistan,” Council on Foreign Relations (Council on Foreign Relations, 2023).

¹⁸² Peter Beaumont and Jon Boone, “US Diplomat 'Forced out' over Stance on Afghan Election Fraud,” The Guardian (Guardian News and Media, September 30, 2009).

¹⁸³ Andy Campbell, “Afghanistan: An Electoral Management Body Struggles to Deal with Executive Interference” (Stockholm, SE: ACE Electoral Knowledge Network, 2012).

Affairs, respectively.¹⁸⁴ Abdul Rashid Dostum, an influential Uzbek politician and former army officer, became Deputy Minister of Defence in 2005 and Ghani's First Vice-President in 2014, despite numerous accusations of war crimes during the 2001 invasion.¹⁸⁵ The most immediate result of these appointments was considerable institutional abuse. During the 2002 elections to the AIG loya jirga, militia commanders like Dostum and Ismail Khan used their forces to seize polling locations and force competing candidates out of contention.¹⁸⁶ Later in 2007, former mujahideen leaders in the National Assembly introduced and passed legislation to absolve themselves of these crimes, alongside granting amnesty for human rights abuses prior to 2001.¹⁸⁷ The involvement and unchecked power of former warlords and mujahideen in the Afghan government after 2001, rather than secure the stability of the new regime, only served to undermine the legitimacy of the democracy and communicated to Afghan citizens that the government primarily served the interests of militant elites.

Government disinterest in human rights abuses is perhaps most clear in the conduct of the ANSF and local militias. Under the 2004 Constitution, crimes against humanity as defined by the United Nations Charter and the Universal Declaration of Human Rights are impeachable offenses for presidents, ministers, and legislators.¹⁸⁸ However, state security forces and militias connected to state officials frequently committed war crimes against Afghan citizens. Pajhwok Afghan News, the country's largest independent news agency until 2021, reported three separate instances of state security forces deliberately killing civilians in government raids in late 2018.

¹⁸⁴ *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions ("Bonn Agreement")* [Afghanistan], S/2001/1154, 5 December 2001.

¹⁸⁵ Carlotta Gall, "Witnesses Say Many Taliban Died in Custody," *The New York Times* (A. G. Sulzberger, December 11, 2001).

¹⁸⁶ "Afghanistan: Return of the Warlords" (New York, NY: HRW, 2002), 4.

¹⁸⁷ Wimpelmann, 44.

¹⁸⁸ The State (Constitution of 2004, art. 7).

These included over 170 suspected deaths in Nangarhar Province between September and October, which government officials denied.¹⁸⁹ In a 2011 report published by the United Nations Assistance Mission in Afghanistan (UNAMA), reviews of Afghan security installations revealed the widespread use of torture against detainees, which was unconstitutional under Art. 29 of the constitution. Interviewing detainees of the National Directorate of Security (NDS), UNAMA officials recognized marks and practices “consistent with torture and ill-treatment,” along with descriptions from prisoners about being tortured.¹⁹⁰ Further reporting by the Washington Post revealed foreign military forces were either aware of or facilitated these practices, with U.S. forces helping deliver NDS detainees to secret prisons in Kabul.¹⁹¹ Despite international and domestic outcry, there is no evidence suggesting that NDS or government officials were accused, tried, or convicted for these acts.

The uneven and abusive application of the 1964 and 2004 Constitutions had severe effects on the health of Afghan representative governance. By consolidating state power over religion, limiting public access to constitutionally enumerated civil liberties, and ignoring substantial human rights abuses by state and state-affiliated actors, the Kingdom and the Islamic Republic eroded the very rule of law they established under their respective constitutions. According to various international governmental and non-governmental reports, this erosion damaged public confidence in the legitimacy of the 2004 Constitution. In 2019, a report on religious freedom by the U.S. Department of State noted that Afghan Shi’a did not trust the government’s security institutions in Shia’-dominated regions and believed the government did

¹⁸⁹ Yousuf Zarifi, “Khogyani Elders Claim 160 Civilians Killed in Night Riads,” Pajhwok Afghan News (PAN, September 25, 2018).

¹⁹⁰ “Treatment of Conflict Related Detainees in Afghan Custody” (Kabul, AF: UNAMA, 2011), vi.

¹⁹¹ Joshua Partlow and Julie Tate, “U.S. Had Advance Warning of Abuse at Afghan Prisons, Officials Say,” The Washington Post (WP Company, October 30, 2011).

not reflect their demographics.¹⁹² Another 2019 report by the World Justice Project revealed that citizens had little to no confidence in the rule of law. Of 17,500 polled Afghans, 59% believed government officials were engaged in corruption, 48% and 38% suspected government officials and law enforcement of corruption.¹⁹³ In contrast, only 19% of the sample believed government officials would be held accountable for non-violent crimes like embezzlement or fraud.

¹⁹² “2019 Report on International Religious Freedom: Afghanistan” (Washington, DC: U.S. Department of State, 2019), 1.

¹⁹³ “The Rule of Law in Afghanistan: Key Findings from 2019” (Washington, DC: WJP, 2020), 7.

Conclusion: “...and the Generations to Come.”

Following the constitutional loya jirgah in 1964, the Dar ul-Aman palace returned to its previous state of abandonment. After a fire partially destroyed the building in 1968, it was restored by the Ministry of Defence the next year and served as the Ministry’s headquarters for the next two decades.¹⁹⁴ After surviving two more fires in 1978 and 1990 —both the result of military coups— Dar ul-Aman was almost totally demolished during the collapse of the Democratic Republic of Afghanistan in 1992 and the succeeding civil wars of the mid- and late 1990s. Post-war infighting amongst the mujahideen factions, coupled with the general decay of national infrastructure during the war, left the palace virtually destroyed and forgotten. Despite plans to refurbish the palace as the seat of the legislature of the Islamic Republic, the government instead built the offices of the National Assembly across the street, a mere 2,000 feet away from the monument Amanullah had built to house his own parliament. Dar ul-Aman remained in limbo until 2019, when the Ghani presidency spent over \$10.5 million USD to renovate the building, but the building did not open until a year later.¹⁹⁵ With the rise of the Taliban government in Kabul and the renovations partially unfinished, it is likely that Dar ul-Aman will remain abandoned for the foreseeable future.

The 1964 and 2004 constitutions, in some ways, parallel the Dar ul-Aman Palace’s cycles of construction, destruction, and reconstruction. Symbols of Afghanistan’s departure from its absolutist past, these legal frameworks represented the country’s commitment to modernization along, as Mariam Ghani described, “rational and enlightened lines.”¹⁹⁶ However, the

¹⁹⁴ “In Pictures: Kabul’s Battle-Scarred Darul Aman Palace,” BBC News (BBC, November 9, 2014).

¹⁹⁵ “Taliban Strike across Afghanistan in ‘Spring Offensive,’” BBC News (BBC, April 16, 2012); AFP, “Afghan Palace Emerges from Ruins as Centenary Nears,” Arab News (Saudi Research and Marketing Group, August 16, 2019).

¹⁹⁶ *A Brief History of Collapses (Excerpt)*, 4:03.

authoritarian political traditions of the constitutions' environment, as well as the self-interest of their architects, meant that any promises of democratic and accountable governance would be subordinated to explicit and implicit autocratic practices. Instead of identifying and addressing these issues, successive governments have taken the 1964 and 2004 constitutions at near face value, built their government institutions on inflexible foundations, and failed to check the excesses of their political leaders.

This is not to say that the 1964 and 2004 constitutions are without merit or that their failures were inevitable. The latter is a particularly egregious claim, as it can be made only in hindsight. It is entirely possible that either constitution could have lived on despite its inherent illiberalism and contradictions, as the 1931 Constitution did. The 1973 republican coup and the War in Afghanistan were events rooted in specific historical processes, but the challenges they presented to the 1964 and 2004 constitutions, respectively, are not. By centralizing political authority, limiting free expression, and eroding the rule of law, both frameworks created environments ripe for the formation of anti-government movements, whether politically or religiously motivated. When similar practices dominated pre- and early modern Afghan politics, the technological and economic superiority of state actors was often enough to snuff out militant opposition, but the introduction of new technology, industries, and communication methods to Afghanistan during the 19th century gradually made armed opposition more effective. The desire to extend pre-modern political practices into the 20th century thus had to contend with modern methods of protest and resistance.

Despite the multiplying challenges facing authoritarian practices in Afghanistan, it is unlikely that these practices will change in the near future. The interim Afghan Taliban government, headed by the jurist Hibatullah Akhundzada and Mullah Hasan Akhund, will likely

mirror the movement's administration from the late 1990s, when the group last constituted some form of government. Throughout its first year in office, the interim government reintroduced a number of measures previously adopted by the Taliban in the 1990s, including reviving the Ministry for the Propagation of Virtue and the Prevention of Vice in September 2021 and resurrecting mandatory veiling for women in May 2022.¹⁹⁷ Indeed, the return of policies targeting the role of women in the public sphere has been especially damaging, with the Islamic Emirate closing primary schools for girls and banning women from public universities in late 2022.

In terms of political and legal governance, the Islamic Emirate has so far diverged little from the overall organization of the Afghan Taliban. Akhundzada, as Supreme Leader of Afghanistan and “Commander of the Faithful,” has largely unchecked executive authority over the administration of the country.¹⁹⁸ He holds exclusive power over the appointment of the prime minister, deputy prime ministers, government ministers, judges, military officials, and provincial administrators. Formally religious bodies, such as the Central Dar al-Ifta’, responsible for issuing Islamic legal opinions, and the Kandahar ‘Ulemā Council, which acts as an executive advisory committee for the supreme leader, are also appointed directly by the head of state.¹⁹⁹ Only the central Council of ‘Ulemā, which holds the power to appoint and dismiss the supreme leader, has any theoretical check on the executive, but whether the council’s members are appointed by the head of state or by other officials is unclear.

¹⁹⁷ Diaa Hadid, “The Taliban Orders Women to Wear Head-to-Toe Clothing in Public,” NPR (NPR, May 7, 2022).

¹⁹⁸ The former title, in Dari as “Rahbar-e Afghansitan” or “رهبر افغانستان;” The latter, in Arabic as “amīr al-mu’minīn” or “أمير المؤمنين” is a title denoting leadership in the Muslim community with roots in early Islam. Its use by the Afghan Taliban dates to the early 1990s, when it was adopted by the movement’s first leader, Mullah Muhammad Omar.

¹⁹⁹ Ashley Jackson, “The Ban on Older Girls’ Education: Taleban Conservatives Ascendant and a Leadership in Disarray,” Afghanistan Analysts Network (AAN, March 30, 2022).

This is all to say that the authoritarian provisions of the 1964 constitutional framework will likely benefit the Taliban administration should they retain it. While the government of the Islamic Emirate utilizes some limited forms of collaborative and decentralized policy-making, this is only in the context of the top leadership and could not constitute a democratic system by any means. It is possible that, under such a system, the future constitution of the Islamic Emirate will legitimize the broad powers of appointment and legislation that the Supreme Leader currently enjoys. As a result, the conclusions of this thesis are of little relevance to either the current interim administration or the first proposed constitutional framework it adopts. Instead, the first constitution of the Islamic Emirate may instead serve to reinforce the initial claim of this thesis: that numerous constitutions of Afghanistan more often extend the consolidated, authoritarian politics of the 1964 Constitution and its heritage than they innovate on the country's approach to decentralization and democratization.

Instead of applying these conclusions findings to the Islamic Emirate, it may be best to apply them to international observers and scholars, who too often supported the continued use of the 1964 Constitution and its authoritarian heritage. Though these actors had substantial influence over or input in the adoption of the 2004 Constitution, their support primarily centered on the framework as providing “much-needed continuity” following decades of civil war and instability.²⁰⁰ While this is not a bad objective in itself, this pursuit came at a considerable cost to the constitution's commitment to democracy, free and efficient elections, and the perceived rule of law. The desire for unity and continuity over popular demands and reconciliation created a system in which war criminals held significant public offices and elections weakened the power of free expression. Worse still, many of the deficiencies and contradictions within this system

²⁰⁰ Jennifer Murtaashvili, “The Collapse of Afghanistan,” *Journal of Democracy* 33, no. 1 (January 2022), 43.

were present and visible as early as 2003, when legal scholars feared the interpretive power of the Supreme Court might unduly influence religious life. Ultimately, these issues were never resolved in an effective manner.

If further attempts at constitution-making are to succeed, whether in a new Afghanistan or elsewhere, future research must identify and address the underlying issues that drove or influenced the development of constitutional law in Afghanistan. While this thesis primarily identified 19th century authoritarian politics and the need for political centralization as key influences on the 1964 and 2004 constitutions, this cannot be the only influence. On the executive specifically, scholarship may explore the relationship between Afghan executives and their civil servants. While the latter relied heavily on the patronage of the former for political success through appointments, it is possible that competing ambitions or ambiguous political agency may have impacted political centralization in Afghanistan. This may further open courses of study on civil-military relations in the country historically, which the present scholarship has primarily focused on in a contemporary context. The centrality of the military to political centralization and expansion during the 19th century, as well as the military's role in the 1964 and 1978 coups, imply a tenuous relationship between the need for executive control and the desire for a strong national security apparatus throughout the 20th century.

On the topic of law and religion, scholars like Faiz Ahmed have already made significant contributions to the place of Islamic modernism in 20th-century Afghan law. However, further research may expand this into the development of Islamism in Afghanistan concurrent to the development of constitutional law after the 1923 Basic Code. What debates were occurring between early Afghan Islamists and their counterparts regarding the 1931 and 1964 constitutions and how did these discussions impact their perception of the central government? Did the clauses

of statutory interpretation of Islamic law influence future opposition to the 1964 and 1977 constitutional frameworks? As a whole, the relationship between the religious and the secular in Afghanistan is a largely untapped field of research with potentially significant answers to questions regarding constitutional law and the rule of law in 20th century Afghanistan.

Appendix: Constitution Translations

As discussed in the introduction of this thesis, online copies of the 1923, 1931, 1964, and 2004 Constitutions are rare, with the 1923 and 1931 constitutions being unavailable readily in their original form and the Constitution of 1964 being unavailable readily in the original Dari or Pashto. Listed below are the copies of these documents used in this thesis and their associated links.

For the English translation of 1923 Basic Code, available at the Archivio di Diritto e Storia Costituzionali at the University of Turin:

<http://www.dircost.unito.it/cs/docs/AFGHANISTAN%201923.htm>

For the English translation of Constitution of 1931, available at the Archivio di Diritto e Storia Costituzionali at the University of Turin:

<http://www.dircost.unito.it/cs/docs/Afghanistan%201931W.htm>

For the English translation of the Constitution of 1964, published by Franklin Book Programs and available through the Arthur Paul Afghanistan Collection at the University of Nebraska-

Omaha: <https://digitalcommons.unomaha.edu/afghanuno/201/>

For the original Pashto and Dari version of the Constitution of 1964, available through ConstitutionNet: [https://constitutionnet.org/vl/item/constitution-afghanistan-final-draft-](https://constitutionnet.org/vl/item/constitution-afghanistan-final-draft-daripashto)

[daripashto](https://constitutionnet.org/vl/item/constitution-afghanistan-final-draft-daripashto)

For an unofficial English translation of the 2004 Constitution, available through the website of the Embassy of the Islamic Republic of Afghanistan in Warsaw:

<https://afghanembassy.com.pl/eng/afganistan/konstytucja>

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