

# **An Assessment of the Possibility of Producing Consensus within the Parliamentary and Decentralized System of Democracy in Afghanistan**




**Dr. Mohammad Amin Ahmadi**

Afghan Institute for Strategic Studies



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Producing Consensus within the  
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In Afghanistan**



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Author: Dr Mohammad Amin Ahmadi

Translator: Abbas Farasoo

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# **The Possibility of Producing Consensus within Framework and Principle of Islamic Republic of Afghanistan**

## **Introduction**

In this paper, the central question is how to navigate compromises and reach an agreement on a peace settlement with the Taliban within the constitutional framework of the Islamic Republic of Afghanistan?

Although this paper focuses on a post-peace political system in Afghanistan, parts can be used for an interim and transitional period to build a political consensus in the country. However, before going into the details, I would like to make some introductory points:

1. A peace settlement with the Taliban is not achievable through a power-sharing framework within the current political order. The Taliban follow a different political-religious discourse and try to establish their own Islamic political system. Therefore, both sides should reach an agreement about the nature of the future political system. But reaching this agreement is one of the most difficult steps in building peace in Afghanistan because the Taliban's view is very different



from other interest groups' demands, including the Republicans. Of course, their view is distant from Afghanistan's international commitment and its future in the international community. Therefore, finding a mutually acceptable formula for both sides is difficult but not impossible.

2. When it comes to the Taliban and their Emirate system, their constitution and intellectual system do not have the capacity to build agreements and consensus in the country. The Taliban's system of thinking and political order will not meet the interests of the domestic stakeholders, nor will it meet the country's international commitment requirements, which is necessary to continue international assistance to Afghanistan.
3. On the other hand, my argument is that the Republic and the current Constitution, especially through their principles, largely can build consensus and agreement internally and fulfill Afghanistan's international obligations. This argument will be detailed through the following claims: First, the current constitution by some amendment can build consensus among Republicans. Second, it can implement the requirements of Afghanistan's international obligations. Third, it can consider the Taliban's wishes and opinions about their system and satisfy them.

This paper will examine the capability of the current constitution about the points mentioned in the above claims. Before going into any details, it is important to note that the first and second claims should be compatible with the third one. Based on this approach, this paper tries to show how consensus for peace can be possible.

### **The need to reach an agreement on the political system and its difficulty**

In this section, I will try to answer two questions: First, in order to achieve peace, why is it necessary to reach an agreement on the political system? Secondly, why is it so difficult to make this agreement? And how to overcome this difficulty?

The significance of reaching an agreement on the political system stems mainly from the Taliban's great differences with the current regime, meaning that the Taliban's strong-armed opposition is not just a result of merely they want to take the power. If that were the case, the problem would be solved simply by involving them in the government and sharing power. But the Taliban's problem is with the principles of the current political system. The Taliban believes that the Emirate system was in place as a legitimate religious (Sharia-based) system,

which was overthrown as a result of the ‘occupation’ of the country by ‘infidels.’ According to the Taliban, they have waged ‘jihad’ for two purposes: first, to end the occupation, and second, to restore the Sharia-based system. The Doha Agreement achieves their first goal as the Taliban signed with the US. It also paved the way for their second goal, which is to establish a ‘pure Islamic System’ through negotiation and the continuation of ‘jihad.’ Also, this is the goal that they want to sustain in the post-peace talks era. The Doha Agreement has accepted that an intra-Afghan political agreement may be reached, leading to a new ‘Islamic government.

As the experience of over eighty days of negotiation with the group on procedural issues has shown us, the Taliban refused to accept even the slightest flexibility that recognizes the Republic political system and the existing constitution. This was why the negotiation on procedural issues lasted for more than two months. Therefore, it is very unlikely that they will accept the current Constitution and Republic political system without changes and modifications. Indeed, in their view, their ideological demands will not be met within the framework of the current structure, and they will not feel politically satisfied without any change to the existing constitution and political

system. On the other hand, the Republicans are reluctant to accept anything less than an elected, democratic system in which women's rights, freedom of expression, and the rights of minorities are respected by denying any discrimination against them. Afghanistan's international partners support this view. The international partners have made their assistance conditional and subject to respecting human rights and democratic values. These demands cannot be met within the Taliban ideological framework and their preferred Emirate political system. Given this situation, there should be a mutually acceptable narrative for both sides to meet the condition related to the international community and Afghanistan's international commitments of protecting civil rights and the Taliban's preferences regarding an 'Islamic political system.'

At the same time, proponents of the Republic are largely at odds over a desirable structure that is more participatory and egalitarian and more consensual. The Stability and Convergence (*Subat Wa Hamgarayee*) team belongs to Abdullah Abdullah's party who leads the High Council for National Reconciliation (HCNR), and clearly calls for the decentralization of power. Besides, the current structure has shown its problem in several presidential elections. As noted by experts such as Barnett

Rubin, holding a transparent presidential election under the influence of political identity has become difficult and unattainable.<sup>1</sup> Instead of directly electing the president as described below, an indirect election option can be used for the president, prime minister, and provincial governors.

Therefore, we have two levels of disagreement. The first disagreement with the Taliban is more intense – it is difficult to resolve this dispute and reach an agreement with them on the nature of the political system. One reason for this difficulty is due to the unique characteristics of the Taliban. The Taliban wants to establish a Sharia political system where the education system is strongly adapted from the traditional education system of the old religious schools (*Madrasas*); they want the sharia laws to be implemented by the government in public and private spheres by the religious police. The Taliban’s inherent objectives and interests are less about justice and equality that could be resolved by ensuring human rights and democracy, wealth distribution, equal access to opportunities, and decentralization of power for them. However, most of the

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<sup>1</sup> Barnett R. Rubin, “Constitutional Issues in the Afghan Peace Negotiations: Process and Substance” (United State Institute of Peace, 2020), <https://www.usip.org/publications/2020/11/constitutional-issues-afghan-peace-negotiations-process-and-substance>.

political groups elsewhere that have fought or are fighting against their governments have made peace, or they can make peace because their problems could be resolved through previously mentioned factors, particularly justice and federation. For example, Recep Tayyip Erdogan of Turkey once wanted to resolve the PKK problem by ensuring democracy and human rights. Indeed, the group's problems can be solved through democracy, human rights, decentralization, and federation, although the group largely seems to be separatist and seeking self-determination. The FARC's problem has been largely solved by providing more social welfare policies and the return of lands taken by large corporations from small landowners. These approaches may work in the case of Afghanistan as well. Still, on their own, it cannot resolve the Taliban's demands because the Taliban wants to restrict political participation, and limit human rights and democratic practices. Therefore, we should find a formula to combine democracy and democratic values with the Taliban's preferences for a Sharia-based political system. This may possibly grant more roles for the religious scholars or Ulama.

The experience of the last 20 years and the chronic political disputes reveal the elites' widespread dissatisfaction of the

people with how the government is run. The crises caused by several presidential elections show that the disagreement mentioned above (the second problem) on the political system among anti-Taliban fronts is also essential. So, if we want to have lasting peace, we must find a reasonable solution to this dispute. Suppose we find a way to solve the Taliban problem (the first one) while the second problem is not solved. In that case, the country's situation will be complicated again, and violence and dissatisfaction may arise from another perspective or corner of the country. Hence, a three-dimensional formula must be considered, as stated in the three claims before.

Although it is not easy to find such a formula, it is possible. The formula should solve the Taliban and the Republicans' disagreements and make the proponents of the Republic more satisfied and cohesive than before. It will be discussed in the following sections of this paper.

Firstly, to reach the formula mentioned above, it is necessary to see which discourse has the capacity to ensure agreement and consensus? The Taliban / Emirate discourse, or the Republican discourse? By republican discourse, I do not mean the current government, rather the legal and political principles and structures accepted in the existing constitution. Simultaneously,

the current constitution's legal and political structures can be amended and developed by the constitution's principles. My objective from the Taliban's discourse is their recent political thinking – not necessarily the Emirate they established or the radical thinking they pursued in the late 1990s.

### **The capacity of the Taliban / Emirate discourse to build consensus and agreement**

In its most moderate form, the Taliban discourse does not have the necessary capacity to ensure political agreement. The Taliban's notion of participation is a simple sharing of power with other ethnic groups in an Emirate political system. Political parties and groups' competition for power through free elections has no clear place in their discourse. There is no real separation of power and the rule of law because in practice, the Amir, or the head of an Emirate political system, holds absolute power, and there is no mechanism to control and monitor the Amir on a practical level. The Taliban's idea of women's rights is at best that women should be socially active and may work in government. Still, they cannot be members of the *Ahl al-hall wal-aqd council*, or those qualified to elect or depose the Amir, head of government, and judges. The Taliban's perception of the rights of Shiites—as evidenced by the experience of more than



seventy days of negotiations with them in Doha—is to simply reduce them to private matters such as divorce and marriage according to Shiite jurisprudence or *fiqh*. The Taliban do not believe in or admit to the principle of denying discrimination against Shiites. In their view, Hanafi Sunni jurisprudence must be the basis of laws and the head of state (i.e. Amir), prime minister and the supreme judges must adhere to Hanafi jurisprudence. They may make symbolic appointments of Shiites in government ministries, but their primary objective is to establish, maintain, and institutionalize the country's identity only on Hanafi jurisprudence.

The Taliban's Emirate system will impose extensive religious restrictions on the fundamental human rights and freedoms provided in the current constitution. The religious police, under the strictest interpretation of the Islamic principles of *amr-e ba ma'ruf wa nahye az munkar* (i.e., enjoining what is good and forbidding what is reprehensible), will have significant powers to control the people. The curriculum of religious education and Arabic language will be changed. The curriculum of religious schools (Madrasas) will be further expanded to general education in schools and higher educational institutions.

This discourse marginalizes women, Shiites, and youths more than any other social groups. And of course, there is no place for civil society in their discourse. In the Taliban discourse, the structure of power is highly centralized and absolute. Hence, it severely undermines the participation and influence of ethnic groups and their elites in developing and implementing national policies. There is no democratic accountability in the Taliban's Emirate system, rights and freedoms are not protected, and the possibility of repression and cruelty in such a system is extremely high. In the absolute Emirate system, there are no participatory power structures, the rule of law, or democratic accountability because it lacks the legal and political structures to ensure these principles.

Therefore, on the one hand, the Taliban system fails to meet the diverse needs and interests of women, ethnic groups, political elites, youths, and different Shiite communities. On the other hand, under the Emirate system, Afghanistan will not fulfill its international obligation to uphold fundamental human rights and ensure democratic governance and participation. Any failure in both fronts may reduce and withdraw international foreign assistance crucial for the Afghan state and society's survival and development. Hence, the Taliban discourse about

the political system cannot build a political consensus and present a way forward for Afghanistan.

### **The capacity of the Republican discourse to create consensus and agreement**

According to its very own principles, which are reflected in the current constitution, the discourse of the Islamic Republic has the ability to combine three demands: (1) The Islamic volition, (2) the will of ethnic groups and all interest groups, (3) and the will of the international community. By satisfying the first demand, it can create the legitimacy that the Taliban want. Through its democratic and participatory structure, it satisfies the will of various ethnic groups and elites. Through the manifestation of human rights and freedoms and the denial of discrimination in the constitution, the Republican discourse can ensure women, Shiites, and other stakeholders' rights and interests. By decentralizing and reforming the structure and strengthening of institutions and processes, it can make the framework of the agreement more inclusive and stable (also, there is a need to have a national consensus on the type and level of decentralization). This discourse will even strengthen its acceptance for the Taliban. In this way, it is even possible to increase the Taliban's participation in institution-building and

process-making, thus creating a ground for them to gain more legitimacy within the system and create a sense of success. Within the framework of the Republic, there will be an opportunity for ensuring Afghanistan's international commitments and the international community will also feel a sense of success because of two reasons: First, Afghanistan will not collapse into a safe haven for global terrorism, and second, Afghanistan will remain committed to international standards of human rights and women's rights and so on. As a result, it will be justified that international assistance is needed for Afghanistan to survive and thrive, and it will not be wasted. The most important issue however is the answer to how Islam within the republic discourse can satisfy the Taliban.

## **Islamization of the Republican System and the demands of the Taliban**

The Taliban's claim about the Emirate system's religious bases, and their rejection of the election-based system, has no strong religious justification. The ultimate religious implication of the verses of the Qur'an is that Muslims apply the divine laws and do not violate these laws. However, when it comes to the type of system, there is not fixed and predetermined instruction in the Qur'an and the Sunnah. Caliphate is a theory that was later formulated among Muslims, which is an interpretation of the actions of the Companions and the Caliphs (*Sahaba and Khalifa*). The precise point is that the structure of the political system is an issue that is subject to the exegesis of the experts or independent reasoning (i.e., *Ijtihad*), and Ijtihad that should be based on expediency and therefore it belongs to the realm of Maslaha (*Masaleh Morsalah* or public interests). Therefore, it should be seen which kind of legal and political structure can better vindicate values such as justice, prevent oppression, and bring efficiency. There is no practicality more important expediency in politics and governance than providing justice, preventing oppression and tyranny, and having good governance.

There is no religious reason based on the Qur'an and Sunnah not to allow elections and a Republican system. The contemporary Muslim jurists and scholars have issued fatwas that allow elections and people's participation in politics. Some contemporary Islamic jurists claim that the Shari'a can provide reasons and justifications in favor of democratic election. They have argued that Imam Abu Hanifa and in the Words of the Companions (*Guftar-e Sahaba*), it is clear that the caliphate does not exist without the consent of the congregation (which means the majority), and coercion, force, and domination are not a legitimate way to gain power. Forming a government is the public duty of Muslims, not the duty of an individual or a particular class. So, the election is the best way for Muslims to form the government by achieving public consent, not by the decision of 'Ahl al-hall wal-aqd,' a council of religious scholars. The reason is simple; God has not given that authority to a special group called 'Ahl al-hall wal-aqd' to have the political power and control the public sphere. In other words, there is no clear reason from the Qur'an and Sunnah for a certain class to claim to indicate their ownership of people's will. Therefore, no social stratum can claim to have ownership of state power and public destiny. Even if we accept the council of 'Ahl al-hall wal-aqd' as a principal actor who has the ability and knowledge

to solve problems, the best way to choose them is the parliamentary and provincial assembly elections. Because if the members of ‘Ahl al-hall wal-aqd’ are appointed by an Amir—according to the Taliban constitution (drafted in 1998 and reviewed in 2005)—the question arises who will appoint the Amir? And how can the member of ‘Ahl al-hall wal-aqd’ monitor the Amir’s actions and behaviors?

Therefore, it can be said that the Taliban’s claim in terms of the structure of the political system and the government does not have strong religious legitimacy. Indeed, there is no religious obligation to prevent the people’s right to vote in an election and choose their representatives or being elected in a democratic manner or build an efficient modern political structure. Therefore, the Taliban cannot refer to Shari’a in order to force the Afghan people to follow their views or deprive them of their rights to participate and build their government.

As I explained, according to Shari’a, we are only obliged to observe and apply divine principles (*Humk-e Khodawand*).’ However, it is not easy to discern what divine rule is and how one can determine which rule or principle is divine and which is not. So, the obedience of divine rule is well formulated in Article 3 of the current Constitution, which prevents enacting

laws that contradict the Islamic one. However, in order to properly implement Islamic law in the political system and ensure it with enforcement, the following measures can be considered:

1. The third article should be amended as follows: This article is paramount over all the principles of this constitution.

2. To protect the constitution, the Independent Commission for the Supervision of the Implementation of the Law, enshrined in Article 157, shall be amended to the Constitutional Court. This court should have the jurisdiction authority to control the laws based on legal and natural persons' request following the constitution. And this court should be the reference for examining the claims of religious institutions regarding the contradiction of the law with Islam. At least three members of this court must be religious scholars. If these three people unanimously agree that the law or a legal article is contrary to Islam, that law will be considered invalid and unenforceable. In this way, it will ensure to approve and implement Islamic principles.

A judicial review system is better than having only a council of Ulema (clerics), which has the authority to review the



inconsistency of laws with Islam. A council where the members are only clerics may not consider fundamental rights, including human rights, in reviewing laws; thus, they may reject them as something non-Islamic or against Islam. However, the Constitutional Court is more professional. Some of its members are jurists and advocates of interest groups; therefore, they may argue in defense of the law and call for a broader interpretation of Islamic laws. As a result, the Constitutional Court's ruling is the one that will come out after an in-depth and careful discussion.

3. Through the law and legal institutions, the media and government departments (for example, the Supreme Media Council in the Ministry of Information and Culture) can be controlled so that they do not violate the Islamic rule provided by law.

4. Within the legal framework, the public space can be subject to judicial supervision through using the justice police to prevent deniers (Munkarat), and deniers or Munkarat must be defined and declared by law as a crime, not otherwise.

5. Articles 17 and 45 of the current constitution have created the necessary basis for religious education and the strengthening of religious schools.

6. The current constitution fundamentally protects and guarantees religious scholars and institutions' independence and freedom and obliges the government to protect and observe it under Article 17.

7. Fight corruption, bribery, and oppression and establish effective and competent governance.

8. Social justice, which is an important Islamic value, should be established.

9. The Taliban, as a religious-political group, should be absorbed in the religious structure of the system and play a strong role in reforming the system. The members of the Taliban, as explained before, can be members of 'Ahl al-hall wal-aqd' and play an important role in appointing the head of state, the head of government and members of the Supreme Court and governors in the provincial and national assemblies. Even they could win the election, and through the election they may control local councils (provincial councils, district and village councils) and local government.

10. The council of ‘Ahl al-hall wal-aqd’ shall be composed of members of both the National and Provincial Assemblies (Provincial Councils and District Councils). They must be elected through free and fair general elections.

11. A parliamentary system is predicted. The president should be elected as the head of state by a council of ‘Ahl al-hall wal-aqd,’ (because a direct election is not practical). His powers should be equal to the king’s powers in the constitution (Constitution of 1343). The head of government (prime minister) is appointed by the House of Representatives within two months which is approved by the president, while the president has no right to reject the appointed prime minister. The prime minister is accountable only to the National Assembly. If the House of Representatives fails to appoint a prime minister within two months, in that case, the president shall appoint a prime minister, and the House of Representatives shall only have the right to impeach the prime minister. The prime minister shall be accountable only to the National Assembly. This model of separation of powers, on the one hand, will prevent the concentration of power and conflicts between the president and the prime minister; on the other hand, it prevents a vacuum of power and instability.

To ensure an inclusive composition in the leadership of the government and state, the president and prime minister should each have three deputies and both of them exercise their authority in consultation with their deputies. Similarly, the mechanism of governance at the local levels should be in a way to provide inclusive and fair participation for all its inhabitants without discrimination on the basis of gender, ethnicity, religion, and social origin.

12. The governors are elected and supervised by the provincial assembly members and the district and village councils.

Considering these 12 articles in this paper enables us to consider the Taliban's views extensively within the republican system. This plan, as I will explain, will also strengthen the capacity for consensus among Republicans. The Taliban's other conflicting views, which distinguish their position from that of the Republic and the international community, do not have a strong religious and Islamic basis: these positions are of particular importance to both sides in three areas: (1) the Emirate against the Republic that I have discussed it earlier; (2) Women's rights; and (3) Shiite rights.

## **Women's Rights**

The best strategy for defending women's rights is to accept the current constitution with only a slight modification to the third article, as mentioned earlier. The current constitution rejects discrimination between men and women, where all important constitutional rights are accepted without discrimination. The current constitution provides the full fundamental rights for women. In some cases, the government is required to provide special protection for women in order to avoid deprivation, violence, and discrimination against women. However, all these rights are subject to Article 3 of the constitution's observance, which stipulates that no law can be contrary to Islam's principles.

For this reason, civil law regarding personal status or family rights has followed Hanafi jurisprudence. Women's rights in this area have been largely determined by Hanafi jurisprudence. However, only to guarantee the enforcement of the principle of non-violation of Islamic rules, it is necessary to amend the third article, as described earlier. Adopting this strategy at the constitutional level makes it possible to reach an agreement at the macro level and defend women's fundamental rights, the details of which should be enshrined in the ordinary law.

Disagreements over details can be gradually resolved. Over time, the parties will realize new capacities and perspectives in Islamic jurisprudence. As a result, they will realize that there is no serious jurisprudential obstacle to ensuring equal rights for women in various fields, including family law.

However, in the realm of constitutional rights enshrined in the existing constitution, we may face three questions from a religious perspective. First, can women be socially active? There is no clear religious reason for the prohibition of this activity. Rather, the manners of the great women of the beginning of Islam, including Umm Al-Mu'minin Aisha and Hazrat Zainab, indicate that such activities are permissible, and in the Holy Qur'an some of the social activities of women (Queen of Sheba) is mentioned with admiration. As we hear from the Taliban, they are not opposed to social activities, education, and women's work. Second, should men and women be equal in constitutional rights, such as the right to vote and to be elected? According to the principle of justice, which is an ethical and reasonable principle and the Qur'an has also commanded to observe it, the primary principle of Islam is that there should be equality between men and women in having access to all opportunities and fundamental rights. In other

words, creating distinction based on gender, which is a natural characteristic and not an acquired one, between two human beings does not seem compatible with justice, and it cannot be morally justified. Creating this distinction has no basis in the Qur'an and Sunnah. Still, the Qur'an has considered religious piety as a criterion of superiority instead of gender, and piety is an acquired virtue. I think there is no clear reason from the Qur'an and Sunnah that women do not have equal rights with men, for example, in granting power of attorney and representative or in establishing guardianship and being the leader of a nation. Again, there is no valid hadith about the inaccuracy of women's political and social leadership, a Hadith accepted by all scholars and does not imply any defect in terms of its validity being disputed. Therefore, our reference is the principle of permissibility and the principle of equality concerning women's leadership rights. However, the condition for men being a leader is rooted in the following Hadith and verse: The well-known Hadith says, 'The people who entrust their affairs to a woman will not succeed'<sup>2</sup> ( لَنْ يُفْلِحَ قَوْمٌ وَلَّوْا أَمْرَهُمْ )

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<sup>2</sup> Jonathan Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World* (Oxford: One World, 2009), 163.

(امْرَأَةً). And the verse says: 'Men are protectors of women'<sup>3</sup>  
(الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ).

However, according to the great contemporary jurist of the Najaf seminary, Ayatollah Mohammad Ishaq Fayyaz, and according to the school of Imam Abu Hanifa, the reputation of fatwas and jurisprudence cannot be the basis for citing a principle or law to God. The Hadith mentioned above, acknowledged by Ayatollah Mohammad Ishaq Fayyaz, is not compatible with our world's tangible reality. For example, in countries with female leaders, their situation is not worse, if not better, than in patriarchal countries. Therefore, it is difficult to prove the impermissibility of public presidency or leadership for women as a divine principle or rule by quoting this Hadith and claiming knowledge about this matter. It is important to know that according to the science of the principles of Hadith (*Elmud-al Derraya*), which also studies the content of a Hadith, it is difficult to rely on the Hadith mentioned above as a base of impermissibility of women's leadership.

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<sup>3</sup> Maulana Wahiduddin Khan, *The Quran: Translation in English*, ed. Farida Khanam (New Delhi: Goodword Books, 2013), Al-Nisa, Verse 34, p 80.



Also, according to detailed research by Khaja Bashir Ahmad Ansari, a graduate of Khartoum University (Sudan), this Hadith does not have the necessary strength and credibility according to the criteria of hadith science (*Elm al Hadith*)—as its chain of narrators have been examined (*Jarh*) by experts.<sup>4</sup> Also, it is not consistent with the verses of Surah An-Naml, which quotes the presidency of the Queen of Sheba in a praiseworthy context and did not condemn it. Also, in terms of semantics, the interpretation ‘Lan Yulaha’ (لَنْ يُفْلِحَ) does not imply the sanctity of action. That is, sanctity cannot be concluded for it. Based on these considerations, according to Ansari, some contemporary scholars, including Sheikh Ibrahim Fayoumi, the general secretary of the Academy for Islamic Studies of Egypt (Magma al-Buḥuṭ al-Islamiya), and Sayyid Muhammad Tantawi, the head of Al-Azhar, have issued fatwas authorizing women to hold public office. According to Ansari, what Fayyaz said about women’s role has been said by Sheikh Mohammad Ghazali many years ago.<sup>5</sup> Ghazali said that a far-sighted woman like Indira Gandhi’s leadership is better than an always-drunk

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<sup>4</sup> Khaja Bashir Ahmad Ansari, *Zan Dar Mizan-e Fiqh-e Seyasi Islam [Women in the Political Jurisprudence of Islam]* (Kabul: Maywand Publication, 2007).

<sup>5</sup> Ansari.

officer like Yahya Khan.<sup>6</sup> Moreover, as the Egyptian jurist Muhammad Salim al-Awa (quoted by Khawaja Bashir Ahmad Ansari in his book) and Ayatollah Fayyaz have stated, the concept of leadership in our time, for example, the presidency, is different from the concept of caliphate and Imamate. The reasons that indicate being a man in the caliphate and Imamate do not prove that this condition is also valid in the presidency, as the subject has changed.

Therefore, we leave the knowledge of this Hadith to God. In addition, according to Imam Abu Hanifa's ijthihad school, this cannot be practiced where it is contrary to the principle of justice. But the verse of the Qur'an, according to the analogy of 'they [men] spend their wealth on them [women]'<sup>7</sup> (وَبِمَا أَنْفَقُوا مِنْ (أَمْوَالِهِمْ)), turns out to be related to the head of family affairs. At the beginning of the verse, 'Alif' and 'Lam' (ال) in 'Ar-rejal' (الرِّجَالُ) in the phrase is about a mental covenant (*ahd-e zehni*), which is advisable to the men of the family. The view that the verse is the expression of the male head in family affairs has

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<sup>6</sup> Also, Ghazali's re-evaluation of the proper role of women in Islamic society also related to witnessing the effective leadership of Margaret Thatcher. See: Jonathan Brown, *The Canonization of Al-Buhārī and Muslim: The Formation and Function of the Sunnī Hadīth Canon*, ed. Wadad Kadi and Rotraud Wielandt, vol. 69 (Boston: Brill, 2007), 306.

<sup>7</sup> Khan, *The Quran: Translation in English*, Al-Nisa, Verse 34, p 80.

been expressed by the great commentator of the twentieth century, Allama Muhammad Husayn Tabatabai, and the famous contemporary jurist, Ayatollah Fayyaz. In addition, it can be said that the phrase ‘God has made some of them excel others’<sup>8</sup> (بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَىٰ بَعْضٍ) conveys the expression that this verse indicates the proposition of actuality (*Qazya-e Kharijiya*) and not the verity (*Qazya-e Haqiqiya*). The actuality proposition is related to a specific time and place, while the verity proposition is true beyond time and space. Therefore, the verse explains that men at the time of the revelation of the verses were in a superior position than women of that time in terms of intellect, strength, and physical ability. Women were largely uneducated and were not active socially. Power and ability were conceivable in the context of physical forces. At the time, there were no new technologies and education as we have them today. And the verse never said that men are superior over women beyond time-and-space. Although it is not stated in the verse that men are superior to women, it may be inferred from the phrase: ‘God has made some of them excel others.’ If it is inferred in this way, we say that it belongs to actuality and not verity by contextualizing

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<sup>8</sup> Khan, Al-Nisa, Verse 34, p 80.

it<sup>9</sup>. So, in general, it can be said that there is no valid reason that originated from the Qur'an and Sunnah that being a man is the condition to be the head of state or an office.

Third, can a woman travel long distances without her Mahram? In Islamic jurisprudence, there are some restrictions on women's actions and behavior; for example, women cannot go on a journey without their Mahram if traveling takes three days and nights. Their journey must be accompanied by a Mahram, according to Hanafi jurisprudence. However, according to other studies, it turns out that this is not the case. First, it is clear from the three-day stipulation that this restriction was imposed on women because of the dangers of long-distance travel in the past. At the time, three-day-and-night travel was considered long. Second, today the world has changed, and people frequently travel from one place to other places for holidays, business, and education. Even if one wants to return home as quickly as possible, Earth's longest journey does not take three days to be subject to this prohibition.

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<sup>9</sup> According to Gazali, originally the Hadith is about the Persian Sassanid Empire downfall. See: Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World*, 163.

## **Shiite Rights**

There are only three important issues regarding Shiite rights: First, the enjoyment of fundamental rights and citizenship without any discrimination. Given that the Shiites are considered Muslim by the Hanafis and the Taliban, the Shiites can be equal in fundamental rights with the other citizens of the country. According to Islam, any discrimination among Muslims is forbidden. In addition, there is no religious reason (even according to the Hanafi School) that judges, president, and the prime minister must belong to the Hanafi denomination. Second, religious rights and freedoms of the Shiites. Shiites in their personal status can practice their denomination and faith, and in this regard, the law for them can be provided according to the Shiite jurisprudence. These religious rights can be acceptable for the Taliban as well. But another important issue is the curriculum of religious education in the country. According to their denomination, the current constitution also provides the opportunity to develop a religious education curriculum for Shiite children according to their own denomination. This is now being implemented in the country.

But the Taliban's position on this issue is not clear. I do not think that there is any reason based on the Hanafi School that obliges

the Sunnis to forbid the Shiite children from having their religious education according to their own denomination and parents' beliefs. Third, the issue of mentioning the Hanafi School as the official denomination of the country as it is the main source of setting laws and government enforcement in religious affairs. This has symbolic importance and indicates that the country and the state belong to Sunnis, which will create a problem for everyone else. The Taliban will strongly support this idea that Afghanistan should be only a Sunni country. In the current constitution, relying on Islam in Articles 2 and 3, and mentioning the Hanafi and Jafari schools in Articles 130 and 131 provides an inclusive identity for the country and prevents exclusion. From the Islamic point of view, including the Hanafi denomination, there is no reason for sectarian monopoly and the denial of some pluralism in the realm of Islamic sects, denominations, and schools. Thus, there is no reason that only one school of Islamic jurisprudence is the basis for interpreting Islam and enacting the law (Taqqin al-Shari'a). The imposition of this type of exclusivism is against the historical experience of Muslims. It has no precedent in Islam's history, and it is not the case in today's Islamic countries (except Iran). In his journal article, scholars such as Abdullah Jafari, *The Place of Sect in the Constitution*, detailed the role of sects or denominations in

Islamic countries' constitutions and confirmed this argument.<sup>10</sup> It is also not compatible with the legislative tradition in Afghanistan, in which the capacities of all Islamic jurisprudences have been used. This exclusivism also increased the limitation of making harmony and compatibility between human rights and Islamic law. Therefore, it increases restrictions and creates problems, which is against peace and stability.

## **Conclusion**

In short, it seems that republicanism is the only way to produce consensus in the country going forward, although there is a need for some modification and amendment. This is important for a durable peace because the political system must guarantee inclusiveness and justice in power and participation for all ethnic and political groups. This is possible by having the proportional electoral system, or something near this system, to avoid any exclusion and marginalization. Without such an electoral system, it will be hard to represent all Afghan citizens in power and public affairs, and thus, there is no guarantee for

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<sup>10</sup> Abdullah Jafari, "Jaygah-e Mazhab Dar Qanoon-e Asasi [The Place of Religion in the Constitution]," *Andisha-e Ma'asir/Contemporary Thought Journal* 5, no. 11 (2020).

justice and inclusiveness in politics and governance in the future.

Previous research has shown that the Republic can ensure citizens' rights, women's and Shiites' rights within Islam's framework. Given the Taliban discourse, it seems that without a Republic system, it is hard to think about an enduring peace in Afghanistan. The Taliban discourse and political system, and the Emirate, cannot provide a platform for sustainable peace, justice, equality, and national consensus. When it comes to the structure of a political system, the important issue is that ethnic groups and people from provinces want decentralization and participation. The ethnic groups and the residents of provinces are not satisfied with the concentration of power in Kabul and consider it contrary to justice and meaningful participation. Therefore, if we want to achieve lasting peace, this problem must be solved among the Republicans, too. The need to resolve this issue stems from two other issues: First, the presidential election has repeatedly faced a national level crisis. This repeated experience shows that due to the concentration of power in the president's office, this position has largely been ethnicized in the context of ethnic division in the country. Thus, the concentration of power with a consistent crisis has



sharpened polarization within the society and among political elites. Second, we need to create a broader framework within the republican structure for Taliban participation and use the concepts and discourse (for example, Ahl al-hall wal-aqd) to reach an agreement.

My above-mentioned suggestions for any change in the Republic system are to solve the problem of concentration of power without harming anyone around the issue. For example, both sides of the conflict can consider a parliamentary system a president with limited powers equal to the king in the Constitution of 1964 and the prime minister. As explained before, the president is indirectly elected by the National Assembly (*Shura-e Milli*) and the Provincial Assembly from among the qualified persons. In other words, the members of these assemblies gather to elect the president. The prime minister shall be appointed by the Wolesi Jirga (the House of Representative) within a maximum of two months. If the Wolesi Jirga fails to appoint the Prime Minister in two months, the president shall appoint the Prime Minister. The Prime Minister shall be accountable only to the National Assembly (both house/parliament) and he may also be impeached and removed by the Wolesi Jirga. Governors are also elected by the

provincial council and district councils of each province. This solves the concentration of power, reduces the likelihood of conflict between the president and the prime minister, and eliminates the possibility of a stalemate in government formation. I propose this plan based on the experience of the last 20 years and the discussions and concerns within the Constitutional Review Commission, of which I was a member in 2003.

At the same time, to balance Afghan nationalism and create an inclusive national identity, the Dari Persian language must be equated with the Pashto language in terms of validity and formality, and the final paragraph of Article 16 of the Constitution, which is also controversial in its validity, must be amended. The government's official terms can be in both languages and be recognized with equal validity. In Article 4, instead of emphasizing the 'Afghan identity,' which is a place of conflict and has not yet become a public culture, and the explosion of information and the generalization of historical documents questioned its historical credibility, it may instead state that each member of the nation of Afghanistan is a citizen of Afghanistan. In this way, like the United Kingdom's

nationalism, Afghan nationalism becomes more flexible and better able to reconcile.

# **Expansion and Explanation of the Previous Article**

## **Introduction and statement of the problem**

The Possibility of a Peace Agreement in the Framework of Afghan Constitution, I proposed four fundamental claims: 1) The Emirate system of governance, or any system which is not based on a free and inclusive election and democratic values, cannot succeed in creating consensus and agreement nor an inclusive system; 2) The republic system and its values which are based on sovereignty of the people and citizenship rights have the capacity to create consensus and agreement, as well as an inclusive government; 3) The republic system and its values according to the formulation of the existing Constitution are not in contrast with Islam, and with minor amendments to Article 3 and the construction of the Constitutional Court, the religious demands of the Taliban can also be met in the framework of a legal structure based on the Constitution; 4) The existing centralized structure of presidential system, should change into a decentralized parliamentary system, because without it, other conflicts would not be resolved.

In that article, I had also added that the electoral system has to be proportional, and the Constitutional Court should be formed. To balance Afghan nationalism, Dari must be equated with

Pashtu in terms of validity and formality. Therefore, the final paragraph of Article 16 of the Constitution which is also controversial in its validity has to be amended. The official terms of the government should be recognized in both languages and the Nation of Afghanistan should be considered as consisting of citizens of Afghanistan, and each citizen should then be called a “citizen of Afghanistan”.

The mentioned article was shared with a limited number of domestic and international experts who reviewed and analyzed it critically during four online sessions. These experts made some constructive comments, some of which are addressed below.

Professor Barnett Rubin, a well-known American scholar on Afghanistan, made two important points:

First, quoting Mullah Abdul Salam Zaeef, the former Taliban ambassador to Pakistan, Dr. Rubin wrote that the Taliban did not have much trouble with the content of the Constitution, rather they questioned its legitimacy, because according to them, it was passed under the shadow of the military presence of the occupying forces. Accordingly, Mr. Rubin suggested that it would be better to cite the 1964 Constitution of Afghanistan, rather than the existing Constitution which my article was predominantly based on.

Second, Dr. Rubin stated that most Taliban scholars do not have formal education, so how can they be absorbed into the structure of the system? The effective Constitution stipulates that many higher government positions require higher education. This legal obstacle must be resolved in some way.

Some fellows regarded the proposed plan in the article as a system where the Prime Minister and the President will lead the Executive Power together, similar to what Khalilzad had proposed. These fellows were afraid that such a system would not result in the creation of an inclusive system and government. Most importantly, it was suggested that the previous article did not provide adequate reasons why a decentralized parliamentary system, proportional electoral system, and the Constitutional Court should be created, and why the national symbols in the area of languages and defining national identity should be modified.

In addition, as the US proposed in their peace plan, the formation of another institution by the name of “Islamic Council of Jurisprudence” has also been proposed. The present article will to make its stance on whether such an institution is necessary or not.

A transition period was also anticipated in this proposed plan (which I had also anticipated in my previous works, including

my article analysing the response of Professor Kakar's to Dr. Najeb<sup>11</sup>). This transition period has three major consequences: 1) The order caused by the Constitution will be disrupted to some extent temporarily (especially in the process of electing a President); 2) The Taliban coming into power will cause the ethnic balance to break down; 3) However, it would provide the opportunity and enough time to address important national matters, such as the structure of system in the framework of Constitutional Commission. The main reason for proposing this transition period is to provide a plan that makes peace with the Taliban possible. It seems as if this is the price for making peace with the Taliban.

In the following section, the above concerns and points will be addressed to the extent possible:

## **1. Legal Basis**

Dr. Rubin's statement that the Taliban only have a problem with the legitimacy of the current Constitution and not with the content of the current Constitution, is questionable from many

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<sup>11</sup> Mohammad Amin Ahmadi, "Dr. Najibullah's National Reconciliation Plan and Lessons on Peace: In Response of Professor Kakar's to Dr. Najeb", *The Endeavors by Afghans for Peace*, edited by Zarin Inzur & Khalilullah Afzali, Kabul, Kakar History Foundation, 1400 Hijri Shamsi (the article was written in the mid-year 1399 Hijri Shamsi)

aspects. First, whatever Mr. Zaeef has said is most probably his own opinion, which can be seen in the Taliban's stance in the Doha negotiations as well as their own Constitution drafted under their sovereignty in the 1990s and its amendment in 2004. Their objection lies with the republic system and it is the content that they have problem with. Second, I am not contrasting the Constitution against an Islamic Emirate constitution in my article; rather, it is a comparison between republic theory and the Emirate in practice to measure which is more capable of creating aggregation and integrity. And third, in contrast to the Taliban's belief about foreign involvement in passing the current Afghan Constitution, it was passed under a free and democratic situation, at the time that Afghanistan was a sovereignty state according to Security Council's resolutions. The presence of the international community was an assistance to creating an open and free space in the country for democratic decision making; therefore, the current Constitution is more legitimate than any other Constitution in the history of Afghanistan and it could bring consensus to some extent.

Prof. Rubin's reference to the 1964 Constitution was very constructive. First, the history of a legal system and initial legal documents form important components of a legal system. In fact, the 1964 Constitution is the foundation of the existing



Constitution and was accredited in Bonn Conference. In addition, it was acknowledged that the 1973 White Coup and the coups after that never affected the legitimacy of the 1964 Constitution. The most important point about the 1964 Constitution is that in terms of civil rights and structure, it is somewhat better than the current Constitution; therefore, it can be a good foundation for defending civil rights and amending the current structure. The important points about the 1964 Constitution will be reflected on briefly to shed light on the reason for the above claim.

The position of Islam and Islamic Sharia is well defined in the framework of a legal order in the 1964 Constitution which ceases any opportunity for abuse by power-hungry groups and radical religious movements. The role of Islam in the 1964 Constitution can be summarized as: Islam is the religion of Afghanistan (Article 2), and no law can be passed which is inconsistent with the principles of Islam or values of this Constitution (Article 64). However, Article 2 immediately emphasizes that non-Muslim citizens are free to perform their religious rituals within the provisions of the law. Except for the King, this Constitution does not limit enjoying the rights to citizenship to any particular religion, Sect or denomination; in contrast, it opposes any kind of discrimination (Article 25). For

statutory laws to be standard, they should not violate the definite principle of Islamic Shariah. Because the Islamic foundations that should have a role in legislation are nothing but the indisputable Islamic law principles, in addition, there is also mentioned that the law should not be inconsistent with the values of the constitution, which means that the values of the constitution and the principles of Islam have equal legal importance in legislation.” could be criteria for rejection of human statute. Additionally, attachment to the values of the Constitution is also mentioned as a prerequisite for any law to be passed. Therefore, it can be concluded that the values of the Constitution are considered to be of equal legal importance as Islamic groundings. Meanwhile, the current Constitution favors the role of Islamic jurisprudence’s sentences in the area of legislation, and also Islamic instructions are considered superior to the provisions of the Constitution. This relative superiority is obvious from its structure.

With regards to the role of the Hanafi Sect, of which most citizens of Afghanistan are followers, amendments to the previous Constitutions of Afghanistan can be summarized in three following points: First, the government performs religious rituals in the country based on this sect of Islam (Article 2), for example, the Azan is broadcast from Radio Afghanistan

according to this sect. Second, the King has to be a follower of Hanafi sect, (Article 8). Third, where about the case not exist any law, the courts handle the cases based on general groundings of the Hanafi sect in a way that justice is best served and the limits of this law are not violated (Article 102). Since the existing Constitution does not limit the right to citizenship and even the right to be elected as a President to any particular sect, thus it has decreed/adjudicated that or penned the way for the personal status of Shiites based on Shiite teachings in the legislation. Therefore, the problem of discrimination based on religious sects and denominations, which was not addressed completely in the 1964 Constitution, is resolved in the current Constitution.

The 1964 Constitution has an obvious superiority over the current Constitution in relation to settlement of disputes based on the Hanafi sect; because instead of “following the rules of Hanafi jurisprudence” as stated in the current constitution, the 1964 Constitution cleverly uses the phrase “following the general principles of Hanafi jurisprudence” (Article 130). This means that the general principles and rules of Hanafi jurisprudence, which are based on rational assessments and real purposes of Shariah, are the basis of judgment, rather than the juridical thoughts of Hanafi jurisconsults which have been

formed throughout history. Thereby, the way for observance of moral and legal requirements of our era has been paved. In fact, this provision of the 1964 Constitution calls on the judges to follow the critical method of Imam Abu Hanifa. In addition, it restricts and binds the judges to observe values of the Constitution as well.

In relation to civil rights, the prominent points in the 1964 Constitution are: denial of discrimination (Article 25); the principle of liberty under the title of natural liberty (Article 26); the freedom of thoughts and speech (Article 31); the freedom of peaceful protest in the form of gatherings and demonstrations (Article 32); the freedom of forming political parties and assemblies (Article 32); the right to receive compensation from administration (Article 33); the right to free education (Article 34); the right to work (Article 37); and, the right to access government posts based on competence (Article 37). National sovereignty in the sense of sovereignty of the nation consisting of all those who own citizenship of Afghanistan was, for the first time, recognized in this Constitution. According to this Constitution, people exercise their sovereignty through the Parliament, and all citizens have the right to elect or be elected (Articles 41 and 46). In this sense, a multi-party parliamentary system, which is a constitutional monarchy, is anticipated.

Therefore, in contrast to the structure of the current Constitution which opens the chapter on Presidency after the rights and duties of Afghan subjects (Atbah), the 1964 Constitution opens the chapter on the National Assembly after the chapter on rights and duties of the people (where the term “people” seems more progressive than “Afghan subjects”).

In Article 20 of this (1964) Constitution, any form of discrimination among the citizens is strictly prohibited. This means that no discrimination on the basis of gender, religion, or sect shall be acceptable. In light of this Constitution, no one can cite the Shariah directly, because in this Constitution the statutory law is considered superior to the Shariah, unless it is a matter of definite principle of Islamic Shariah which is the right thing to do as well, because according to Quran, we are required to obey the command of Allah (verses 44-47 of Surah Al-Ma'idah, verse 14 of Surah Al-Hashr, and other similar cases). However, epistemologically, no one can claim they know that the existing rules and provisions in the juridical books (the book of Islamic Jurisprudence) are directly orders or the law of Allah and Prophet Muhammad for all human throughout time and space; and therefore, must be applied in all places and at all times; and all Muslims should obey them even if these laws are in contrast with important of human universal values. This is

because these laws are mostly obtained on the basis of ijtiḥad, which is interpretation of these laws that is based on human conjectures and reasons (which are based on documents which are not sure and certain).

The epistemological validity of that conjectural reasoning in proving God's judgment become more under question if it is not compatible with human values such as justice, equality, and human dignity because the right religion cannot be in conflict with these values. These values are also the product of human knowledge and experiences, and one cannot say that human rational and moral understanding is completely invalid. One may only do not consider human reasons and wisdom that are directly against the words of God. However, in the case of ijtiḥad, the word of God for human beings is proved through human intellect, and human intellect cannot really claim that these ijtiḥad reasons are words of the God. Therefore, in principle, as provided in this Constitution, only on the occasion that a statutory law stands against the definite provisions of Islamic Shariah, can one claim that a statutory law is against words of the God.

In the 1964 Constitution also provides the best formulation of individual liberty, privacy, immunity of property, political

liberty, and freedom of thoughts and speech. By defining liberty as a natural human right, it defines individual liberty very well, draws the boundaries for it, and clarifies and provides ways to protect it from government or society's aggression in a logical order. So in this constitution according to the principle of natural liberty, the criminalization is forbidden, which only can be defined by law. Thus, nature of crime and its definition is limited by the principle of legality of the crime. Similarly, prosecution and arrest are bound to provisions of the law; therefore, acquittal is the natural status. In addition, it prohibits torture even if it is intended to extract the truth, and it does not consider being indebted a reason for deprivation of liberty. Moreover, it defends the right to travel and reside at its highest level possible. Enforcing exile is also prohibited. All of the above are the results of an individual's enjoying natural freedom as stated in Article 1 (Article 26). However, the current Constitution has not observed this logical order and arrangement (consequences), because it has been divided into separate Articles (Articles 24-32).

The present Constitution has nothing further to present in the area of freedom of expression, as compared to the 1964 Constitution. In terms of political freedoms, the 1964 Constitution is significantly better than the current Constitution.

Here are some examples: the 1964 Constitution stipulates that peaceful demonstrations and gatherings are allowed without prior permission from the government (Article 32); this stipulation does not exist in the current Constitution and it only states that according to the provision of the law, demonstrations and gatherings are allowed (Article 36). In relation to forming a political party, the 1964 Constitution does not require a political party to be strictly under the provisions of Islam and it only states that a party shall not oppose the values of the Constitution (Article 32), in this way, secular parties could have been formed; but the current Constitution stipulates that no party shall be in opposition with provisions of Islam (Article 35), which has taken away the opportunity for secular and non-religious political groups to be formed. Additionally, the dissolution of a political party in the 1964 Constitution is considered only in the jurisdiction of the Supreme Court (*ibid.*) which is equal to a Constitutional Court. In the current Constitution, the common courts can dissolve political parties (*ibid.*). In fact, the 1964 Constitution is in favour of a multi-party parliamentary system and it supports such a system.

To this end, just by removing the monarchy system from the 1964 Constitution, it can also be a good legal basis for defending civil rights, an election-based government, and a multi-party



parliamentary system. In fact, the most important flaw of this Constitution in terms of democracy is the powers that it has given to the King in various fields (Article 9), which has put the monarchy system beyond a constitutional monarchy.

Meanwhile, three other problematic provisions were also coined in this (1964) Constitution for the first time which are: 1) a centralized administrative system (Article 108); 2) changing the name of “Farsi-Dari” language to “Dari” (Article 3) which was in contrast with the history, culture, and anthropological realities of Afghanistan and has fuelled identity problems as I will explain later; 3) referring to all citizens of Afghanistan as “Afghan” (Article 1), which was contrary to historical, cultural and anthropological realities of the country and fuelled identity clashes. As a result, addressing these three problems is an urgent necessity.

## **2. The Parliamentary System**

The proposed suggestion in my previous article is mainly about a parliamentary system, not a blended system; therefore, it is different than the second option of USA’s proposed peace plan. America’s peace plan is nothing further than an “executive

premier”; therefore, it would not help horizontal decentralization and the formation of checks and balances (and the reciprocal control of powers), and in the end it will not prevent repeating the same mistakes of the past 20 years. The major reasons for choosing a “parliamentary system” over a “presidency” are explained below:

First, the ministries and public directorates (like the National Statistics and Information Authority) exist in the administrative system of Afghanistan, and were based on a parliamentary system, and it is anticipated that the Prime Minister would be the ruler of the government. Therefore, according to the 1964 Constitution no government entity was outside the control of the parliament, because all of them were under supervision of the Prime Minister who then was accountable to the Parliament. But, since the President is the ruler of the government in a presidential system, the independent directorates are supposed to be integrated with the ministries, but that did not happen and remained under direct supervision of the President. As a result, those government entities were not accountable to the Parliament and resulted in centralization of power, and thus the principle of power separation was violated.

Second, since the direct election of a very powerful president has been leading to an absolute win-or-lose game, it usually

ends up in chaos because political group who lost the election will lose all the power and opportunities, and this creates conflict. It usually ends up in chaos; The Second, Third and Fourth Presidential Elections are examples of this claim<sup>12</sup>. A parliamentary system does not face such chaos.

Third, since all the political and social factions in the Parliament have an effective role in electing and monitoring the actions of the Prime Minister, the groundwork for an inclusive government, with accountability and transparency, can be provided. This way, the government will be less ethno-centered and more democratic. The parliamentary monitoring over government actions is comprehensive and steady; while such monitoring in the presidential system is broken and intermittent, so there will be no real accountability nor transparency.

Fourth, the parliamentary system reduces the possibility of individual tyranny, and it strengthens political parties and democratic institutions in line with the Constitution. In addition, it reduces the possibility for the emergence of populist policies which weaken institutions and make the power relations more personal and less institutional. A presidency system does

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<sup>12</sup> See reports by Afghan Analyst Network prepared by Aliyavar Adeli: Afghanistan's 2019 Elections (31): a review of the disputed presidential election and its aftermath, Aliyavar Adili, Afghanistan Analysts network, [www.afghanistan-analysts.org](http://www.afghanistan-analysts.org)

entirely the opposite and paves the way for tyranny and populist policies. Researches have shown that in post-Soviet states, parliamentary systems have been more successful in building stable democracies than presidential systems.<sup>13</sup>

Fifth, in a parliamentary system, the President is the ruler of the State, guardian and defender of the Constitution and the principle of separation of power. On the other hand, the Prime Minister is the head of executive power. This way, power is not centralized and the Constitution maintains a strong guardian. To this end, a parliamentary system is more capable of enforcing the Constitution and monitoring vertical or horizontal decentralization. Therefore, this system is a better option for representing the ethnic diversity of Afghanistan. Nobody feels like a loser in a parliamentary system. When a proportional or multi-dimensional election system is in place and provincial electoral sites are defined, all social and political groups will be able to win seats in the Parliament to the extent of their popular base.

The reason a parliamentary system is chosen over a blended system, like the one in France, is that in a blended system the executive power has two leaders. This creates a conflict between

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<sup>13</sup> M. Steven Fish, “Stronger Legislature, Stronger Democracies”, Mohammad Hussain Noori, **Seraj**, Issue 28, pp. 103-124.

two elected entities: The Parliament and the Prime Minister on one side, and the President on the other. The concern over Parliament's disagreement on forming the government is addressed in my proposal: if the Parliament fails to elect the Prime Minister in its assigned date, the President would appoint the Prime Minister and the Parliament would only have the authority to dismiss and remove the Prime Minister. The main emphasis in this proposal is on the parliamentary system. Therefore, I reiterate and correct the point I had made in my previous article: the authorities of the President would be equal to a King as in the 1964 Constitution; however, it should be noticed that the authorities of a King in the 1964 Constitution can practically appoint the President as head of the executive power and at the same time, remove the President from leadership of the government. That is why Paragraphs 11, 12 and 14 in Article 9 of the 1964 Constitution regarding the power to define the authorities of a President should be omitted, and Paragraph 13 of Article 9 must be modified in accordance with Paragraph 12 in Article 64 of the current Constitution so that it becomes aligned and harmonized with this proposal.

### **3. A Unit and Decentralized System**

Although this article does not suggest federalism, it does consider vertical decentralization – between national and local levels – a must. The main point in favor of a decentralized system is that the citizens have control over their local affairs, and the government represent their interests while being accountable to the people. In addition to this, if the people are of a particular social identity, this system is better capable of representing various groups in the government and providing opportunities for their effective participation in the system. Furthermore, this system welcomes local initiatives and efforts for development. It should also be added that these very reasons require that the Hazara populated areas in the central parts of Afghanistan be given local governments immediately within the framework of some provinces. This is a good opportunity to draw the attention of this article’s readers to the interpretation of The Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) on the explanation of the “social status” in Article 136 of the current Constitution:

“Article 1. The Afghanistan Constitution follows two main goals in forming a local government: first, ensuring social justice and balanced development for all citizens, ethnicities and tribes of Afghanistan which according to

Article 6 of the Constitution, it is one of the core responsibilities of the government; second, ensuring direct participation of the people in deciding about their fate, as well as building enough capacity within the framework of a unit government to address cultural, political, social and economic demands of the society. For these two demands to come into reality, the Constitution in its chapter on administration, has ordered implementation of the three below methods:

- A. Division of provinces should be based on their population, economic, geographical cultural and social situation;
- B. The provincial councils, districts, and municipals should be elected by the people;
- C. The necessary authorities should be transferred to local governance through passing laws.

To this end, the term “social status” which is considered one of the criteria in Article 136 of the Constitution for formation of a province, will follow the two aforementioned main goals in order to accomplish social justice and balanced development and also to build enough capacity to meet identity and political demands.

Article 2. According to above explanation in Article 1 of this theory, social status means the historical and cultural relations of a social mass, should be considered beside their population, economic and geographic situation in appointing this mass as local governance unit. To this way, the people who have a special history and identity can have an effective participation in determining their fate within the framework of local governance unit, and also reach their social, political, cultural and economic rights.”<sup>14</sup>

In the existing centralized structure, an authoritative President controls all the provinces based on his own will and the people have no effective role in local governance. The current local governance represents the President instead of representing the people. After the former system of appointing the provincial governors through the Ministry of Interior was cancelled and replaced with the Independent Directorate of Local Governance, the Parliamentary monitoring authority over local governance was given exclusively to the President which is in contrast with the existing Constitution. This situation has caused huge

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<sup>14</sup> Interpretive theory of Independent Commission for Overseeing the Implementation of the Constitution on explanation of social status as in Article 106 of the Constitution; Interpretations, Theories and Legal Advices of ICOIC between the years 1389-1393 Hijri Shamsi, pp. 155-156.



dissatisfaction, especially in the northern provinces. The people in these provinces witness signs of ethnic policies forced on them by the central government through the leadership of their provinces and local governments. That is why the urge for a decentralized system has increased.

It is important to notice that as important as a decentralized government is for strengthening democratic identity and values, it is also important that the exclusivity of power, inequality, and discrimination against minorities should be prevented at the local level just as it is done on a national level. The local government has to be as committed and dedicated to civil rights, inclusive values and democratic identity as the national government is. Nevertheless, in the current situation, equal civil rights are not practiced for non-native ethnic groups in many provinces and often become more marginalized.

#### **4. Ethnic Identity vs. Democratic Identity**

Afghan nationalism, is based on an ethnic identity despite its thin non-ethnic mask, which generalize this ethnic identity to all Afghanistan's citizens as national identity. , Historically, the emergence of the Durrani Empire followed by the foundation of a new Afghanistan in the middle of the Persian Empire and the Indian subcontinent by Pashtun rulers and the gradual

settlement of Pashtuns from the 15th century in Kandahar, Helmand Valley, Uruzgan and northern Zabul and western Ghazni and Kabul, and then the settlement of nomadic tribes (Kuchies) and sometimes eastern tribes in the northern parts of the country, has played a role in creating the impression that the country belongs to Afghans/Pashtuns. However, the dominant culture was Dari Persian, with its strong historical background which culturally and scientifically connected the people of Afghanistan. The European nationalism that divided Christian Europe was based on ethnicity (for example, Germans and Franks), a common language, history, territory and culture. It was based on the assumption that a nation needed distinctive features to necessitate its existence as a nation-state. New and modern signs of this way of thinking in Afghanistan can be seen in the writing works of Mahmoud Tarzi. It was he who cautiously proposed that the "Afghan language" should become the language of the nation, because a nation cannot exist without a particular language, that is, the nation must have a distinctive face<sup>15</sup>. This statement emerged as a principle in Afghan nationalism. I heard the same principle and rule in the words of

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<sup>15</sup> Dr. Abdolfaghour Rawan Farhadi (collector) (Articles by Mahmoud Tarzi, pp. 227-230. Of course, Tarzi emphasizes that you also like your official and political Persian language very well and study it well.) Ibid., P. 630)

Mohammad Siddiq Patman, one of the Pashtun nationalists, during the elaboration and approval of the new constitution. This way of thinking, along with the historical background of power in modern Afghanistan and the will to establish an ethnic hegemony in general, led to the recognition of Afghan as the identity of all citizens of Afghanistan in the constitutional monarchy, which partly represented a parliamentary democracy. Additionally, the name of the Persian language, which was rooted in history, poetry and the written and unwritten culture of the people, in order to be distinguished from the official language in Iran, was called Dari, which is the adjective of the language; and the "Afghani language<sup>16</sup>" as was said by Mahmoud Tarzi, became Pashto in the new constitution (1964). The Pashto language was announced as the official language and became the national language (Article 35) with the aim to gradually replace the Persian language.

Now we have to answer the question why this official policy about identity and language of Afghan nationalism has become a problem? To give a clear answer to this question, let us consider a few points as an introduction:

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<sup>16</sup> Afghani language is a name that was used in verbal and written Persian. It is still more or less used in the general public. But the Pashtuns themselves have used the name of Pashto in their conversations for their own language.

First: Historically, before the new constitution, in official documents, in written works, in official oral culture, and in the general public, the name of the language which is now officially called "Dari" was Persian/ Farsi. For this reason, Pashtun compatriots called the Persian speakers of Afghanistan "Parsi Ban" and still do. After the approval of the constitution, the same title remained in school textbooks for many years, and it was taught as the subject of Persian reading. It is still the name of the Persian/ Farsi language in the general public and in the informal speech. Maulana Jalaluddin Balkhi, whose book Masnawi Maanawi is widely accepted in Afghanistan along with the Holy Quran, is well known in Persian, as are the works of Jami, Hakim Nasser Khesraw Balkhi, and Sanai which are classical and historical text of Afghanistan.

Second: The word Afghan has the same fate. In all of the Katib's works, some of which are official documents approved by the government of his time, because it is the official history of the crown, "Afghan" has been used to name the Pashtuns and "Afghani" has been used instead of the Pashto language.

Amanullah Khan<sup>17</sup> and Mahmoud Tarzi<sup>18</sup> have also used these two words in the same sense. In common parlance, these two words were common and still remain the same generality. In fact, the new identity that has been constructed politically has not yet penetrated deep into popular culture, and many Afghanistan citizens still do not call themselves Afghans.

Third: Identity for every buddy stems primarily from the basic human need to be respected and to be recognized by others. This basic need (which expresses human dignity and autonomy) is the basis of many fundamental rights, including the origin of the need for democracy. But sometimes certain social groups gain a common collective understanding of themselves based mainly on their cultural characteristics, with a desire to be known and respected under this title. If the dominant common element in this collective understanding is ethnicity, ethnic identity is formed, and if this ethnic identity is the basis for the formation of the nation-state, the national identity of that country takes on an ethnic dimension. This type of national identity in multi-

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<sup>17</sup> . BORHANODIN KOSHKAKI, *The Events of Great Council (LOYA GDRGA)*, ED. D. Abdullah Shafaei, p.325. He said whenever Afghani language become public in all Afghanistan I then accept the title of TOLWAK (the owner of public affairs).

<sup>18</sup> Ibid. In several articles in the "Collection of Articles" we see the use of Persian and Afghani. Tarzi has written a particular article entitled Persian on the importance of this language and considers it as the only official language of the government of Afghanistan. Ibid., Pp. 221 - 226

ethnic countries does not succeed in creating a common national identity, but causes a crisis, because it requires the denial of the individual and collective identity of those people who historically, culturally, ethnically, and linguistically do not feel themselves as belonging to an artificial identity which is based on the ethnicity of a particular group. Because in this structure, this group of people are neither known as they are on the margins of power, nor are their collective identities known; and or at least their collective identity is not respected equally. Therefore, they are usually collectively denied and ignored, and as a result, they are marginalized.

To solve this problem in multi-ethnic countries such as Switzerland, the federal system (federation) has been established and identity has been democratized. This type of political system also results in the establishment of democratic institutions, and equal citizenship rights and respect for all sub-identities. Switzerland is an example that has used its federation and democratic identity to unite its highly fragmented ethnic identity and create a country that is one of the most stable and wealthy countries in the world. National Identity in the United States has developed after the Civil War and the civil rights movement by transformation from the elements of race and gender to a democratic identity.

[The nation of] the United Kingdom, also known as England (Englestan in Persian), also enjoys a democratic identity. Therefore, the county is not known as England, even though the English are the majority. The name of this country is Great Britain which refers to the island made up of England, Wales and Scotland, and the country is also called the United Kingdom made up of all these parts plus Northern Ireland. From all this, it became clear that the identity is flexible, reformable and repairable.

Forth: The identity and language on the official narrative in Afghanistan has become the origin of conflict. The current conflicts about the national Identity Card, the ratification of some proposals of law, and the long struggle about the signboard of Herat University, and many other examples are clear sign of this conflict, which we need to resolve in order to attain lasting peace.

Conclusion: Considering the above-mentioned points, it is recommended to amend Article 4 of the current Constitution and paragraph 5 of Article 16 of the current Constitution, as described in the first article. The amendment is necessary, otherwise, we have denied the cultural and historical identity of a large part of the people of the country (including in terms of

language), and have imposed an artificial ethnic identity construct as a national identity on a large part of the people against their perceptions and emotions. In this way, we hurt the identity and dignity of these people (because the dignity of an individual is that we recognize and respect him as he is and as he understands himself). Respect for identity and dignity of individuals is the basis of human rights and justice. So, we need to democratize our identities like Switzerland, the United States, and the United Kingdom. It can be said that in this respect, Nader Khan's constitution (approved in 1309/1930) is better than the constitutions that came later. Article 9 of this (1930) Constitution states: "all persons residing in the country of Afghanistan, despite their religious or sectarian differences, are considered to be subject of Afghanistan."<sup>19</sup> I would like to mention here that Johan Galtung, a European peace theorist and expert, considers Switzerland as the European example of Afghanistan with respect to the multi-part identity of Afghanistan. He believes that policy transferring from

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<sup>19</sup> It should be noted that wherever this article refers to the constitutions of Afghanistan, based on the full text of the constitutions of Afghanistan, it is edited and researched by Sarwar Danesh whose complete bibliographic specifications are given in the references section.



Switzerland as a model will solve the problems of Afghanistan<sup>20</sup>.

## **5. Electoral system**

The type of electoral system plays a key role in ensuring fair and well-balanced participation, ensuring the participation of the groups at risk of exclusion and discrimination, and establishing stability and sustainable peace. The fundamental elements of the electoral system are the electoral formula, the electoral district, and the electoral threshold for understanding the importance of an electoral system in ensuring fair and balanced participation. It is instructive to compare the fate of Egypt and Tunisia in the Arab Spring. Egypt, with its electoral formula of majority and single-seat constituency, gave the majority of parliamentary seats to the Muslim Brotherhood with a low turnout of less than 30% of all eligible voters. Also, due to the existence of the presidential system, the president was elected from this group with a weak majority. As a result, the authority to draft and approve the constitution was given to this group by a minority vote of all qualified individuals. The coming to power of this group caused fear and panic among the middle class, secularists,

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<sup>20</sup> Peace theorist Johann Galtung, for example, has repeatedly referred to this in his lectures. See YouTube, Johan Galtung, the Cycle of Violent Conflict

women and minority groups, and led to widespread protests, resulting in a military coup. But in Tunisia, the parliamentary system, along with the proportional representation formula and the national constituency, prevented the Ennahda party from gaining a majority in parliament with 40 percent of the vote. On the other hand, if it followed the majority formula with a single-seat constituency, the Ennahda party would have won an absolute majority of seats (approximately 9 out of 10 seats), while as a result the proportional representation system could only win four out of ten seats. Therefore, the party was forced to form a coalition government and distribute the power, and as a result, there was satisfaction and stability, and democracy succeeded in Tunisia<sup>21</sup>. The proportional representation system with constituencies at the provincial level in Afghanistan is essential due to the ethnic divide, and can ensure inclusive participation. Otherwise - in non-proportional system - justice will not be provided for all. The votes of ethnic groups in an election are not collected in their own basket or political party and do not reach the required quorum, rather they are broken down into micro-baskets and never become electoral power, which in turn cannot create and organize the polity in a

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<sup>21</sup> Fred Stephen "Transition in Tunisia and Bilateral Tolerance" Ali Adeli, Sina Book, p. 38

democratic way. At the same time, the national constituency, or considering the country as one election constituency, is replicating the experience of presidential election crises and fuelling fraud.

## **6. Constitutional Court**

I emphasize and believe that instead of the Supreme Court having the power to interpret the Constitution and hear constitutional claims, in order to establish strong judicial protection of the Constitution and constitutional rights, the Independent Commission for Overseeing the Implementation of Constitution needs to be promoted to the Constitutional Court. I have explained my reasons for this claim in the article on “constitutionalizing in Afghanistan constitutional law system<sup>22</sup>. However, I will only mention two of those reasons here briefly: First, the legal system in Afghanistan is Roman-Germanic, not common law; therefore, unlike the judges in the countries with common law, the judges in the Supreme Court of Afghanistan do not have the power of *ijtihad* in the area of principles and foundations of the law, especially the Constitution; so, our judges cannot develop the fundamental values of the

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<sup>22</sup> Mohammad Amin Ahmadi, "Fundamentalism in the Constitutional Rights of Afghanistan", *Ketab-e-Sina*, pp. 159-174.

Constitution based on their interpretations. For this reason, the Afghanistan Supreme Court's interpretations of the constitution have limited the principles of the Constitution. An interesting example is the case of Spanta, which is beautifully critiqued in Max Planck's book on the Constitution Law<sup>23</sup>. I have also criticized the warrant of the court on the law of the IOCIC in the article "Constitutional Interpretation Reference"<sup>24</sup>. Second, as I had explained in my article on the Constitution, it is necessary to form a "Special Court" with a series of jurisdictions similar to European courts to work firmly and seriously on constitutionalizing so that the Constitution finds the necessary judicial and executive guarantees. This way, the organization for overseeing the implementation of the Constitution would become an effective and powerful organization.

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<sup>23</sup> Guidelines of the Max Planck Institute for the Fundamental Rights of Afghanistan, Volume I, pp. 184-193.

<sup>24</sup> Mohammad Amin Ahmadi, "Constitutional Interpretation Reference", the Journal of Constitution, first issue, pp. 128-142.

## **7. Making Peace with the Taliban Possible**

It is crystal clear that the Taliban would not accept a durable and just peace so easily. On the other hand, the government of Afghanistan and its international allies do not have many options. To defeat the Taliban in the battlefield is a very difficult task to accomplish. This situation has raised the question of what proposals can provide the Taliban with a proper rationale to maintain peace within its ideological framework, while maintaining and strengthening the democratic system and its core values.

I believe we need to take two important steps in this regard: First, in response to the Taliban's demand for the establishment of an Islamic system, the perspectives of Shariah should clarify and enlighten what is required to be observed in governance based on the Quran and Sunnah. This question was answered in detail in my previous article, and I have also explained its legal and executive mechanisms. Here, I would only reflect on the "High Council for Islamic Jurisprudence" which has been proposed in America's peace plan. In fact, the purpose of establishing this council, which was originally envisaged in the Rand Plan<sup>25</sup>, is to provide a mechanism for Islamizing the

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<sup>25</sup> Laurel E. Miller, Jonathan S. Blake, *Envisioning a Comprehensive peace Agreement for Afghanistan*, Rand Corporation, p. 54 – 55.

system and to create room for religious scholars (especially Taliban religious scholars) in an important institution. Whatever advisory role is anticipated for this council, the extent to which this council will provide advice is definitely beyond its religious obligation. As I had explained in my first article, religious obligation is only within the scope of overseeing the non-enactment of the laws that are contrary to God's orders, and also overseeing the implementation of the laws that make God's orders enforceable. Therefore, I believe that the jurisdiction of this council has to be provided as below. The High Council for Islamic Jurisprudence with the following jurisdiction will be formed:

- A. Studying the laws in terms of their alignment with Islamic provisions, and also providing the government and the National Assembly with specific proposals for amendment or modification when necessary;
- B. Monitoring the functions of the government only in terms of complying with laws and regulations that ensure implementation of God's orders within the government, and also providing the relevant organizations with the necessary consultation for complying with these laws;

- C. This council can allege against any law, provisions, or government action that it deems to be contrary to Islamic provisions at the Supreme Court during the transition period, and at the Constitutional Court once the Constitution is modified.

Second, the peace plan should inevitably lead to a system of governance during the transition period that is agreeable to both sides. The vital importance of the transition period is in two points: First, it provides the ground for the Taliban to participate in a new system based on an agreement. The legal barrier to their participation due to lack of formal education (the point that Prof. Rubin had made) can be easily solved by just adding, to the peace agreement, the requirement that “for earning a government position one needs to have higher education or its equivalent”. This agreement does not make either parties feel overpowered, rather it is a win-win-game. The transition period and the transition system should instill in the Taliban the feeling that the system has changed at their behest, rather than them having surrendered to the military as a result of their defeat and collapse. Second, the transition period provides an opportunity for comprehensive conflict resolution, reforming the structures, and strengthening the institutions including the electoral laws,

to provide a more comprehensive Constitution that meets the needs of Afghanistan as described. If the Taliban did not agree to make peace without such a period, nor did they accept an early election, or the international community did not deem an early election practical or refused to fund it; then agreeing to such a period as stated in the US peace plan, albeit with amendments I have suggested (see appendix) and the plan by Wahdat-e-Islami Political Party, is a rational and legitimate price that should be paid for peace. Except for the first presidential election, the constitutional order has not been observed in any other elections, especially in the last two. In addition, the moral importance and legitimacy of a peace in which the agreement and consent of all ethnic, religious, political and civil society stakeholders is achieved is far greater than the symbolic legitimacy of a flawed election or non-democratic and repetitive traditional Loya Jirga.



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## **About the Author**

Dr Mohammad Amin Ahmadi is a Research Fellow at AISS, Member of Afghan Peace Negotiating Team and Member of Legal Board, Ministry of Higher Education. He has a PhD. in Islamic Philosophy from Tehran University, and he completed 15 years of studies in Jurisprudence, Principles of Jurisprudence, Quranic Exegesis, Islamic Philosophy and Mysticism at Qom Seminary. Dr Ahmadi published many books and articles in the field of Philosophy, Islam, Peace, Human Rights, Law and Politics such as:

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