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RETHINKING AFGHANISTAN’S LONGEST-LIVED  
CONSTITUTION: THE 1931 CONSTITUTION THROUGH THE  
LENS OF CONSTITUTIONAL ENDURANCE AND  
PERFORMANCE LITERATURE

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INTRODUCTION .....	285
I. AFGHANISTAN’S HISTORY OF SHORT-LIVED CONSTITUTIONS (1923–1990).....	287
II. RETHINKING THE PERFORMANCE OF THE 1931 CONSTITUTION OF AFGHANISTAN .....	292
A. <i>Assessing the Longevity of the 1931 Constitution: The         Role of Constitutional Deferral</i> .....	294
B. <i>Assessing the Performance of the 1931 Constitution</i> .....	300
CONCLUSION .....	306

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*The 1931 Constitution of Afghanistan is derided in the existing literature as a “step backwards,” a “do nothing constitution,” a document containing “numerous unclear and contradictory provisions,” and a “hodgepodge of unworkable elements.” This Article attempts to re-evaluate the 1931 Constitution through the lens of constitutional performance and constitutional endurance literature, arguing that the 1931 Constitution was far more successful than its critics realize. Specifically, this Article tests the 1931 Constitution against some “midrange” benchmarks of constitutional performance that Tom Ginsburg and Aziz Huq used to test the success of the 2004 Constitution of Afghanistan. This Article finds that the 1931 Constitution survived for more than three decades—surpassing the average lifespan of other written constitutions in the world by more than a decade. Moreover, under this Constitution, Afghanistan experienced some elements of democratic governance, as a wide range of political movements began to take hold. The 1931 Constitution created a method of governance that successfully channeled through formal institutions, conflict among Afghanistan’s powerful and well-armed stakeholders. Tested against these benchmarks of constitutional performance, the 1931 Constitution was considerably successful. This Article further evaluates the longevity of the 1931 Constitution through the lens of the constitutional deferral theory. This Article highlights that constitutional deferral played a key role in ensuring that the 1931 Constitution promoted ongoing debate regarding controversial constitutional issues—leading to its survival. The longevity of the 1931 Constitution thus provides evidence to support Rosalind Dixon and Tom Ginsburg’s claim that an “optimal” level of significant constitutional deferrals might contribute to constitutional stability and help constitutions survive longer.*

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<sup>1</sup> See Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT’L J. CONST. L. 636, 639 (2012) (arguing that the dangers of deferral “can affect the expected endurance, as well as *optimality*, of constitutions.”) (emphasis added).

## INTRODUCTION

The 1931 Constitution of Afghanistan (“the 1931 Constitution”) is criticized in the existing literature as a document containing “numerous unclear or contradictory formulations,”<sup>2</sup> a “do nothing constitution,”<sup>3</sup> a “step backwards” in the Afghan constitutional history,<sup>4</sup> and an embodiment of “a hodgepodge of unworkable elements.”<sup>5</sup> Drawing on the recent scholarship regarding constitutional performance and constitutional longevity, this Article attempts to re-evaluate the performance of the 1931 Constitution. It highlights that scholars of Afghan constitutional history have overlooked the success of the 1931 Constitution. This Article finds that, tested against some metrics of constitutional performance that scholars have proposed (such as facilitating democracy and channeling political conflicts through formal institutions), the 1931 Constitution scores considerably well as compared to other Afghan constitutions. The success of the 1931 Constitution is directly related to the fact that its drafters deferred answering many controversial constitutional questions that most of Afghanistan’s short-lived (and failed) constitutions have answered in ways that powerful communities ultimately found unacceptable.

The 1931 Constitution of Afghanistan is the longest-lived Afghan constitution to date and one of the longest-lived constitutions around the world. It survived for 33 years (1931–1964)—thereby surpassing the average lifespan of written constitutions in the world by more than a decade.<sup>6</sup> The longevity of the 1931 Constitution can be one main measure of its success. Furthermore, the 1931 Constitution came into being after the collapse of a short-lived constitution (“the 1923 Constitution”), which had opponents that repeatedly declined to accept the order that it created and staged a series of rebellions that led to the collapse of the 1923

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<sup>2</sup> ASTA OLESEN, *ISLAM AND POLITICS IN AFGHANISTAN* 176 (1995).

<sup>3</sup> See THOMAS BARFIELD, *AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY* (2010) (describing Afghanistan’s Constitution of 1931).

<sup>4</sup> Fausto Biloslavo, *The Afghan Constitution Between Hope and Fear*, 1 CEMISS Q. 61, 62 (2004).

<sup>5</sup> LOUIS DUPREE, *AFGHANISTAN* 464 (1973).

<sup>6</sup> See Mohammad Rubaiyat Rahman, *Constitution of Afghanistan: The Great Expectations*, S. ASIA CANTEEN (Mar. 8, 2014), <http://southasiacanteen.wordpress.com/2014/03/08/constitution-of-afghanistan-the-great-expectations/>; see also Tom Ginsburg et al., *The Lifespan of Written Constitutions*, U. CHI. L. SCH. (Jan. 21, 2008), <https://www.law.uchicago.edu/news/lifespan-written-constitutions> (describing the duration of other countries’ constitutions and their successes).

Constitution and the government.<sup>7</sup> Afghan politics continued to be played, relatively peacefully, under the rules of the 1931 Constitution, until 1964, when the 1931 Constitution was peacefully replaced.<sup>8</sup> The 1931 Constitution also scores well on some metrics of constitutional performance. For instance, under the 1931 Constitution, Afghanistan experienced some elements of democratic governance; a wide range of political movements representing a broad cross-section of the society began to take hold; and the Constitution created a method of governance that prevented violence and successfully channeled conflict among powerful stakeholders through formal institutions.<sup>9</sup>

This Article highlights that constitutional deferral played a key role in ensuring that the 1931 Constitution promoted ongoing debates of controversial constitutional issues—leading to its survival for more than three decades. The longevity of the 1931 Constitution thus provides evidence to support Rosalind Dixon and Tom Ginsburg’s claim that although it is often dangerous for drafters of constitutions to defer a large number of important questions as part of its constitutional design, certain types of significant constitutional deferrals might help constitutions survive longer under some circumstances.<sup>10</sup> Moreover, this Article finds that deferrals in the 1931 Constitution successfully incentivized powerful groups to channel their conflicts through formal constitutional institutions.<sup>11</sup> Because the 1931 Constitution left a number of important constitutional questions open for debate, powerful groups opted to influence the debate through formal institutions, rather than violence.

The rest of this Article is structured as follows. Part II will briefly describe the history of Afghanistan’s short-lived constitutions of the twentieth century (1923–1990), highlighting that most Afghan constitutions failed to create legitimacy or channel conflict through formal institutions, which led to the demise of these constitutions.<sup>12</sup> Part III explores the history of the 1931 Constitution and how it fared from 1931–1964.<sup>13</sup> Part III further explores the longevity of the 1931 Constitution and its performance

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<sup>7</sup> Biloslavo, *supra* note 4, at 61–62.

<sup>8</sup> BARFIELD, *supra* note 3, at 211.

<sup>9</sup> See *infra* text accompanying notes 43–45.

<sup>10</sup> See Dixon & Ginsburg, *supra* note 1, at 643, 645, 665 (explaining that deferrals are not optimal for all issues, but can be helpful for some issues with respect to the constitution’s long-term success).

<sup>11</sup> See discussion *infra* Section III.B & Part IV.

<sup>12</sup> See discussion *infra* Part II.

<sup>13</sup> See discussion *infra* Part III.

through the lens of constitutional deferral theory and the recent literature on constitutional performance.<sup>14</sup> Part III finds that the 1931 Constitution of Afghanistan was far more effective in its performance than the Constitution that preceded it (the 1923 Constitution), and the ones that followed it.<sup>15</sup> The 1931 Constitution created a system of governance that successfully channeled conflict through formal institutions; led to the emergence of diverse political movements, which began to shape the political discourse in Afghanistan; and for the first time in Afghan history, led to the establishment of a parliament that was elected through general, direct, and free elections.<sup>16</sup> Finally, Part V, the conclusion to this Article, highlights that constitutional deferral played a significant role in the overall performance of the 1931 Constitution of Afghanistan and its survival.<sup>17</sup>

### I. AFGHANISTAN'S HISTORY OF SHORT-LIVED CONSTITUTIONS (1923–1990)

Between 1923 (when Afghanistan adopted its first constitution) and 2004 (when the United States–led coalition ousted the Taliban from power and helped install a new government), Afghanistan has seen ten different constitutions, including the 1993 *mujahidin* draft constitution.<sup>18</sup> However, the fate of each Afghan constitution was related to that of the governing regime that adopted it.<sup>19</sup> Like the destiny of governing regimes, Afghanistan's history of short-lived constitutions is closely linked with crises, coup d'états, and popular revolts.<sup>20</sup> In the absence of a popular mandate, new regimes that came to power tended to use constitutions as instruments of gaining political legitimacy.<sup>21</sup> As such, almost all twentieth-century Afghan constitutions, except arguably the 1931 Constitution, failed to take hold. They were either not enforced by the state or they lacked domestic legitimacy—at certain times, they lacked both.<sup>22</sup>

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<sup>14</sup> See *infra* Part III.

<sup>15</sup> See *infra* Part III.

<sup>16</sup> See *infra* Part III.

<sup>17</sup> See discussion *infra* Part IV.

<sup>18</sup> Tom Ginsburg & Aziz Huq, *What Can Constitutions Do?: The Afghan Case*, 25 J. DEMOCRACY 116, 118–20 (Jan. 2014).

<sup>19</sup> *Id.*

<sup>20</sup> Mohammad Hashim Kamali, *Islam and its Sharia in the Afghan Constitution 2004 with Special Reference to Personal Law*, in THE CONSTITUTIONS OF AFGHANISTAN, IRAN, AND EGYPT – IMPLICATIONS FOR PRIVATE LAW 23–24 (Najma Yassari ed., 2005).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; Mohammad Hasan Kākar, *Constitutional History of Afghanistan*, in VI ENCYCLOPEDIA IRANICA 158 (1992).

Amir Amanullah Khan (1919–1929) promulgated Afghanistan’s first written constitution in 1923.<sup>23</sup> The 1923 Constitution declared Islam the religion of the state,<sup>24</sup> directed the Council of State (the legislature) to consider the requirements of the *sharī‘a* in making laws,<sup>25</sup> made primary education compulsory,<sup>26</sup> abolished slavery,<sup>27</sup> prohibited torture,<sup>28</sup> and granted equal rights and duties before the law to all Afghans without any regard to race, religion, or other affiliations.<sup>29</sup> The 1923 Constitution, or the so-called liberal constitution of Afghanistan,<sup>30</sup> however, failed to channel conflict through formal constitutional institutions.<sup>31</sup> It therefore sparked a series of tribal revolts that ultimately toppled both King Amanullah Khan and the 1923 Constitution.<sup>32</sup>

Nadir Shah (1929–1933) promulgated Afghanistan’s second constitution in 1931.<sup>33</sup> The 1931 Constitution of Afghanistan “was in some respects significantly more liberal than that of 1923,” and, in theory, it declared Afghanistan a constitutional monarchy.<sup>34</sup> Like the 1923 Constitution, the 1931 Constitution also declared Islam as the official religion of the state and the *Hanafi* school of *sharī‘a* as its official

<sup>23</sup> See Kākar, *supra* note 22; Said Amir Arjomand, *Constitutional Development in Afghanistan: A Comparative and Historical Perspective*, 53 *DRAKE L. REV.* 943, 945 (2005); Amin Tarzi, *Islam and Constitutionalism in Afghanistan*, 5 *J. PERSIANATE. STUD.* 205, 210 (2012).

<sup>24</sup> See AFG. CONST. of 1923, art. 2.

<sup>25</sup> See *id.* art. 72.

<sup>26</sup> See *id.* art. 14.

<sup>27</sup> See *id.* art. 10.

<sup>28</sup> See *id.* art. 24.

<sup>29</sup> See *id.* art. 16.

<sup>30</sup> See SENZIL NAWID, *RELIGIOUS RESPONSE TO SOCIAL CHANGE IN AFGHANISTAN 1919-1929: KING AMAN-ALLAH AND THE AFGHAN ULAMA* 62–71, 72–104 (1999); see also LEON B. POUILLADA, *REFORM AND REBELLION IN AFGHANISTAN, 1919–1929: KING AMANULLAH’S FAILURE TO MODERNIZE A TRIBAL SOCIETY* 93–94 (1973) (detailing the more liberal attributes of King Amanullah, and examining the role that he played in the creation of the 1923 Constitution of Afghanistan).

<sup>31</sup> See, e.g., NAWID, *supra* note 30, at 62–104 (analyzing the conflicts between the modernization of Afghanistan and Islam, which ultimately led to the downfall of King Aman-Allah); POUILLADA, *supra* note 30, at 92–94 (examining the significant historical events that contributed to the creation of the 1923 Constitution of Afghanistan).

<sup>32</sup> DUPREE, *supra* note 5, at 451–55; VARTAN GREGORIAN, *THE EMERGENCE OF MODERN AFGHANISTAN: POLITICS OF REFORM AND MODERNIZATION: 1880–1946*, 254–56 (1967).

<sup>33</sup> Kākar, *supra* note 23; see also NIGHT MEHROZE CHISHTI, *CONSTITUTIONAL DEVELOPMENT IN AFGHANISTAN* 50–60 (1998) (discussing King Nadir Shah’s reign and the events that led to the creation of the 1931 Constitution).

<sup>34</sup> Arjomand, *supra* note 24, at 948.

*madhhab*.<sup>35</sup> It retained the 1923 Constitution's provisions that mandated free education<sup>36</sup> and prohibited slavery<sup>37</sup> and torture.<sup>38</sup> The 1931 Constitution further created a national parliament with legislative power, consisting of an elected House of Representatives,<sup>39</sup> and a royally appointed upper House of Nobles.<sup>40</sup> For the first time in Afghanistan's history, the 1931 Constitution made governmental ministers responsible to parliament.<sup>41</sup>

The 1931 Constitution of Afghanistan survived for more than three decades.<sup>42</sup> During this time, the rules of the 1931 Constitution facilitated the rise of new social and political groups, which were considerably liberal and forward-looking.<sup>43</sup> Although the 1931 Constitution had partly confirmed the influence of the traditional stakeholders in the Afghan society, the general economic development and expansion of the domains of the state led to the consolidation of new urban groups, who ultimately asserted their claims to share political power through constitutional reform.<sup>44</sup> Thus, the discourse on the future shape of the Afghan state and society was directed by various sections of these new Afghan elites, culminating in the formation of a new, and considerably liberal, constitution in 1964 ("the 1964 Constitution").<sup>45</sup>

The 1964 Constitution, which was promulgated by Zahir Shah (1933–1973) in response to the political developments of the 1950s and 1960s, established a constitutional monarchy,<sup>46</sup> guaranteed numerous

<sup>35</sup> See AFG. CONST. of 1931, art. 1.

<sup>36</sup> See *id.* art. 20.

<sup>37</sup> See *id.* art. 11.

<sup>38</sup> See *id.* art. 19.

<sup>39</sup> See *id.* art. 29.

<sup>40</sup> See *id.* art. 67.

<sup>41</sup> See *id.* art. 61.

<sup>42</sup> See Rahman, *supra* note 6.

<sup>43</sup> See SABAHUDDIN KHUSHKAKI, DAHA-YE QANUN-I ASSASI, GHAFLAT-I ZINDAGI AFGHAN HA WA FURSAT TALABI RUS HA [DECADE OF THE CONSTITUTION: NEGLECT OF THE LIVES OF THE AFGHANS AND THE OPPORTUNISM OF THE SOVIETS] (4th ed., 1384) (2005); THOMAS RUTTIG, ISLAMISTS, LEFTISTS—AND A VOID IN THE CENTER: AFGHANISTAN'S POLITICAL PARTIES AND WHERE THEY COME FROM 1902–2006, 5–6 (2006) (describing the emergence of liberalized social movements and political groups beginning in the 1930s throughout the 1950s). See generally OLESEN, *supra* note 2, at 172–203 (discussing the period of political transformation beginning in the early 1930s throughout the mid 1960s).

<sup>44</sup> OLESEN, *supra* note 2, at 199.

<sup>45</sup> *Id.*

<sup>46</sup> See AFG. CONST. of 1964, art. 1.

individual rights and freedoms,<sup>47</sup> and significantly broadened political space. At the same time, however, the 1964 Constitution produced paralyzing political stalemate and increased frustration within the ruling elites (particularly within the royal family).<sup>48</sup> The 1964 Constitution, which some observers considered to be the “finest in the Muslim world,”<sup>49</sup> survived for a decade. Although Afghanistan experienced a decade of democratic governance under this Constitution,<sup>50</sup> the document failed to channel political conflict through the political process. The 1964 Constitution itself produced new flash points for internal power struggles among the members of the royal family.<sup>51</sup> Of these, the 1964 Constitution prohibited members of the royal family from occupying political offices.<sup>52</sup> This provision effectively denied Daoud Khan, the King’s cousin and former prime minister (1951–1963), the option to take his disagreements to formal political institutions established by the Constitution.

In 1973, Daoud Khan led a military coup that ousted the long-ruling monarchy and became president of a new revolutionary republic.<sup>53</sup> Daoud enacted a constitution in 1977 (“the 1977 Constitution”),<sup>54</sup> but that document proved short-lived.<sup>55</sup> The 1977 Constitution transplanted an authoritarian model of governance in Afghanistan, which provided for a presidential system of government within the framework of a single-party

<sup>47</sup> See *id.* arts. 25–40.

<sup>48</sup> See Ginsburg & Huq, *supra* note 18, at 119.

<sup>49</sup> See DUPREE, *supra* note 5, at 565; see also Arjomand, *supra* note 23, at 952 (“[The Constitution of 1964] was the product of the meeting of liberal constitutionalism and Islamic modernism that proposed to interpret the principles of Islam without undue restriction from the rigidities of medieval Islamic jurisprudence and succeeded in finding the finest formula for the reconciliation of Islam and constitutionalism in the middle east to that date or since.”).

<sup>50</sup> See also Bahar Jalali, *Afghanistan: 1963–1973* (2005) (unpublished dissertation, University of California, Berkeley) (on file with author). See generally KHUSHKAKI, *supra* note 43 (arguing that Afghanistan for the first time in its history created democratic institutions, the three branches of the government were separated and the people took part in direct election – electing their representatives to the parliament).

<sup>51</sup> See Tarzi, *supra* note 23, at 218–23 (explaining that the adoption of the 1964 Constitution produced internal conflict resulting in the removal of Mohammad Zahir Shah following a military coup led by the king’s cousin and former prime minister in 1973).

<sup>52</sup> See AFG. CONST. of 1964, art. 2.

<sup>53</sup> See Mohammad Hasan Kākar, *The Fall of the Afghan Monarchy in 1973*, 9 INT’L J. MIDDLE E. STUD. 195, 214 (1978) (discussing the republican and constitutional movements during the fall of the Afghan monarchy).

<sup>54</sup> Kākar, *supra* note 23; CHISHTI, *supra* note 33 at 131–37.

<sup>55</sup> Ginsburg & Huq, *supra* note 18, at 119.

system.<sup>56</sup> Thus, Daoud's 1973 Constitution also failed to channel political dispute through formal constitutional institutions—as it did not in fact provide for any such institutions at all.<sup>57</sup> Daoud, himself, dominated all aspects of the state and the government, including its institutions.

Consequently, one year later, the Daoud regime fell in a coup d'état that was staged by a leftist communist party from within the Afghan military.<sup>58</sup> This new communist regime adopted an interim constitution in 1980 that, "like the regime itself, was extremely unpopular."<sup>59</sup> By this time, the Soviet Union had entered and occupied Afghanistan.<sup>60</sup> The Soviet invasion forced many Afghan-Islamic leaders to flee the country and organize a large-scale armed opposition, the *mujahidin*, against the communist government.<sup>61</sup> As a result, the new constitution was largely irrelevant beyond certain urban cities.<sup>62</sup> In 1987, shortly after Mohammad Najibullah (1987—1992) became president of Afghanistan, a *Loya Jirga* (Afghanistan's constitutional convention) passed another constitution ("the 1987 Constitution").<sup>63</sup> The 1987 Constitution attempted to establish revised economic and political rules that the majority of Afghans, including the armed *mujahidin* opposition, might be willing to accept.<sup>64</sup> The 1987 Constitutional also purported to create political institutions that could channel conflict through formal institutions.<sup>65</sup> However, the

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<sup>56</sup> See AFG. CONST. of 1977.

<sup>57</sup> MIR MOHAMMAD SEDIQ FARHANG, AFGHANISTAN DAR PANJ QARN-I AKIR [AFGHANISTAN IN THE LAST FIVE CENTURIES] 8532 (1371) [1992].

<sup>58</sup> See BARFIELD, *supra* note 3, at 225; THOMAS TAYLOR HAMMOND, RED FLAG OVER AFGHANISTAN 38–55 (1984) (discussing events occurring in Afghanistan during the Soviet invasion).

<sup>59</sup> Ginsburg & Huq, *supra* note 18, at 119.

<sup>60</sup> See BARFIELD, *supra* note 3, at 233–42. See generally BEVERLEY MALE, REVOLUTIONARY AFGHANISTAN: A REAPPRAISAL 206–15 (1982) (discussing revolutionary uprising during Soviet invasion of Afghanistan).

<sup>61</sup> See, e.g., GILLES DORRONSORO, REVOLUTIONS UNENDING: AFGHANISTAN, 1979 TO THE PRESENT 98–102 (2005) (explaining that many religious elites and leaders were forced into exile in Iran or Pakistan); OLIVIER ROY, ISLAM AND RESISTANCE IN AFGHANISTAN 118–19 (1985) (examining the rise and the ideological background of the Afghan Islamist movement).

<sup>62</sup> Ginsburg & Huq, *supra* note 18, at 119.

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

<sup>64</sup> See AFG. CONST. of 1987.

<sup>65</sup> Ginsburg & Huq, *supra* note 18, at 120.

government's opponents, who were winning significant battles in the countryside, refused to lay down their arms.<sup>66</sup>

Under pressure from the armed *mujahidin* opposition, President Najibullah amended the 1987 Constitution in 1990.<sup>67</sup> The Soviet withdrawal in 1989, nevertheless, prevented the president from securing popular support for the amended constitution in 1990.<sup>68</sup> The *mujahidin* factions, who were fighting the Soviets and their installed regime in Kabul, finally forced Najibullah's government out of power in 1992, and the country fell into civil war.<sup>69</sup> Thereafter, both the *Sunni* and the *Shi'ite mujahidin* factions drafted their own ideologically informed constitution.<sup>70</sup> However, both failed to provide formal constitutional mechanisms that could generate legitimacy for the state or successfully channel political conflict among the powerful *mujahidin* groups through formal constitutional institutions. Therefore, both the *Sunni* and the *Shi'ite* draft constitutions failed to be ratified.<sup>71</sup>

## II. RETHINKING THE PERFORMANCE OF THE 1931 CONSTITUTION OF AFGHANISTAN

The 1931 Constitution of Afghanistan came into being after the collapse of the short-lived 1923 Constitution, which failed to create a system of government that could channel political disputes among Afghanistan's powerful stakeholders through the political process. The opponents of the 1923 Constitution, therefore, staged a series of rebellions that led to the collapse of the 1923 Constitution and the system of government that it established.<sup>72</sup>

Against this backdrop, the 1931 Constitution proved considerably successful, especially because it created formal political institutions to

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<sup>66</sup> See generally LARRY P. GOODSON, AFGHANISTAN'S ENDLESS WAR: STATE FAILURE, REGIONAL POLITICS, AND THE RISE OF THE TALIBAN 67–69 (2001) (discussing attempts to end the war in Afghanistan).

<sup>67</sup> See Shamshad Pasarlay, *Islam and the Sharia in the 1993 Mujahideen Draft Constitution of Afghanistan: A Comparative Perspective*, 3 *INDON. J. INT'L & COMP. L.* 183, 192 (2016).

<sup>68</sup> Ginsburg & Huq, *supra* note 18, at 119.

<sup>69</sup> See GOODSON, *supra* note 66, at 54.

<sup>70</sup> See Pasarlay, *supra* note 67, at 194.

<sup>71</sup> See *id.* at 195–96.

<sup>72</sup> See NAWID, *supra* note 30, at 100–04 (examining how rebellions often lead to a government collapse).

channel conflict and lasted for three decades.<sup>73</sup> During this time, the 1931 Constitution not only managed to successfully channel political conflict through formal institutions, but it also led to an experimental democratic government in the 1950s, facilitated the participation of a broad cross-section of the Afghan political society, and helped put Afghanistan on a steady course of social and political transformation.<sup>74</sup>

The 1931 Constitution was ratified two years after Nadir Shah acceded to the Afghan throne (1929–1933), after a *Loya Jirga* was held in Kabul.<sup>75</sup> Nadir Shah first convened a *Loya Jirga* in September 1930, which approved him as the king of Afghanistan, announced support for his governing policies, and promised to move “Afghanistan back into the mainstream” of the *Hanafi shari‘a*.<sup>76</sup> With King Nadir Shah’s approval, the *Loya Jirga* selected 105 of its members to form a National Council, which would pass legislation proposed by the throne.<sup>77</sup> Arguably, this National Council then adopted the second constitution of Afghanistan in October 1931.<sup>78</sup> However, there is no evidence that any of the provisions of the 1931 Constitution were debated during the *Loya Jirga*. Rather, the main question at the meeting was the basis of legitimacy of Nadir Shah’s monarchy and how, and with whose support, he took control of Kabul.<sup>79</sup> The substance of the 1931 Constitution, however, does make clear that the traditional *Sunni ‘ulamā’*, the tribal notables, and the influential members of the government of Nadir Shah, were “either consulted or had direct influence over the constitutional drafting process.”<sup>80</sup>

The 1931 Constitution was a considerably vague and ambivalent document. In essence, it established the monarchy in the line of Mohammad Nadir Shah; formed a facade of parliamentary government yet left control in the hands of the royal family; kept the judiciary primarily under

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<sup>73</sup> See Rahman, *supra* note 6.

<sup>74</sup> See HAFIZULLAH EMADI, DYNAMICS OF POLITICAL DEVELOPMENT IN AFGHANISTAN: THE BRITISH, RUSSIAN, AND AMERICAN INVASIONS 39–52 (2010); RUTTIG, *supra* note 43, at 4–5.

<sup>75</sup> MOHAMMAD ALAM FAYYZAD, JARGAH HAI BOZURG-I MILLI AFGHANISTAN (LOYA JARGAH HA): JARGAH HAI NAMNEHAD TAHT-I TASALOT-I KAMONEST HA WA RUS HA [AFGHANISTAN’S MAJOR JIRGAS: SYMBOLIC JIRGAS UNDER THE CONTROL OF THE COMMUNISTS AND THE SOVIETS] 147–68 (1368) [1989].

<sup>76</sup> DUPREE, *supra* note 5, at 463.

<sup>77</sup> *Id.*

<sup>78</sup> See FARHANG, *supra* note 57, at 407.

<sup>79</sup> See Tarzi, *supra* note 23, at 215.

<sup>80</sup> *Id.*

the religious leaders; created a semi-socialist economic framework with the principle of free enterprise; and accepted and guaranteed theoretical individual equality.<sup>81</sup> Therefore, in the legalistic sense, pre-1964 Afghanistan was governed by the following types of legislations: *Hanafi sharī'a* of *Sunni* Islam, as interpreted by religious leaders (the '*ulamā*'); royal *farmans* (decrees); laws passed by parliament, which were usually first proposed by the ministries; ministerial decrees relating to the function of individual ministries; and the Constitution, itself.<sup>82</sup> This structure basically provided a place and influence for most of the stakeholders in the state institutions.

The 1931 Constitution further established, in principle, that all legal disputes would be within the framework of the *Hanafi sharī'a* of *Sunni* Islam, but it simultaneously left room for the influence of secular law (state adopted laws and regulations) by establishing official state courts, which were led by state appointed judges and applied state laws, rather than *Hanafi sharī'a*.<sup>83</sup> Therefore, these two separate and often “contradictory” court systems—one, which was religious and headed by traditional *qazi*-religious judges, and the other, which was “semi-secular” and operated under the supervision of provincial governors, their assistants, and state appointed judges—attempted to function side-by-side and resolve legal disputes.<sup>84</sup>

#### *A. Assessing the Longevity of the 1931 Constitution: The Role of Constitutional Deferral*

The 1931 Constitution, as drafted and approved, survived for more than three decades (1931–1964).<sup>85</sup> Recent literature on the lifespan of written constitutions has found that the average life expectancy of formal constitutions in the world, promulgated since 1789, is a mere 19 years.<sup>86</sup> The 1931 Constitution of Afghanistan, however, survived for more than

<sup>81</sup> See DUPREE, *supra* note 5, at 471.

<sup>82</sup> See *id.*

<sup>83</sup> See AFG. CONST. of 1931, art. 94.

<sup>84</sup> See DUPREE, *supra* note 5, at 468.

<sup>85</sup> Rahman, *supra* note 6.

<sup>86</sup> See ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 129 (2009) (describing how constitutions endure over time); see also Ginsburg et al., *supra* note 6 (noting that “[c]onstitutions, in general, do not last very long. The mean lifespan across the world since 1789 is 19 years.”).

three decades (thirty-three years to be precise)—thereby surpassing the average lifespan of written constitutions by almost a decade and a half.<sup>87</sup>

Zachary Elkins, Tom Ginsburg, and James Melton argue that constitutions that survive for a long time basically share three major features.<sup>88</sup> First, long-lived constitutions emerge through an open participatory process—a process that involves the participation of the public during the deliberation and drafting stages.<sup>89</sup> Second, these constitutions tend to be flexible, providing “reasonable” mechanisms for amending and interpretations.<sup>90</sup> Flexible amendment procedure allows constitutions to adjust to the emergence of new social and political forces.<sup>91</sup> Thus, flexible amendment procedures are related to the concept of group inclusion.<sup>92</sup> By enabling new groups to participate in constitutional bargains, flexible amendment procedures “generate [...] a vital constitutional politics,” in which the newly included groups also have a stake in safeguarding certain central “elements of the constitutional bargain even as more peripheral elements change.”<sup>93</sup> Third and finally, longer-lived constitutions tend to be specific—referring to the level of detail and scope of coverage in formal written constitutions.<sup>94</sup>

It is difficult to know how to score the 1931 Constitution of Afghanistan on these first two issues because little information is known about its amendment process, as the 1931 Constitution did not provide any formal mechanisms to amend the Constitution. Specifically, with regard to the third issue, however, the 1931 Constitution is remarkably deficient, as the document was considerably vague and inconsistent, and one might, therefore, have expected it to die young.<sup>95</sup> In follow-up work, however, Rosalind Dixon and Tom Ginsburg further investigated whether constitutions that contain deferrals on key issues by constitutional design are constitutionally fragile.<sup>96</sup> They argue that certain types of constitutional

<sup>87</sup> See Rahman, *supra* note 6.

<sup>88</sup> See ELKINS ET AL., *supra* note 86, at 66.

<sup>89</sup> See *id.* at 78–81.

<sup>90</sup> See *id.* at 81–83.

<sup>91</sup> See *id.* at 82.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See *id.* at 84–88.

<sup>95</sup> See OLESEN, *supra* note 2, at 176.

<sup>96</sup> For information regarding constitutional deferral, see generally Dixon & Ginsburg, *supra* note 1, at 637–38 (exploring the rationales behind constitutional deferral, and examining both successful and unsuccessful constitutional deferrals); Clark B. Lombardi, *The Constitution as*

deferrals can occasionally be useful in promoting productive ongoing negotiations of contentious constitutional principles, and thus, can help constitutions survive longer.<sup>97</sup> The history of the 1931 Constitution of Afghanistan and its longevity provide evidence to support this conclusion.

Deferral, as Dixon and Ginsburg describe it, is a conscious decision by constitutional writers not to decide a controversial issue by constitutional design, but rather, leave it to the legislature or the judiciary to decide after the constitution is ratified.<sup>98</sup> Theorists of constitutional deferral note that deferral can come in different forms. The first form is to explicitly identify an issue within the constitution, but state it in a manner that requires it to be resolved by the legislature after the constitution is ratified (by using a “by-law clause” in the text of the constitution).<sup>99</sup> The second form of deferral is “implicit deferral,” which defers controversial constitutional questions to constitutional courts.<sup>100</sup> In this case, drafters of constitutions deliberately use unclear language to describe a structural rule or a constitutional right, which practically requires that the rule be elaborated in the future by institutions entrusted by the constitution with the power to interpret the constitution.<sup>101</sup>

Finally, the history of the 1931 Constitution indicates that, in theory, one might conceptualize another type of implicit deferral, although it is one that would be very problematic to study. This would be a mode of deferral through silence. The constitutional drafters would take an important issue that could, in theory, be regulated through the constitution. In fact, some drafters may have wanted to regulate this issue at the constitutional level if the related question is considered to be of constitutional significance. However, unable to decide what the rule would say, drafters simply choose not to include any constitutional regulations within the constitution, which means that the issue is to be resolved later at the sub-

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*an Agreement to Agree: The Social & Political Foundation (and Effects) of the 1971 Egyptian Constitution*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (Denis J. Galligan & Mila Versteeg eds., 2013) (examining constitutional deferral in the context of the Egyptian Constitution); Mark Tushnet, *Constitution-Making: An Introduction*, 91 TEX. L. REV. 1983 (2013) (examining important conceptual and practical issues associated with modern constitution-making).

<sup>97</sup> See, e.g., Dixon & Ginsburg, *supra* note 1, at 648 (providing a successful example of constitutional deferral that supports the likelihood of constitutional endurance).

<sup>98</sup> *Id.* at 646–47.

<sup>99</sup> See *id.* at 643–46.

<sup>100</sup> See Lombardi, *supra* note 96, at 409; Tushnet, *supra* note 96, at 2007.

<sup>101</sup> See Lombardi, *supra* note 96, at 409.

constitutional level. Deferral through silence is, in other words, a lacuna that functions as a “by-law”<sup>102</sup> clause.

The text of the 1931 Constitution of Afghanistan clearly signals constitutional deferral at many places. Deferral in the 1931 Constitution came explicitly through “by-law”<sup>103</sup> clauses, implicitly through strategic ambiguity, and in some places through constitutional silence—for instance, an important constitutional issue, such as who would interpret or amend the constitution, was not regulated in the text of the Constitution at all.<sup>104</sup> These types of deferrals played a key role in the longevity of the 1931 Constitution. Specifically, deferral in the 1931 Constitution helped promote ongoing discussion of controversial constitutional questions in formal institutions that the Constitution itself created, which led to the survival of the 1931 Constitution for more than three decades.<sup>105</sup>

For example, the 1931 Constitution attempted to guarantee some fundamental rights, but it did not simply declare most rights to be constitutionally guaranteed, rather, it instructed the legislature through the adoption of by-law clauses to define the scope of the protected rights and freedoms and then enact laws that would clarify the relationship between basic rights and the *sharī‘a* and define the powers of the institutions that would protect them.<sup>106</sup> In this way, the 1931 Constitution left the question of protected rights open. Up until the 1950s, the government did not attempt to resolve the deferrals on these questions of rights, arguably because concretizing a particular practice would have created violence. At the same time, however, the governing elites of Afghanistan took the debate on rights well beyond the adoption of the 1931 Constitution, resolving them only when a minimum societal consensus on the question of rights and their relations with the *sharī‘a* emerged.<sup>107</sup>

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<sup>102</sup> See Dixon & Ginsburg, *supra* note 1, at 643–46.

<sup>103</sup> See *id.*

<sup>104</sup> See Arjomand, *supra* note 23, at 949.

<sup>105</sup> See AFG. LEGAL EDUC. PROJECT AT STANFORD LAW SCH., AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF AFGHANISTAN 13 (2011) (stating that the 1931 Constitution created a national parliament consisting of two houses).

<sup>106</sup> See AFG. CONST. of 1931, arts. 9–26.

<sup>107</sup> See Shamshad Pasarlay, Making the 2004 Constitution of Afghanistan: A History and Analysis through the Lens of Coordination and Deferral Theory, chapter 1 (June 10, 2016) (unpublished Ph.D. dissertation, University of Washington) (on file with author) (discussing how deferrals in the 1931 Constitution helped calm the serious debate on the question of the relationship between Islamic law and liberal rights).

In addition, the 1931 Constitution required the state to legislate in accordance with the provisions of the “sacred religion of Islam,”<sup>108</sup> but it did not clarify which form of Islam—modernist or traditionalist Islam, *Hanafi* Islam, or some other type. While the 1931 Constitution made the *Hanafi* School the official *madhhab* of the state,<sup>109</sup> the ruler was not explicitly obliged to rule in a manner that was consistent with *Hanafi* Islam, but rather, with the provisions of “the sacred religion of Islam.”<sup>110</sup> It seemed that although an average person might reasonably interpret “the sacred religion of Islam” to mean that the state must rule in accordance with the *Hanafi* version of Islam, the ruler might reasonably propose a different view—namely that, as king, he would be a *Hanafi*, but he had the right to act in accordance with rival understandings of Islam if it would promote the interests of the country or the power of the ruler. Therefore, the constitutional scheme arguably worked in favor of both the traditional ‘*ulamā*’ and the state, which opted to continue the debate on the form of Islam that the state had to respect in the *Jamīyy’āt-i ‘Ulamā*’ (Society of ‘*Ulamā*’), an institution that reviewed the compliance of state laws and government conduct with the “sacred religion of Islam.”<sup>111</sup>

Similarly, the 1931 Constitution did not contain any provisions about who would decide whether the state had legislated in accordance with the provisions of “the sacred religion of Islam.” While the text of the Constitution was silent on this question (deferral through silence), in practice, the *Jamīyy’āt-i ‘Ulamā*’ examined laws for compliance with the *sharī‘a* (indeed, the *Hanafi sharī‘a*).<sup>112</sup> The *Jamīyy’āt-i ‘Ulamā*’ was a body that included traditional *Hanafi ‘ulamā*’.<sup>113</sup> This ambiguity arguably kept the powerful *Hanafi ‘ulamā*’—who had rebelled against the 1923 Constitution—happy and satisfied. They believed that they had not already lost under the constitutional scheme. They hoped that they might be able to influence the interpretation of the *sharī‘a* going forward in accordance with the *Hanafi* School.<sup>114</sup> At the same time, the state preferred to deal with and pacify an organized, cohesive body of ‘*ulamā*’ rather than the previous comparatively anarchic groups, which could only be co-opted as

<sup>108</sup> See AFG. CONST. of 1931, art. 63.

<sup>109</sup> See *id.* art. 1.

<sup>110</sup> See *id.*

<sup>111</sup> See GREGORIAN, *supra* note 32, at 295; OLESEN, *supra* note 2, at 184.

<sup>112</sup> See OLESEN, *supra* note 2, at 184.

<sup>113</sup> See DUPREE, *supra* note 5, at 468; GREGORIAN, *supra* note 32, at 305.

<sup>114</sup> See *id.*

individuals.<sup>115</sup> Thus, both the state and the traditional *'ulamā'* apparently opted to postpone the debate on what form of Islam the state would respect in to future—leading to the survival of the 1931 Constitution.

The 1931 Constitution also deferred on the question of constitutional interpretation and constitutional amendment through constitutional silence. The text of the Constitution did not contain any provisions about who would interpret and amend the Constitution. In practice, however, a *Loya Jirga* (Afghanistan's constitutional convention) functioned as a constitutional interpretation and constitutional amendment body.<sup>116</sup> Under the 1931 Constitution, the *Loya Jirga* convened every three years to debate new laws, amend, and interpret the Constitution.<sup>117</sup> The *Loya Jirga* was comprised of tribal chieftains and traditional *Hanafi 'ulamā'*, who had overthrown the 1923 constitutional order.<sup>118</sup> These powerful groups under the 1931 Constitution, however, opted to resolve their disagreements through these institutions.<sup>119</sup> They knew that they had the final say on what the Constitution required.<sup>120</sup> These deferrals kept the powerful tribes from rebelling because they believed they could influence constitutional matters through constitutional amendment, constitutional interpretation, and by changing the constitution to their advantage every three years when a *Loya Jirga* was convened.<sup>121</sup>

In short, the complex and sometimes vague and inconsistent formulation of the 1931 Constitution of Afghanistan reflected the fact that King Nadir Shah was simultaneously trying to pacify the modernists, the conservative *'ulamā'*, and tribal notables, by evoking values and concepts from their respective, separate, and arguably contradictory points of view,<sup>122</sup> while allowing open the debate, which took place in the

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<sup>115</sup> See OLESEN, *supra* note 2, at 184.

<sup>116</sup> See DONALD WILBER, *AFGHANISTAN: ITS PEOPLE, ITS SOCIETY, ITS CULTURE* 158 (1962).

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

<sup>119</sup> *See id.* at 157–58.

<sup>120</sup> *See id.*

<sup>121</sup> *See id.* at 143, 157. At the same time, however, Nadir Shah intended to incrementally form a centralized educational system that was designed to allow the state to put forward its message without having that message mediated—and perhaps modified—by independent religious scholars, along with a centralized army that could impose the state's will upon people, who at that time trusted their local leaders more than the authoritarian king.

<sup>122</sup> See OLESEN, *supra* note 2, at 176–83.

parliament and the *Jamīyy' āt-i 'Ulamā'*.<sup>123</sup> Thus, although the 1931 Constitution was vague, lacked textual consistency on the surface, and implicitly deferred key constitutional questions, it indeed survived until 1964, which is the longest any constitution has survived in Afghanistan's history thus far.<sup>124</sup>

In fact, the critics of the 1931 Constitution point out to these constitutional deferrals and describe the 1931 Constitution as a “step backwards,” a “do nothing constitution,” a document containing “numerous unclear and contradictory provisions,” or a “hodgepodge of unworkable elements.”<sup>125</sup> However, against the backdrop of the constitutional history of Afghanistan, it seems that the 1931 Constitution's deferrals were anything but unworkable and inconsistent. The 1931 Constitution did not succeed and survive *in spite of* these constitutional deferrals; it survived and succeeded *because of* them.

### B. Assessing the Performance of the 1931 Constitution

The longevity of the 1931 Constitution of Afghanistan could be used as one measure for its success. However, as Tom Ginsburg and Aziz Huq note, a constitution is not adopted for its own sake; it is a device for achieving greater social good.<sup>126</sup> When a constitution does not serve this end, it should be scrapped.<sup>127</sup> Although no constitution lasts forever, a constitution that dies after only a year or two must be judged a failure by any benchmark.<sup>128</sup> Most Afghan constitutions are failures by most benchmarks of constitutional performance. They were not only short-lived, but they also failed to achieve greater social good. For instance, the 1977 Constitution of Afghanistan died less than a year after it was promulgated.<sup>129</sup> It further failed to create legitimacy for the state or channel political conflict through formal constitutional institutions.<sup>130</sup> Therefore, the 1977 Constitution of Afghanistan is a failure by any metric.

This section tests the performance of the 1931 Constitution of Afghanistan against some metrics of constitutional success. Ginsburg and

<sup>123</sup> See GREGORIAN, *supra* note 32, at 295; OLESEN, *supra* note 2, at 184.

<sup>124</sup> See OLESEN, *supra* note 2, at 176–78; Ginsburg & Huq, *supra* note 18, at 118–19.

<sup>125</sup> See DUPREE, *supra* note 5, at 464; Biloslavo, *supra* note 4, at 62.

<sup>126</sup> Ginsburg & Huq, *supra* note 18, at 120.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 119.

<sup>130</sup> See Kākar, *supra* note 23.

Huq propose four “midrange goals” that successful constitutions tend to achieve.<sup>131</sup> They argue that successful constitutions tend to (1) create public legitimacy for the state; (2) channel violent political conflicts through formal constitutional institutions; (3) reduce the agency cost associated with government; and (4) facilitate the production and delivery of public goods.<sup>132</sup> Ginsburg and Huq further note that the achievement of these goals should be attributable to the constitution, itself, rather than to any exogenous circumstances.<sup>133</sup> However, not everyone agrees with Ginsburg and Huq’s proposal.<sup>134</sup> Other scholars in the field add some other metrics of constitutional performance, which assess how well democracy is facilitated,<sup>135</sup> the people’s level of participation in the affairs of the state,<sup>136</sup> and the extent of state maintenance and stability.<sup>137</sup>

The 1931 Constitution of Afghanistan scores pretty well on most of these metrics of constitutional performance. First, the 1931 Constitution helped produce an interesting experiment in democracy in the 1950s and 1960s.<sup>138</sup> The educational policies of the state under the 1931 Constitution helped generate a new class of educated elites, including individuals who were mostly educated in the West.<sup>139</sup> In 1947, these Western-educated, young Afghans encouraged Prime Minister Shah Mahmud (1946–1953) to broaden the basis of support for the monarchy.<sup>140</sup> In response, Shah Mahmud made some modest attempts to bring about free elections, at least relative to past elections. For the first time in Afghan history, Afghans

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<sup>131</sup> See Ginsburg & Huq, *supra* note 18, at 120.

<sup>132</sup> See *id.*

<sup>133</sup> See *id.*

<sup>134</sup> See TOM GINSBURG & AZIZ Z. HUQ, ASSESSING CONSTITUTIONAL PERFORMANCE 5 (Tom Ginsburg & Aziz Z. Huq eds., 2016) [hereinafter ASSESSING CONSTITUTIONAL PERFORMANCE] (describing multiple ways to evaluate the success of a constitution that is not based on a strict factor-analysis test).

<sup>135</sup> See Rosalind Dixon & David Landau, *Competitive Democracy and Constitutional Minimum Core*, in ASSESSING CONSTITUTIONAL PERFORMANCE, *supra* note 134, at 268.

<sup>136</sup> See Yash Ghai, *Chimera of Constitutionalism: State, Economy, and Society in Africa* (2011) (unpublished paper), [http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/15338/Chimera\\_of\\_constitutionalism\\_yg1.pdf](http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/15338/Chimera_of_constitutionalism_yg1.pdf).

<sup>137</sup> See Aziz Z. Huq, *Hippocratic Constitutional Design*, in ASSESSING CONSTITUTIONAL PERFORMANCE, *supra* note 134, at 39 (asserting that the most successful constitutions are ones free from self-defeating elements that lead to a government breakdown).

<sup>138</sup> DUPREE, *supra* note 5, at 494.

<sup>139</sup> See LUDWIG ADAMEC, HISTORICAL DICTIONARY OF AFGHANISTAN 164–65 (4th ed. 2012).

<sup>140</sup> DUPREE, *supra* note 5, at 494.

voted for candidates they preferred.<sup>141</sup> The resulting parliament of 1949, known in Afghan history as the “Liberal Parliament,” consisted of forty to fifty (of the total 120) reform-minded members, who basically opposed the ruling elites.<sup>142</sup> Previously, the king would choose tribal aristocrats and the members of the ‘*ulamā*’ to the parliament, or they would be elected through state-engineered elections.<sup>143</sup>

Replacing the tribal aristocrats, the newly educated, liberal elites took their roles as parliamentarians seriously.<sup>144</sup> They questioned individual ministers about budgetary matters, which, in a country where corruption often served as a major path to riches and power, deeply troubled entrenched patterns.<sup>145</sup> Moreover, the “Liberal Parliament” passed constitutionally mandated laws permitting freedom of the press and freedom of speech.<sup>146</sup> Overnight, several newspapers emerged, all of which opposed the ruling regime, and further developments were made that were facilitated by the rules of the 1931 Constitution and were unimaginable in Afghanistan by the 1950s and 1960s.<sup>147</sup>

Moreover, the rules of the 1931 Constitution facilitated an interesting growth of social and political movements, which represented a broad cross-section of Afghanistan’s divided society.<sup>148</sup> Several parties were formed during this period, including the *Wish Zalmiyān* (Awakened Youth), *Watan* (Homeland), *Khalq* (People), *Sirri Ittehad* (Secret Union), and *Ittehad-i Muhasilīn-i Kabul* (Kabul Student’s Union).<sup>149</sup> Even the ruling elite tried to promote its policies through the formation of a political party, by establishing its own party, *Hizb-i Dimokratic-i Milli* (National Democratic Party).<sup>150</sup> Except for the governmental National Democratic Party, almost all of these parties advocated for extended freedoms of speech and press, parliamentary checks and balances, the formation of political parties, the scrutiny of ministerial budgets by parliamentary

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

<sup>142</sup> *Id.*

<sup>143</sup> *See id.* at 494–97.

<sup>144</sup> *See id.*

<sup>145</sup> *See id.*

<sup>146</sup> *See* EMADI, *supra* note 74, at 49–70.

<sup>147</sup> *See* DUPREE, *supra* note 5, at 495.

<sup>148</sup> *See* EMADI, *supra* note 74, at 49–70.

<sup>149</sup> *See* MIR GHULAM MOHAMMAD GHUBAR, AFGHANISTAN DAR MASIR-I TARIKH [AFGHANISTAN IN THE COURSE OF HISTORY] 217 (1366) [1987] (detailing the emergence of political parties following Afghanistan’s 1931 Constitution).

<sup>150</sup> *See id.*

committees, and the protection of civil and political rights.<sup>151</sup> By exploiting constitutional ambiguities (deferrals) in the 1931 Constitution, these new political parties successfully achieved some of their demands.<sup>152</sup> In fact, the rules of the 1931 Constitution facilitated a period in the 1960s, known in Afghan's existing historical literature as the "decade of democracy" or "the decade of the constitution."<sup>153</sup>

Second, and more importantly, the 1931 Constitution of Afghanistan successfully utilized formal institutions to channel conflicts among Afghanistan's deeply divided and heavily armed stakeholders, who had not internalized a habit of obedience to any particular constitutional bargain.<sup>154</sup> The 1931 Constitution coopted powerful tribal aristocrats and the traditional *Hanafī 'ulamā'* through offers of cabinet positions and memberships in the *Loya Jirga*, which served as the constitutional amendment and constitutional interpretation body, and the *Jamīyy'āt-i 'Ulamā'*, which examined laws for compliance with *Hanafī sharī'a*.<sup>155</sup> These appointments helped replace with peace the outright violence staged by these powerful groups that occurred during lifespan of the 1923 Constitution.

During the 1931 Constitution's reign, Nadir Shah further appointed powerful tribal aristocrats to important positions of the state. For instance, he appointed Mohammad Khan and Ali Mohammad, two powerful members of Amanullah Khan's cabinet, as foreign and education ministers, respectively.<sup>156</sup> He further appointed Hazrat Fazal Omar Mojaddidi, who was the most influential member of the *'ulamā'* and leader of the *'ulamā'* opposition to the 1923 Constitution, as the Ministry of Justice.<sup>157</sup> The Ministry of Interior was overseen by Mohammad Gul Momand, a tribal aristocrat who helped Nadir Shah accede to the throne.<sup>158</sup> In this way, Nadir Shah's regime converted powerful stakeholders, who rebelled against the 1923 Constitution, to the ruling elites. These controversial figures in turn opted to resolve their disagreements through the formal institutions that the 1931 Constitution established. The tribal aristocrats sat at

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<sup>151</sup> See DUPREE, *supra* note 5, at 495; EMADI, *supra* note 74, at 49–70.

<sup>152</sup> See EMADI, *supra* note 74, at 49–70.

<sup>153</sup> See, e.g., JOHN GRIFFITHS, AFGHANISTAN: WITH A HISTORICAL NOTE BY SIR OLAF CAROE 33 (1967) (explaining the influence of Afghanistan's 1931 Constitution in bringing about a democratic society).

<sup>154</sup> See *id.*

<sup>155</sup> See FARHANG, *supra* note 57, at 405–10.

<sup>156</sup> *Id.* at 406.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

the *Loya Jirga* and interpreted or amended constitutional provisions that they opposed.<sup>159</sup> The traditional *Hanafi* 'ulamā', who had opposed the 1923 Constitution and revolted, opted to resolve their disagreements with the state regarding Islamic law through the *Jamīyy'āt-i 'Ulamā'*, where they had the right to examine whether state laws complied with their own interpretations of *Hanafi* Islam.<sup>160</sup>

The 1931 Constitution also created a national parliament with legislative power, which consisted of an elected National Assembly<sup>161</sup> and a royally appointed upper House of Nobles,<sup>162</sup> and made the ministers responsible to parliament.<sup>163</sup> As described earlier, under the 1931 Constitution, the parliament—rather than the battleground—really became the hub of disputes between Afghanistan's traditional power-holders (the tribal aristocrats and the 'ulamā') and the newly emerging intellectual elites in the 1950s and 1960s.<sup>164</sup>

Third, the 1931 Constitution arguably helped put Afghans in a better material position by facilitating, at least to some extent, the delivery of public goods. Under the rules of the 1931 Constitution, the Afghan economy received a great stimulus in the 1930s, when Afghan entrepreneurs established different businesses and investment banks.<sup>165</sup> Economically, *Da Afghanistan Bank* (State Bank of Afghanistan) was incorporated in 1938 and opened branch offices overseas, in British India, Munich, and London.<sup>166</sup> Several German, Italian, and Japanese companies responded and maintained branches in Afghanistan until the 1970s.<sup>167</sup> Another bank, the *Bank-i Milli*, which was set up in the 1930s and served as a center for capital accumulation, facilitated the flow of investments from the bank to northern Afghanistan, which contributed greatly to the creation of almost all pre-World War II industrial developments in Pul-i Khumri, Kunduz, and Kabul.<sup>168</sup> The *Bank-i-Melli* contributed greatly to the beginning of industrialization in Afghanistan. Since many members of the royal family

<sup>159</sup> WILBER, *supra* note 116, at 158.

<sup>160</sup> See GREGORIAN, *supra* note 32, at 295; OLESEN, *supra* note 2, at 184.

<sup>161</sup> See AFG. CONST. of 1931, art. 29.

<sup>162</sup> See *id.* art. 67.

<sup>163</sup> See *id.* art. 61.

<sup>164</sup> See DUPREE, *supra* note 5, at 494–500.

<sup>165</sup> *Id.* at 479.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 472.

held large blocks of stock, government cooperation helped sustain stockholders' high profits.<sup>169</sup>

In the area of education, furthermore, the government took some important steps. Nadir Shah reopened many schools, which were shut down during the uprisings against the 1923 Constitution, and built many more.<sup>170</sup> He also founded a literary academy and a medical facility in 1932, which later evolved into today's Kabul University.<sup>171</sup> The government completed a modern road from Kabul to the north that stretched through the Shibar Pass, built several irrigation dams, and drained northern swamps to promote cotton cultivation.<sup>172</sup> Additionally, the government was able to attract foreign aid, especially from the United States, some European countries, and, from the 1950s onwards, the Soviet Union.<sup>173</sup> Using these aids, the government undertook special, five-year development plans that created jobs and helped the economy flourish.<sup>174</sup>

In short, as opposed to the dominant view, the 1931 Constitution of Afghanistan scores considerably high on these metrics of constitutional success. The 1931 Constitution was, by no means, a do-nothing constitution. It maintained peace in the country until 1964.<sup>175</sup> The governing elites of Afghanistan decided to adopt a new constitution in 1963 to replace the 1931 Constitution, only after the Afghan society underwent a remarkable transformation under the rules of the 1931 Constitution.<sup>176</sup> Thus far, the 1931 Constitution is the only constitution in the history of Afghanistan that has been replaced peacefully.<sup>177</sup>

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<sup>169</sup> *Id.* at 473.

<sup>170</sup> SHAISTA WAHAB & BARRY YOUNGERMAN, A BRIEF HISTORY OF AFGHANISTAN 111 (2007).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See DUPREE, *supra* note 5, at 494–500 (discussing how the United States, some European countries, and the Soviet Union provided aid to Afghanistan's government).

<sup>174</sup> *Id.*

<sup>175</sup> See Arjomand, *supra* note 23, at 948–51 (discussing how the 1931 Constitution was a productive and diplomatic document that helped maintain civilized order in Afghanistan until 1964).

<sup>176</sup> See generally *id.* (explaining how Afghanistan transitioned from the 1931 Constitution to the 1964 Constitution).

<sup>177</sup> See generally Kākar, *supra* note 22 (noting how every constitution in Afghanistan, except the 1931 Constitution, has not been replaced peacefully).

## CONCLUSION

The performance of a written constitution can be judged by a variety of benchmarks, which assess how well the constitution facilitates democracy, provides legitimacy for the state, promotes education, facilitates public participation in the political process, channels political conflict through formal institutions, and survives over time.<sup>178</sup> While most Afghan constitutions, except arguably the 2004 Constitution, which is still in force,<sup>179</sup> perform miserably low on all of these metrics, the 1931 Constitution stands out as the only Afghan constitution that performed considerably well on most of these benchmarks.

The success and longevity of 1931 Constitution of Afghanistan suggests some positive lessons for the drafters of constitutions (particularly those in divided societies). First, the longevity of the 1931 Constitution of Afghanistan suggests that it may be useful, in certain circumstances (especially instances of deep division), for the constitution to deliberately leave some divisive constitutional questions unresolved—with the understanding that those controversial questions will be resolved incrementally over time.<sup>180</sup> This strategy might promote agreement among divided groups and incentivize them to work within the system and work towards the future resolution of deferrals to their advantages.

Second, the performance of the 1931 Constitution suggests that constitutional deferral might help incentivize powerful groups, who have the ability to threaten a constitutional order, to resolve their disputes through formal constitutional institutions, rather than through violence.<sup>181</sup> Constitutional deferral does not attempt to answer all of the controversial constitutional questions of a divided society, like Afghanistan. Instead, deferral leaves room for evolution and empowers ordinary political institutions—such as the legislature and the judiciary—to resolve these deferrals in the future. Deferral thus prevents a zero-sum game in constitutional

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<sup>178</sup> See generally Ginsburg & Huq, *supra* note 18, at 118–25 (discussing a variety of benchmarks that can be used to judge the performance of a written constitution).

<sup>179</sup> See *id.* at 116–18 (discussing performance and accomplishments of the 2004 Constitution).

<sup>180</sup> See HANA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (2011); Asli Bâli & Hana Lerner, *Constitutional Design Without Constitutional Moments: Lessons from Religiously Divided Societies*, 49 CORNELL INT'L L.J. 227, 292–97 (2016) (explaining the incremental makings of constitutions in detail).

<sup>181</sup> See, e.g., Pasarlay, *supra* note 107 (discussing the history of the 1931 Constitution and how it may suggest that major stakeholders could be incentivized by constitutional deferral to resolve their disputes through formal institutions).

negotiations. It provides hope to the losers of the constitutional bargain that they may eventually influence those institutions to answer the deferred questions in a way that secures their interests. As this Article discussed, under the 1931 Constitution, the *Loya Jirga* and the *Jamīyy'āt-i 'Ulamā'* played their roles considerably well—resolving the open constitutional questions in ways that discouraged violence and rebellion.<sup>182</sup> The continued debates of formal constitutional institutions regarding these deferred questions further ensured that the 1931 Constitution of Afghanistan survived for more than three decades.

Third, the history of the 1931 Constitution and its governance suggest that resolving vague constitutional questions—in the absence of agreement—might threaten the constitutional order.<sup>183</sup> Indeed, under the 1931 Constitution, the government did not exercise its power to interpret the vague and deferred constitutional questions in a way that offended major stakeholders who had the ability to overthrow the constitutional order.<sup>184</sup> The government's refusal to concretize a particular constitutional practice helped maintain peace for a long time. Under other Afghan constitutions, especially under the 1964 Constitution, by contrast, the government's decision to answer deferred constitutional questions, in the absence of agreement, caused outright violence.<sup>185</sup> Therefore, constitutional deferral and the governmental practice of resolving vague constitutional questions both play a key role in preventing violence and ensuring that constitutions survive longer.

Finally, the performance of the 1931 Constitution adds an important case study to the recent scholarship on assessing constitutional success. By examining the performance of the 1931 Constitution of Afghanistan, we can gain a better understanding of the ways in which a constitution can survive and deliver some greater public goods. We confirm the insights of those who have suggested that constitutions succeed when they create legitimacy for the state, facilitate democracy and the delivery of public goods, prevent violence, and stabilize the state. At the same time, it should be acknowledged that there is no single, universal benchmark against which all constitutions can be evaluated. This Article has primarily tried

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<sup>182</sup> See discussion *supra* Sections III.A & III.B.

<sup>183</sup> See discussion *supra* Section III.A.

<sup>184</sup> See discussion *supra* Section III.A.

<sup>185</sup> See Ginsburg & Huq, *supra* note 18, at 116–20. See generally J. Alexander Their, *The Making of a Constitution in Afghanistan*, 51 N.Y. L. SCH. L. REV. 557, 558–65 (2007) (discussing the overall history of Afghanistan's constitutions and how the 1964 Constitution affected the country by dividing the branches of government).

to test the performance of the 1931 Constitution of Afghanistan against some benchmarks that Ginsburg and Huq have used to test the performance of the 2004 Constitution of Afghanistan, and has found that when tested against some midrange benchmarks of constitutional performance, the 1931 Constitution was a far more successful document than its critics have realized.