ANDREW REYNOLDS

Constitutional Design
Promoting Multi-Ethnic Democracy

The crafting of democracy in a fragile and divided state, often ripped apart by internal conflict or buffeted by international and regional storms, is one of the most difficult and important tasks that international politicians face. The ever-deteriorating conflicts in Iraq and Afghanistan have been driven in large part by mistakes of institutional design in the immediate post-conflict period. Implementing a well-crafted constitution tailored to the peculiarities of a divided nation state is not the solution to ethnic conflict. However, there has never been an enduring peace settlement in which a well-designed, multi-ethnic government was not central. Designing a suitable democracy is a necessary, if not sufficient, prerequisite for stability in a divided society.
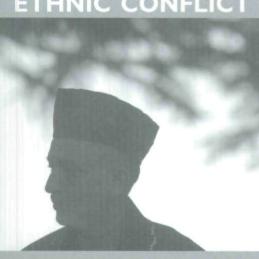
A democracy is an interconnected web of political institutions chosen by and beholden to the voters who fall under its laws and regulations. But that web must be tethered to the distinct cultural, historical, and social threads that bind a state together. A post-conflict constitution needs to reflect traditional ways of making decisions, dominant power centers in villages and cities, and the scope of ethnic divisions—in both their intensity and root causes.

A constitution stipulates the ground rules of the democratic game. Thus I shall use the terms "constitutional design" and "democratic design" interchangeably, although a constitution necessarily speaks to issues beyond the scope and derivation of institutions of governance. A good constitution is a pillar of inter-ethnic harmony, but it is only one pillar. Even when constitutional designers are successful, the new state can be thrown back into violence and chaos by regional conflict or meddling neighbors.

But when it comes to building stability and managing ethnic conflict, well-crafted political structures are the best way of dealing with communal conflicts existing within nation states. A credible and well-developed constitution assuages minority fears and feelings of alienation. In a divided society there are two elements of building ethnic stability. First, each significant ethnic group must feel included and acknowledged in the running of the state. Second, weaker groups and individuals must be protected. It is quite possible for a state to include a minority group in government while not protecting the rights of that group. Alternatively, a state can protect but not acknowledge the minority voice when making decisions of governance. A state can have one without the other, but true ethnic accommodation requires both. Protection is ultimately legal, yet inclusion is a crucial characteristic of good—and workable—politics. Thus I will focus here on the constitutional elements which can manifest inclusion.

Democratic Design in Afghanistan and Iraq

With such burgeoning instability in both Afghanistan and Iraq, one might pose the question: How central is domestic constitutional design to the future of Afghanistan and Iraq? It certainly could be argued that defeating the insurgencies,

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eliminating corruption, and rebuilding each country's socio-economic infrastructure are more pressing problems than imperfect elections and legislative maneuvers. But in fact, the emergence of workable democratic political structures has been central to both states' survival since the US-led occupations, and without attention to institutional design, democratic slippage may doom both countries to increasing fragmentation and violence. A vacuum of legitimate political power, if allowed, will set the stage for insurgency and instability.

The situation in Afghanistan remains a highly complex mosaic of age-old ethnic enmities, power plays, and struggles over religion, nationhood, and wealth. These tensions permeate the state's political discourse and particularly come to a head in debates over how democracy in Afghanistan should be crafted, who will receive power, how leaders will be chosen, and how their power, once bequeathed, will be restrained.
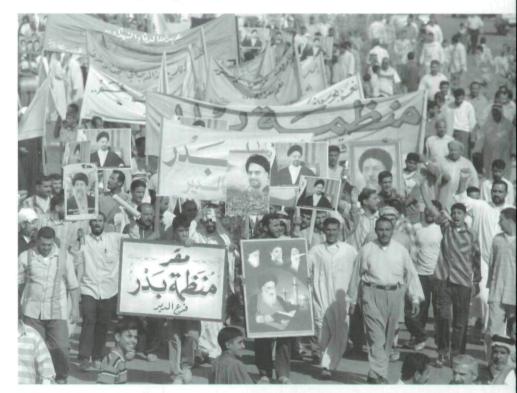
In Iraq, a political and security vacuum marked the first two years of the US-led occupation. The quick establishment of a legitimate government might have constrained the anti-government, sectarian violence that has now spiraled out of control. Today's multi-ethnic Iraqi government has gained some legitimacy, but its emergence was not quick or comprehensive enough to forestall the slide into anarchy, and its leaders continue to play both public and private paramilitary games.

In addition to new constitutions themselves, the processes through which new institutions are chosen can be equally powerful in reducing or exacerbating ethnic polarization. In Afghanistan, both interim and permanent political arrangements were determined by behind-the-scenes horse trading of unsavory elites. The Loya Jirga, the traditional Afghan meeting that selected Hamid Karzai as interim president in 2002, was chaotic and unfocused, with power ceded to strongmen who had been co-opted into the Karzai-US camp. Southern and eastern Pashtuns felt left out of a process that they saw as essentially driven by Tajiks, Uzbeks, and the Northern Alliance. The Constitutional Loya Jirga of 2004 had a more representative membership, but delegates received a copy of the draft constitution only upon their arrival in Kabul and were precluded from making any significant alterations to it.

The process of democratic design in Iraq following the 2003 war was characterized by a series of missteps, misreadings, and errors of judgment on the part of the occupying Coalition Provisional Authority (CPA). The first members of the Iraqi Governing Council chosen by the CPA proved to be ineffective and unrepresentative of Iraqi opinion. US advisors resisted Ayatollah Sistani's early calls for national elections and wasted fruitless months trying to engineer a parliament that would be selected by elite caucuses in major towns. The vacuum of legitimate leadership widened over the next three years, while political violence grew. And despite the technical hand over of sovereignty to Prime Minister Allawi in June 2004 as well as the elections of a Transitional Assembly in January 2005 and a permanent Assembly in December 2005, the situation has continued to deteriorate. While it is technically true that an elected assembly drafted Iraq's constitution and that the document was approved in a national referendum, Sunnis were effectively shut out of both processes. For example, the Transitional Assembly elected in 2005 was virtually devoid of Sunni representatives. Furthermore, the constitution's vagueness on the details of power distribution leaves a troubling potential for future power grabs by the Shi'a majority.

Opposite: **Afghan President Hamid Karzai was elected in Afghanistan's historic elections in 2004 after months of debate over the power of the president.** *Above:* **Numerous Shi'a groups march in support of the new Iraqi constitution in 2005.**

Even if most analysts agree that the implementation of democracy in Iraq and Afghanistan was flawed, there remains enough room in both cases to allow for democratic evolution and institutional reform. With that in mind, it becomes necessary to determine the available instruments in the constitutional designer's toolbox. There are a variety of ways in which power can be apportioned and wielded in a divided state, but three areas dominate prospects for inter-ethnic accommodation: first, power sharing versus winner-take-all government, second, centralized versus decentralized power, and third, electoral design.

Power Sharing

While a number of post-conflict states such as Liberia and the Democratic Republic of the Congo have adopted

and majoritarian. Iraqi institutions are parliamentary, providing for multi-ethnic government and checks on unfettered majority rule. In practice, however, President Karzai has had to include Afghanistan's main ethnic groups in his administration, while in Iraq, Shi'a and Kurds have taken dominant roles over Sunnis.

The interim administration in Kabul has been inclusive on some level, but it has swayed more towards the inclusion of the powerful than the representative. Warlords were let into the tent, but embryonic Afghan civil society movements, lacking armies and clear agendas, were not deemed essential enough to be included in governance. Crucially, the current Afghan government's multi-ethnic composition is not legally codified and exists only at the whim of the sitting president. There is no guarantee that Hamid Karzai, or

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winner-take-all majority rule systems, many other cases have opted for various systems of power sharing between ethnic groups. Occasionally the largest parties in parliament have been required to share seats in the cabinet, such as in South Africa in 1994 and 1999. In Lebanon, religious groups have been guaranteed executive positions, while in Northern Ireland minorities have been granted an effective veto over legislation that affects them. Executive power can be shared in a number of ways—on the basis of electoral support, regional elites, or the recognition of communal blocs. Even when power sharing is not required by law, many fragile governments have sought to informally include former combatants in unity administrations, such as in Sierra Leone and South Africa after 1999.

There is also a choice to be made between presidentialism and parliamentarism. When multiple ethnic groups are competing for power, setting up a scenario in which the presidency is the only prize worth winning may be disastrous to peace settlement efforts. Presidentialism in Africa has a highly suspect track record, with countless strongmen winning power electorally and then systematically advantaging their ethnic group and marginalizing others. Sometimes, the high stakes of presidentialism do not even allow for the survival of democracy after election day. Angola is a prime example: in 1991, the minority candidate, Jonas Savimbi, restarted the war immediately after losing the election.

The government of Afghanistan is formally presidential

any future president, will maintain this balancing act. The Pashtun community was the delivery vehicle for Karzai's 2004 presidential victory. Indeed, this first-round victory might not have materialized if Afghans in Pakistan, who are overwhelmingly Pashtun, had not been allowed to vote. In much of the Hazara center and Uzbek and Tajik north, Karzai was roundly defeated by his ethnic opponents.

In Iraq, it is difficult to imagine any government that would not formally include representatives from the three main ethnic blocs. Today, the president, who holds a largely ceremonial position, is Kurdish, the prime minister Shi'a, and the two deputy prime ministers Sunni and Kurdish. The defense minister is Sunni, as are eight of his cabinet colleagues. In the cabinet at large, there are 22 Shi'a ministers, 8 Kurds, and 1 Christian. There is no formal super-majority or government of national unity requirement in the constitution, but the parliamentary proportional representation system makes coalitions inevitable, while the sharing of executive posts goes beyond an informal norm. Nevertheless, the specifics of how power was to be divided between the Iraqi executive and legislature were lacking in the 2005 constitution. In essence, the rules of the democratic game are being improvised day by day.

In both countries, the executive position is held by the largest ethnic group: the Pashtun in Afghanistan and the Shi'a in Iraq. Both President Karzai and Prime Minister Nouri al-Maliki have to work with legislatures they do not control.

The composition of the Afghan Wolesi Jirga is making the passage of President Karzai's reform agenda exceptionally difficult. There are over 30 different factions represented in the Afghan legislature, and the largest party has only 10 percent of the seats. At any given time, roughly a third of those legislators can be considered pro-government, a third pro-opposition, and a third non-aligned. Such fragmentation mean that each bill must be backed by a majority cobbled together by presidential promises. The Iraqi legislature, by contrast, is more powerful and less fragmented. The Council of Representatives can appoint and dismiss prime ministers and their cabinets, and can also control legislation. Four main blocs—Shi'a, Kurdish, Sunni, and secular—hold 90 percent of the assembly seats, and while the United Iraqi Alliance is in partnership with the Shi'a Daawa Party and the Supreme Council for the Islamic Revolution in Iraq, they nearly hold a parliamentary majority.

Centralization versus Decentralization

The next important question is whether geographic power lies in the capital or in regional centers. This dimension of democratic design is often the most controversial element of a political settlement. Very few countries have opted for the complete federalism typical of Spain, Canada, and Switzerland. In Africa, only South Africa and Nigeria operate within a federalist framework, and it is not particularly strong in either. Sudan's peace agreements envisage a confederal system between governments in the North and South, but leave the West and East out of the process.

The democratic designer has a variety of options from which to choose when it comes to decentralizing power. For example, there can be US-type symmetrical federalism, in which each component part of the federation has equal power, or asymmetrical federalism such as in Spain, where some states have enhanced power. There is cultural autonomy, which is not based on geography, as is the case for Muslims in India, and there is also regional autonomy, which grants a minority group the ability to rule themselves, such as in southern Sudan. There are cross-national communal powers such as the Roma councils in Central Europe, and even the extreme option of secession, as in Eritrea. Indeed, federal and autonomous arrangements could help in a number of countries in which concentrated minorities feel excluded and marginalized: Chechnya in the Russian Federation, Mindanao in the Philippines, Irian Jaya and Banda Aceh in Indonesia, and the Tamils in Sri Lanka.

Iraq and Afghanistan are classic case studies in ethnic polarization, but they have adopted opposite extremes as far as how they have divided power between the center and other regions. Iraq's constitution allows for the creation of powerful "super-state" regions, provinces which come together to

form a larger administrative district. These pose the threat of overwhelming the authority of the central government in Baghdad. Such largely autonomous regions are slated to have tax-raising powers, effective judicial control, and to garner the lion's share of oil revenues from fields currently known to be in their territory. Some see the creation of Sunni and Shi'a administrative regions as an inevitable reaction to the *de facto* Kurdish state, which already exists. Indeed, the asymmetrical autonomy of the Catalan and Basque regions of Spain has been cited as a positive example of concentrated minorities being reassured by self-governing powers. However, one must not overlook the fact that the Spanish constitution explicitly blocks two or more states from coming together as super-states for the very reason that the drafters were fearful of the disintegration of the nation-state as a whole.

In contrast to the Iraqi model and in the face of significant geographical concentrations of mutually distrustful Pashtuns, Hazaras, Uzbeks, and Tajiks, Afghanistan chose to adopt a highly centralized system devoid of federalism or significant provincial or local government. The democratic designers diagnosed Afghanistan's ailment as that of a weak center thwarted in its reform and modernization efforts

DIVIDED DEMOCRACY?

Crucial to national stability is the form of democracy adopted. In the case of Afghanistan, the recent establishment of a non-federal, centralized presidency clashes with the country's ethnically divided constituency. The result has been a tentative and fragile balance between the government and extremist leaders at the expense of accurate ethnic representation.

National Geographic

by a powerful, corrupt, and fragmented periphery. Thus the designers chose to give a large amount of power to the central state in Kabul. Despite the intuition of the diagnosis, the prescription flew in the face of wisdom drawn from other conflicted and fragmented societies. When power is manifested in the regions, there must either be a central monopoly of force to subjugate local strongmen or enough resources to leverage the people away from dependence on the traditionally powerful local elites. The central Afghan state has neither the resources nor the force to achieve either of these goals; the state is purely a paper tiger that relies on shifting alliances to maintain a modicum of control.

Electoral System Design

Elections are the bedrock events of any democracy yet also the institution most open to manipulation. The electoral system, or how votes cast are actually translated into seats, has a huge impact not just on ethnic inclusion or exclusion,

Afghan delegates to the Constitutional Loya Jirga read the new constitution of Afghanistan on January 4, 2004. Though the group had a membership representative of Afghanistan itself, they were not allowed to make substantial changes.

but also on the tone of the entire political system. There has been considerable innovation in electoral system design around the globe. Recent changes and proposed reforms in Palestine, Mongolia, Lebanon, Bosnia, Liberia, Jordan, South Africa, Guyana, and Fiji illustrate a variety of criteria that multi-ethnic states wish to fulfill through their election systems. They include many of the following: first, that the system is perceived to be fair, inasmuch as all major interests are represented in parliament; second, that avoid anomalies in results which would lead to illegitimacy; third, that there is space for multi-ethnic parties; fourth, that women and minorities are given fair access to representation; fifth, that internal party democratization is promoted; and sixth, that the geographic connection between voters and representatives is maintained in the interests of accountability.

When elections were first envisaged for the post-conflict chaos of both Afghanistan and Iraq, international advisers recommended systems of provincially-based proportional representation to elect parliaments in both Afghanistan and Iraq. Unfortunately, neither country chose to follow this advice. Iraq implemented a national List PR system, with disastrous consequences in its Transitional Assembly elections of January 2005. Afghanistan ended up with the Single Non-Transferable Vote (SNTV) system for its legislative elections in September of that year.

The national List PR system worked poorly in January 2005 because it translated low Sunni election turnout into minimal Sunni representation in the subsequent Constitutional Convention. In the months that followed the election, inter-ethnic violence spiraled out of control, and a provincial list system (in which Sunnis gained a proportionate share of the seats regardless of voter turnout) was introduced for the December 2005 elections. Unfortunately, it was a case of too little, too late.

In Afghanistan, widespread distrust of political parties, which are associated with the Communist era, and a misunderstanding of the implications of giving a single vote for individual candidates in large multi-member constituencies triggered a series of unintended consequences. President Karzai changed a provincially based, list PR system to SNTV by simply pronouncing that voters would select a candidate rather than a party, list, or bloc, and that candidates could not show party affiliation on the ballot. The system resulted in a great deal of voter confusion (in Kabul there were 400 candidates for the 33 spots up for election) and a spoilt ballot rate of 5 percent, as opposed to 1 percent in Iraq. The result was a highly fragmented parliament containing over 30 continuously evolving factions with shifting loyalties (in Iraq there are only four main blocs). Over two-thirds of all votes were cast for losing candidates, whereas in Iraq only 5 percent of votes were wasted in this way.

Conclusions: What Might Have Been Better?

There is clearly no constitutional design panacea to the overwhelming democratic challenges in Iraq and Afghanistan. However, substantive changes must be made to the institutions of both countries in order to give them hope for recovery. In Afghanistan, *de jure* power rests in the hands of one man, but more formal recognition of a far more complex reality must be considered. A federal system of decentralization is crucial to the incorporation of democratic elements outside the capital. When there are more prizes to be won, progressive forces are able to gain more of a foothold in government structures. There is also a need

Iraq needs a system in which two magnets are distinctly opposite forces that complement the whole. Powers given out to regional governments need to be balanced by incentives to compete for power at the national level. Any future federal regions must have a degree of autonomy over their own affairs and wealth, but the center must also retain overarching powers to align key areas, such as the legal system, national security, and economic planning. If most of the current and future oil wells are in Shi'a areas, then those regions should receive a significant proportion of the wealth. Yet at the same time, the central state should receive a significant amount of the revenue to be used in Sunni areas

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to formalize power-sharing arrangements at the executive level, in order to reassure minority groups that their voices in government are not dependent on the altruism of the current majority leader. This is critical in placating their fears. One might recognize regional movements as proxies for ethnic interests, while at the same time allowing multi-ethnic movements to compete for and share power. It is also apparent that a stronger legislature, one that is controlled less by the executive, could be a crucial constraint on any president bent on domination. Finally, there is no doubt that a new electoral system is needed to fairly translate votes into parliamentary seats. A mixed system that includes a proportional element has already been proposed and certainly ought to be adopted.

Iraq has similar issues to Afghanistan, with an administration that informally includes majority and minority interests but does not guarantee such a power sharing dynamic into the future. Indeed, the Iraqi constitution remains so vague that it provides few concrete guidelines on the details of governance. The powers of the President, Prime Minister, and Cabinet are murky at best. Above all else, the issue of federalism is crucial to Iraq, and correctly balancing geographic power will go a long way towards providing a foundation upon which the country can stabilize itself. Too much of the debate has focused on a zero-sum game between the center and the regions, over how oil wealth will be distributed, and whether ethnic groups are allowed to monopolize the territory that they control. But in countries where muscular federalism is in functional operation, issues never come down to zero-sum debates.

where natural resources are scarce. Finally, there should be minority inclusion in regional governments. We tend to forget about minorities within minorities, but their interests and rights must be just as strongly protected as larger groups of minorities.

As noted earlier, well-conceived democratic design is a necessary, if not sufficient, condition for political stability. Among the plethora of lessons that Afghanistan and Iraq can teach us, three issues of process stand out. First, and perhaps surprisingly, both cases suggest that when democracy is born, the old elites, warlords, and ethnic strongmen should be marginalized, and space should be created for more democratic leaders to emerge. Using the preexisting, corrupt, and violent leaders as the foundations for the new Afghan and Iraqi states may have appeared unavoidable during the transition period, but a few years later, that foundation has starved the oxygen from new, peaceful, and representative leaders. Second, elections and democracy need to be bottom up, rather than top down. Local and regional elections should develop democratic norms and parties before attempting national elections. A vibrant, sub-national tier of governance has the power to serve as a nursery for sustainable democracy at the national level. Last, and above all else, both Afghanistan and Iraq demonstrate that the state must exist first before a successful democracy can be implemented. Without a monopoly of force or the basic elements of a bureaucracy, even a well designed constitution will do little to promote belief and investment in the new democracy. It is clear that the state must be established first. Then, and only then, will democracy follow. ◨