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CONSOCIATIONALISM VS. INCENTIVISM IN DIVIDED SOCIETIES: A QUESTION OF THRESHOLD DESIGN OR OF SEQUENCING?

Clark B. Lombardi & Shamshad Pasarlay*

ABSTRACT

Scholarship on constitutional design for post-conflict or divided societies focuses a great deal of attention on two issues: (1) the processes and timing by which constitutional rules should be established and (2) whether constitutions should reflect a consociationalist or incentivist approach to governance. Scholars are increasingly willing to entertain the possibility that constitutions drafted during period of transition from civil war or authoritarianism need not, and often should not, answer immediately all questions that constitutions tend to answer; however, they tend to assume that the question of whether constitutions should be consociationalist or incentivist is one that should not be deferred. And, as a practical matter, most constitutions make an initial choice between the two and seem to assume that the initial choice will be a permanent one. This article explores Afghanistan's constitutional history since the fall of the Taliban. It argues that Afghanistan's history sheds light on the strengths and weaknesses of consociationalism and incentivism and provides tantalizing evidence that, as in Afghanistan, people drafting democratic constitutions for a post-conflict or divided society should have prescribed a transition from one type of governance to the other. During a period in which civil wars are raging in many continents and post-conflict constitutions will need to be drafted, the lessons of Afghanistan should prove enormously valuable.

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I. INTRODUCTION

Within the U.S. and international legal academy, there is growing interest in questions of constitutional design for post-conflict societies or for other divided societies undergoing democratic transition. Recent scholarship in this field has focused on several types of questions. Some works compare different types of constitutional drafting processes and try to identify the ones most likely to result in a successful constitution.¹ A second group of works contrasts the different goals that constitution drafters might aim for when they set out to draft an initial constitution for a divided society.² Some suggest that drafters should avoid answering in an initial constitution divisive questions about national identity and government structure.³ A third set of works explores what types of government structure and voting process are most likely to minimize societal divisions over time and lead to an effective deliberative democracy.⁴ This article contributes to

¹ See, e.g., Mark Tus net, *Constitution Making: An Introduction*, 91 TEXAS L. R. 1983 (1984); John Lester, *Forces and Mechanisms in the Constitution Making Process*, 45 DUKE L. J. (1995); Rosalind Dixon, *Constitutional Drafting and Distrust*, 13 I-CON: THE INT'L J. CONST. L. 819 (2016).

² Much of this literature responds to the work of liberal constitutional theorists, such as Bruce Ackerman, who have argued that the moment in which a country emerges from a civil war, and/or overthrows an authoritarian regime, the so-called “constitutional moment,” really is the best time to write up a detailed and entrenched constitution – one whose rules will be difficult to amend? See BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992). Among those who challenge Ackerman are those who argue that, in divided societies, it is advisable to draft a transitional constitution. For an overview of these critiques, see Vicki C. Jackson, *What's in a Name—Reflections on Timing, Naming and Constitution-Making*, 49 WM & MARY L. R. 1249 (2008); See, e.g., Heinz Klug, *CONSTITUTING DEMOCRACY: LAW, GLOBALIZATION AND SOUTH AFRICA'S POLITICAL DEVELOPMENT* (2000); Heinz Klug, *Constitution-making, Democracy and the “Civilizing” of Irreconcilable Conflict: What Might We Learn from the South African Model?*, 25 WISC. INT'L L. J. (2007); ROTI TITLE, *TRANSITIONAL JUSTICE* (2008). Other critics have advocated for constitutional deferral, a process by which drafters leave important questions open for later resolution. See, e.g., HANNA LERNER, *MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES* (2011); see also *CONSTITUTION WRITING, RELIGION AND DEMOCRACY* (Ashli Bâli & Hanna Lerner eds., 2017).

³ Rosalind Dixon & Tom Ginsburg, *Deciding not to Decide: Deferral in Constitutional Design* 9 INT'L J. CONSUL L. 636 (2011).

⁴ For an overview of this body of scholarship, see Suit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law*, in *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION* (Suit Choudhry ed., 2008), and, for examples, see the contributions in

this third body of scholarship.

Scholars who focus on government structure and electoral systems for divided societies have broken into two camps. One group insists that the only feasible approach is “consociationalism.”⁵ Opposed to this are scholars who argue that consociationalism only exacerbates the problems that it is supposed to solve. They prescribe, instead, an approach of “centripetalism” or “incentivism” (this article will use the second term).⁶ Seeing their approaches as mutually exclusive, consociationalists and incentivists have rejected the possibility that one could ever create an effective hybrid.⁷

In recent years, some scholars have cautiously begun to question whether the choice between a consociationalist and incentivist system needs really be as stark as the leading scholars in the field have suggested. Such outliers suggest that, in practice, many divided societies *do* adopt constitutions that include both consociational and incentivist elements, and some have suggested this may be wise.⁸ It is beyond the scope of this article to summarize the hybrid consociational-incentivist systems of governance that these outliers have identified or to evaluate the

CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION (Suit Choudhry ed., 2008).

⁵ See Arendt Lijphart, *Consociational Democracy*, 21 *WORLD POLITICS* 207 (1969); ARENDT LIJPHART, *THINKING ABOUT DEMOCRACY: POWER SHARING AND MAJORITY RULE IN THEORY AND PRACTICE* (2008).

⁶ See generally DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (1985).

⁷ See, e.g., Donald L. Horowitz, *Constitutional Design: An Oxymoron?*, in *DESIGNING DEMOCRATIC INSTITUTIONS* 253, 261 (Ian Shapiro & Stephen Macedon eds., 2000).

⁸ See, e.g., Stefan Wolff, *Review Essay: Building Democratic States after Conflict: Institutional Design Revisited*, 12 *INTERNATIONAL STUDIES* 128-214, 137 (2010); compare with Anna Jars tad, *Power Sharing: Former Enemies in Joint Government*, in *FROM WAR TO DEMOCRACY: DILEMMAS IN PEACEBUILDING* (Anna Jars tad & Timothy D. Sisk eds., 2008), PIPPA NORRIS, *DRIVING DEMOCRACY: DO POWER SHARING INSTITUTIONS WORK?* (2008), Katia Papa Gianni, *Participation and State Legitimation*, in *BUILDING STATES TO BUILD PEACE* (Charles T. Call & V. Wyeth eds., 2008), William Reno, *Bottom-up State building?*, in *BUILDING STATES TO BUILD PEACE* (Charles T. Call & V. Wyeth eds., 2008), Mimi Soderbergh-Kovacs, *When Rebels Change Their Stripes: Armed Insurgents in Post War Politics*, in *FROM WAR TO DEMOCRACY: DILEMMAS IN PEACEBUILDING* (Anna Jarstad & Timothy D. Sisk eds., 2008), Stephen Tierney, *Giving with One Hand: Scottish Devolution within a Unitary State*, in *CONSTITUTIONAL DESIGN* (Choudhry ed., 2008); cf. John Ejobowah, *Integrationist and Accommodationist Measures in Nigeria's Constitutional Engineering: Successes and Failures*, in *CONSTITUTIONAL DESIGN* (Choudhry ed., 2008).

viability of such systems. This article will, thus, assume that hybrids are, indeed, unworkable. It will explore, instead, another possible approach to compromise – constitutional sequencing.

To date, few, if any, countries have written constitutions that prescribe a “sequence” from a consociational system of government to an incentivist one, or vice versa.⁹ Drawing on the experience of Afghanistan, this article will argue that under some circumstances, this type of sequencing may be the only viable option. Part II of this article outlines the current state of the debate about constitutional design for a democratizing divided society. Part III describes the constitutional experience of Afghanistan since the fall of the Taliban in 2001. Part III asks what lessons can be drawn from this history. It concludes that, on its face, Afghanistan’s recent experience is a sobering one. It supports much of the criticism that consociationalists level at incentivism; but, at the same time, it supports the incentivists’ critique of consociationalism. Recent Afghan history suggests that each party has leveled damning criticism at the other, without offering a viable alternative. From this, a pessimist might conclude that divided societies simply cannot be governed democratically. Part IV argues such a conclusion would be premature. Whether or not their constitutions formally require it, divided democratizing countries can, and occasionally do, switch from one approach to another. In Afghanistan’s case, an extra-constitutional, ad-hoc move from incentivism to consociationalism has not solved Afghanistan’s deeper problem. This forces us to ask, however, whether divided societies like Afghanistan might benefit from a constitutionally-mandated switch in the other direction – from consociationalist to incentivist government.

II. SCHOLARSHIP ON DESIGNING DEMOCRATIC CONSTITUTIONS FOR DIVIDED SOCIETIES

Interest in divided societies has grown steadily in recent

⁹ Ginsburg and Dixon point to one case study in which a country resolved a debate about consociational versus incentivist structures by a constitutional “revisit” approach. The initial constitution included provisions that reflected an incentivist philosophy, as well as a provision calling for the country after a period of time to review those provisions and, if they had been counterproductive, to abandon them for consociationalist provisions. Dixon & Ginsburg, *supra* note 3, at 651 (discussing Brazil’s 1988 Constitution).

decades. It was initially provoked questions about the mixed record that formerly authoritarian European countries racked up during the last quarter of the twentieth century as they tried to move from authoritarian to democratic governance.¹⁰ In those decades, a number of European countries abandoned authoritarian forms of government in favor of a democratic parliamentary form of government either on the Westminster model or a modified Westminster model.¹¹ Only some of these transplantations, however, resulted in effective democratization. Those that took place in the 1970s and 80s tended almost uniformly to be successful, resulting in parliamentary democracies with strong legitimacy and effective governance; by contrast, the democratic transitions that took place in Central and Eastern Europe after the fall of the Soviet Union often failed.¹²

When scholars sought to explain the different outcomes in different countries, they noticed an interesting pattern. Westminster/quasi-Westminster parliamentary democracies tended to succeed in countries that were not “divided societies” and tended to fail in countries that were “divided societies.” A divided society, as they saw it, was one in which two factors are simultaneously in play. First, the polity is diverse. Second, crucially, its diverse ethno-cultural, religious, or other communities are politically mobilized.¹³ That is to say, political and economic decisions are dictated primarily by a person’s communal identity. In other words, a citizen’s primary loyalty is to her community rather than to her fellow citizens. In such a society, citizens can reliably be expected to vote only for a candidate who came from their community. Once in office, an elected official tends to promote the interests only of citizens who belong to her community.¹⁴ In a series of works, scholars like Arend Lijphart and Donald Horowitz explained convincingly why Westminster parliamentary democracy tended to fail in divided societies. They disagreed, however, on the solution to the problem. That is to say,

¹⁰ See Choudhry, *Bridging Comparative Politics*, *supra* note 4, at 5.

¹¹ On the distinctions between these, see generally Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L.R. 633 (2000).

¹² Arend Lijphart, *The Wave of Power-Sharing Democracy*, in *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY* 37 (Andrew Reynolds ed., 2002).

¹³ Ian Lustick, *Stability in Deeply Divided Societies: Constitutionalism versus Control*, 31 *WORLD POLITICS* 325, 325 (1979).

¹⁴ See Choudhry, *Bridging Comparative Politics*, *supra* note 4, at 5; Lustick, *supra* note 13, at 325.

they disagreed on the question of what sort of democratic political system would succeed in the divided societies that could not be governed by Westminster-style parliamentary democracy.

In a Westminster system, elections to parliament take place on the basis of single-member, plurality voting, also referred to as “first-past-the-post” or FPTP voting.¹⁵ (Each registered voter in a defined area is allotted one vote, which they can cast for their preferred candidate. At the conclusion of the election, the candidate with the most votes wins.) Usually, though not always, a single party commands a majority in the legislature. The majority party (or coalition) selects the prime minister, who serves as head of the executive branch, along with the rest of the cabinet. Such a system is well suited to produce stable elected governments for a society that is not communally “divided.” In such societies, electoral losers are willing to accept the legitimacy of the overall political system because they feel that the system is not irretrievably rigged against them. Parties differentiate themselves on the basis of policy, and a party that loses an election can tweak its policy platform in future years to win votes from people who had previously voted for their opponents. A party that loses in one year can reasonably expect to win a future election and thus has an incentive not to resist election results by force. Conversely, parties in power govern in full knowledge that they will at some point lose; and, accordingly, the party in power at any particular point in time has incentives not to abuse its power.¹⁶ By contrast, a Westminster-style parliamentary system is unlikely to produce a stable democratic regime in a divided society. This is because in a divided society parties associated with a minority group may reasonably doubt that they will ever win a democratic election. In these societies, people tend to vote on the basis of their ethnicity (which never changes) or religious affiliation (which tends to change slowly, if at all). A party or coalition that runs candidates from a majority community and promotes the interests of that community will be able to win every election, no matter how abusive their policies are.¹⁷ By extension, parties representing the interests of minority communities will permanently be excluded from political office, and members of their community will suffer.

¹⁵ Choudhry, *Bridging Comparative Politics*, *supra* note 4, at 17.

¹⁶ *See id.*

¹⁷ AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 3-4 (1977), *compare with* Choudhry, *Bridging Comparative Politics*, *supra* note 4, at 17.

In such a system, the interests of minority communities, even large ones, can be ignored. Since minority groups cannot protect their interests through the regular political process, members of small communities cease to see the advantage of participating in the democratic process at all. When possible, they resort to extra-constitutional resistance, and in many cases civil war breaks out. Lijphart said in 1985 that for all practical purposes, when it comes to the members of a minority community in a divided society, Westminster democracy is basically “no democracy at all,”¹⁸ and Horowitz agreed.¹⁹

Seeing that Westminster and quasi-Westminster democracy are doomed to fail in a divided society, scholars like Lijphart and Horowitz struggled to imagine a different type of democratic system that might fare better. All agreed that effective democratic constitutions will have to address three distinctive challenges.²⁰ Great care must be taken to ensure that (1) an elected government will be trusted by all communities and will represent the interests of all; (2) the political system will encourage, over time, political cooperation across community lines – cooperation of a sort that is likely to build further trust between members of rival communities; and, (3) the experience of electing governments and being governed under them will, ideally, lead people to value their identity as citizens of the diverse state as much as they value their identity as members of their ethnic or religious community.

If they agreed on the qualities that the government of a divided society should have, however, Lijphart and Horowitz disagreed deeply about what sort of government would best realize those qualities. Each championed a very different approach to electing and organizing the government of a divided society.

A. Rival Solutions: Consociationalism vs. Incentivism

Scholars of divided societies have proposed two contrasting approaches to democratic governance in a divided society.²¹ A

¹⁸ See AREND LIJPHART, POWER-SHARING IN SOUTH AFRICA 13 (1985).

¹⁹ Donald Horowitz, *Conciliatory Institutions and Constitutional Processes in Post Conflict States*, 49 WILLIAM & MARY L. R. 1213, 1215 (2008).

²⁰ For a discussion of some questions, see generally Clark B. Lombardi & Shamsah Pasarlai, *Constitution-Making for Divided Societies: Lessons from Afghanistan*, in CONSTITUTIONALISM IN CONTEXT (David Law ed., forthcoming 2019).

²¹ See, e.g., Katherine Belmont, Scott Mainwaring & Andrew Reynolds,

group of scholars, associated with Lijphart and his students, insist that divided societies can be governed democratically only through a form of “consociational” government.²² The argument for consociationalism is premised on the idea that divided societies are most likely to be governed democratically when the constitution establishes a structure of government and election rules that together guarantee each of the country’s politically important communities the ability to influence government policies in areas of serious concern to the community.²³ According to Lijphart and like-minded scholars, consociational government is absolutely necessary whenever one community in a divided society has more than 50% of the voting population and can effectively govern. Consociational government is effective in many other types of divided society too.

What is consociational government? Such governments always include a grand coalition executive, meaning that all important rival groups should be included and allowed to exercise some meaningful power in government.²⁴ It usually includes, as well, segmental autonomy in either a territorial or corporate form.²⁵ That is to say, the state will delegate power to a territory that is dominated by a particular community or alternatively it will guarantee a certain degree of executive or legislative power to community leaders. Through such mechanisms communities gain control over issues of particular concern to them. Two additional features that consociationalists often favor are mutual veto rights on matters of vital importance to rival communities and proportionality in political representation, including in the legislature, civil service appointments, and the allocation of public funds.²⁶ By giving mutually distrustful communities guarantees of political power, usually including veto rights, Lijphart’s “consociational” model of governance tries to create the

Institutional Design, Conflict Management and Democracy, in THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT AND DEMOCRACY (Andrew Reynolds ed., 2002); Choudhry, *Bridging Comparative Politics*, *supra* note 4.

²² See, e.g., LIJPHART, *supra* note 18.

²³ Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96, 97 (2004).

²⁴ LIJPHART, *supra* note 18, at 25–47.

²⁵ *Id.*

²⁶ See *Id.* at 25–47; Arend Lijphart, *Consociational Democracy*, in THE OXFORD COMPANION TO POLITICS OF THE WORLD 188–89 (Joel Krieger ed., 1993); compare with Choudhry, *Bridging Comparative Politics*, *supra* note 4, at 18–19.

conditions in which communities will be willing, however grudgingly, to work together. This will hopefully allow these communities to experience the benefits of cooperating rather than fighting. On this foundation, consociationalists argue, trust and more effective cooperation can be built. Over time, ideally, consociational guarantees will no longer be needed.

Challenging the claims of consociationalists are “incentivists,” a group associated with Donald Horowitz and his students. Incentivists reject consociationalism as impractical and ultimately counterproductive.²⁷ They point out that in many divided societies, important communities have little incentive to participate in a consociational democracy.²⁸ Most importantly, if any communal group in a country makes up more than 50% of the population, that group will rarely have any reason to agree to a consociational compromise. Incentivists argue, therefore, that consociation is likely to be accepted only where (1) minorities have taken up arms and have forced a majority group to compromise or where (2) there is no clear majority and when the structure of government precludes coalitions of ethnic groups from cooperating politically to the detriment of others.²⁹ Furthermore, even in these rare cases, some parties will come to regret their agreement to participate in consociational government. For example, if a majority is compelled by violence to accept a consociational form of governance, that majority is likely to resent the situation going forward and to undermine or repudiate the consociational bargain as soon as it thinks it has the military power to impose its will. In countries with no dominant community, consociationalism might last longer. In such countries, however, incentivists argue that consociational government always devolves over time in a way that renders the government ineffective, illegitimate, or both.³⁰

²⁷ See generally Donald Horowitz, *Democracy in Divided Societies*, 4 J. OF DEMOCRACY 18 (1993). For a detailed response to Horowitz’s criticisms, see Lijphart, *The Wave of Power-Sharing Democracy*, *supra* note 12, at 40–45.

²⁸ Horowitz, *Constitutional Design*, *supra* note 7, at 20.

²⁹ Horowitz, *Conciliatory Institutions and Constitutional Processes*, *supra* note 19, at 40–48; Choudhry, *supra* note 4, at 20.

³⁰ In consociational democracies, the electoral systems are structured in a way that guarantees that communities will be represented by a member of their own community, and this person is understood to be the figure who will have responsibility for promoting their interests against the interests of other communities. Members of a particular community thus have every incentive to make sure that this seat is held by someone who will represent their interests most vigorously. Choudhry, *Bridging Comparative Politics*, *supra* note 4, at 20–21.

For one, federalism and proportional representation (PR) in parliamentary elections each tend to result in the election of extremists rather than moderates from rival ethnic or religious parties.³¹ Furthermore, minority vetoes tend to be abused and to promote gridlock that will in turn lead people to question the effectiveness and legitimacy of their government.

To incentivists like Horowitz, then, consociationalism is a poor solution to the problem of democratic governance in a divided society. It is unlikely to be adopted in the first place, and, where it is adopted, it will exacerbate the communal tensions that it is supposed to solve.³² Instead of dividing political offices among people based on the community that they come from, the system should reward parties and politicians who are willing to reach out to members of communities outside their own and establish policies that promote the interests of people who belong to rival communities. As an alternative to consociation, incentivists propose that divided societies establish highly centralized, unitary governments headed by a strong president. Importantly, however, those presidents must be elected through voting systems that benefit moderate politicians who are able and willing to work with politicians representing rival communities.³³

What voting systems are likely to incentivize moderate politicians to seek votes from members of other communities and likely to provide moderates with more votes from other communities than they lose from communal extremists who abandon them? The best such system was said to be the “alternative vote: system” (AV).³⁴ The possibility of vote transfers in such a system encourages candidates to appeal for support across ethnic lines. It thus creates incentives for moderation.

The battle between consociationalists and incentivists continues to resonate to this day, both within the academy and

³¹ PR systems penalize rather than incentivize moderate political behavior across ethnic lines.

³² Horowitz, *Constitutional Design: An Oxymoron?*, *supra* note 7, at 256-257.

³³ DONALD HOROWITZ, A DEMOCRATIC SOUTH AFRICA?: CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY 461 (1991).

³⁴ In such a system, voters are asked to rank candidates in order of preference. If no candidate is successful after first preferences have been counted, the bottom candidate is dropped from the ballot and votes cast for that candidate are distributed according to the second preferences. AV gives parties that represent a majority community a compelling reason to seek votes from members of minority communities. Doing so will allow them to get an absolute majority through second preferences.

among people who draft constitutions for divided societies.

B. Must a Constitution Choose Consociationalism or Incentivism?

No constitution ever answers all possible questions about the nature of the country or the structure of government. Some scholars have suggested that, in divided societies emerging from crisis, constitutions should not provide answers to the most divisive questions about national identity, rights, or, even sometimes, governmental structure.³⁵ To this end, some scholars have proposed drafting “transitional constitutions” designed to operate for only a short period of time, after which they will be replaced by a permanent constitution.³⁶ Even if people feel compelled to draft a permanent constitution at the outset, they can draft it in a way that ‘defers’ on important questions.³⁷ That is to say, drafters can identify questions that are particularly divisive at the time of drafting and can delegate to the political branches the power to resolve those questions in the future – simply by enacting a law to deal with the issue. Alternatively, those who draft constitutions for a divided society can choose in places to use deliberately ambiguous language, leaving it for constitutional interpreters (possibly legislators and possibly judges) to resolve the divisive issues at a later date.³⁸

As we have discussed in another work, scholars have in recent years produced a number of interesting works on constitutional deferral. Tom Ginsburg and Rosalind Dixon have used large (n) studies to create typologies of deferral and to draw some initial lessons about which types of deferral are productive and which are likely instead to create stress and potentially shorten the lifespan of a constitutional regime.³⁹ Lombardi, Pasarlay, Lerner, and Bâli have each used case studies to explain why under certain conditions, certain types of divided societies have benefited from a practice of constitutional deferral.⁴⁰ Taken

³⁵ LERNER, MAKING CONSTITUTIONS, *supra* note 2; *see also* CONSTITUTION WRITING, RELIGION AND DEMOCRACY (Asli Bâli & Hanna Lerner eds., 2017).

³⁶ *See* the texts in *supra* note 2 above.

³⁷ Hanna Lerner, *Constitution Writing in Deeply Divided Societies: The Incrementalist Approach* 16 NATIONS AND NATIONALISM 68 (2010).

³⁸ Lombardi & Pasarlay, *supra* note 20.

³⁹ *See* Ginsburg & Dixon, *supra* note 3.

⁴⁰ Clark B. Lombardi, *The Constitution as Agreement to Agree: The Social and*

together, these studies suggest that deferral can, under certain circumstances, make sense. Sounding a cautionary note, however, Dixon and Ginsburg point out that deferral can also overtax political institutions.⁴¹ While more case studies are needed, the limited evidence available suggests that a divided society which aspires to be ruled democratically may reasonably choose to defer on a number of questions, but it should resolve very early (in the constitution or shortly afterwards) the question of whether the state should be governed according to a philosophy of consociationalism or incentivism.⁴²

Certainly, at the time they sat down to write a new constitution in 2004, Afghanistan's elites shared the intuitions of Ginsburg and Dixon. Apparently feeling that the choice of consociationalism vs. incentivism was an either/or choice, they debated and selected one approach to governance – one that, supposedly, they expected to apply indefinitely. Ultimately, they chose an incentivist system. Afghanistan's experience living under that system sheds important light on the relative advantages of consociationalism or incentivism for divided societies, and it suggests an innovative new approach to constitutional drafting that might allow countries over time to enjoy the best of each system.

III. AFGHANISTAN'S RECENT CONSTITUTIONAL HISTORY

Afghanistan provides us with a textbook example of a state

Political Foundations (and Effects) of the 1971 Egyptian Constitution, in THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 398 (Dennis Galligan & Mila Versteeg eds., 2013), Shamshad Pasarlay, "Making the 2004 Constitution of Afghanistan: A History and Analysis through the Lens of Coordination and Deferral Theory" (Ph.D. dissertation, University of Washington School of Law, 2016); Asli Bâli & Hanna Lerner, *Constitutional Design without Constitutional Moment: Lessons from Religiously Divided Societies*, 49 CORNELL INT'L. L. J. 227 (2016); Shamshad Pasarlay, *Rethinking Afghanistan's Longest-Lived Constitution: The 1931 Constitution through the Lens of Constitutional Endurance and Performance Literature*, 10 ELON L. REV. 283 (2016).

⁴¹ To illustrate the problem, Ginsburg and Dixon point to the example of Iraq after the U.S. Invasion of 2003, which illustrates, to their minds, the dangers of deferral on questions of voting systems—a deferral that leaves open the question of whether the government will be consociational or incentivist. See Ginsburg & Dixon, *supra* note 3, at 661–665.

⁴² *Id.*

that is supposed to regulate a deeply divided polity. From the time Afghanistan was recognized as a nation in the late 19th century, its citizens have identified with one of a multitude of distinct communities – ethnic communities, linguistic communities, and religious communities.⁴³ Communal identity has always had political salience. Afghans have tended to trust members of their community more than members of other communities. And their trust has generally been rewarded. Leaders have generally promoted the interests of the communities from which they hailed.⁴⁴

Communal divisions deepened during 25 years of civil war between 1976 and 2001, a period in which communities came to rely on their communal militias for protection.⁴⁵ In 2001, U.S.-led forces invaded Afghanistan; and, in the wake of this invasion, the international community sought to help Afghans establish a democratic government.⁴⁶ After years of communal fighting, Afghans tended to look to the leaders of communal militias or figures close to these leaders. They looked to these figures to represent their interests in the new government.

From 2001 to 2004, representatives of Afghanistan's mistrustful communities drafted, debated, and ratified a constitution that was supposed to usher in a period of democratic governance.

A. The Drafting of Afghanistan's 2004 Constitution

In 2001 after the invasion of Afghanistan by an international force led by the United States, the international community

⁴³ Among the various major Afghan ethnic/linguistic groups are the Pashtuns and Tajiks (the two largest) followed by Hazaras, Uzbeks, and a host of smaller, but regionally significant, minorities, such as Baluch and Turkmen. VARTAN GREGORIAN, *THE EMERGENCE OF MODERN AFGHANISTAN: POLITICS OF REFORM AND MODERNIZATION, 1880–1946*, 25–38 (1967). THOMAS J. BARFIELD, *AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY* 23–32 (2010). (In addition, Afghanistan is deeply divided along religious lines. Even within a single ethnic group, one can find communities embracing different sects (Sunni or Shi'a); and, within a particular sect, one can find dramatically different approaches to the faith. See generally *AFGHANISTAN'S ISLAM: FROM CONVERSION TO THE TALIBAN* xiii (Nile Green ed., 2016).

⁴⁴ See Lombardi & Pasarlay, *Constitution-Making*, *supra* note 20.

⁴⁵ See generally LARRY GOODSON, *AFGHANISTAN'S ENDLESS WAR* (2001); see also WILLIAM MALEY, *THE AFGHANISTAN WARS* (2009).

⁴⁶ See Barnett Rubin, *Crafting a Constitution for Afghanistan*, 15 *J. OF DEMOCRACY* 5 (2004).

committed itself to promote a new regime of stable, democratic government in Kabul. With the assistance of powerful international actors, a meeting was held in Bonn, Germany, where powerful figures represented a variety of mutually hostile communities with militias.⁴⁷

At the meeting in Germany, the participants signed a power-sharing agreement, the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, commonly known as the Bonn Agreement.⁴⁸ This Agreement set a timetable for a two-year transitional period in which a transitional administration would be set up and would supervise the drafting of a new constitution.⁴⁹ Hamid Karzai, the hereditary head of a Pashtun tribe that had been active in Afghanistan's civil war, was appointed president of the Transitional Administration.

In October 2002, Karzai appointed by decree a nine-member commission to prepare the first draft of the constitution.⁵⁰ The nine-member Constitutional Drafting Commission (CDC) included representatives from the most powerful political and military factions in Afghanistan, except for the Taliban. Its members represented groups with different and rival ideological, political, ethnic and regional commitments.⁵¹ The CDC identified a number of key questions of constitutional design that would ideally be resolved before a constitution was drafted. These included (1) if and how power should be separated – both horizontally or vertically; (2) whether the state should recognize Islam as an official religion, if so, how specifically should the state identify the particular version of Islam that would serve as the official religion, and should principles embedded in the official religion constrain the legislative, executive, or judicial discretion of the state; (3) what fundamental rights should the state be

⁴⁷ J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 NEW YORK LAW SCHOOL LAW REVIEW 557, 559 (2006-07).

⁴⁸ *Id.*

⁴⁹ Special Representative of the Secretary-General for Afghanistan, Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, transmitted to the Security Council by the Secretary-General, Art. I: 6, U.N. DOC. S/2001/1154, 1155 (Dec. 5, 2001), <http://www.un.org/News/dh/latest/afghan-agree.html>.

⁵⁰ Decree No. 141 of the President of the Transitional Administration of Afghanistan, Hamid Karzai, on the Appointment of the Constitutional Drafting Commission (Oct. 2002).

⁵¹ Thier, *supra* note 47, 566–567.

obliged to respect; and, finally, (4) what institutions should be entrusted with the power to interpret and enforce the constitution.⁵²

Failing to form a minimum consensus on the last three questions, and worried that time was running out, the CDC decided temporarily to defer consideration of these questions. This decision enabled the members of the commission to prepare a first draft of a constitution – albeit one with significant lacunae. Karzai then appointed a larger Constitutional Review Commission (CRC), which revised the CDC draft and submitted it to a Constitutional *Loya Jirga* (CLJ) – a constituent assembly that would have the authority to debate, revise if necessary, and ultimately adopt Afghanistan’s first constitution of the twenty-first century in 2004.⁵³

In revising the CDC’s initial draft constitution, the Constitutional Review Commission remained deeply divided on questions of Islam, national values, and judicial review. In another work, Pasarlay has recently discussed in detail how the deadlock was broken only when the CRC agreed to engage in constitutional deferral, leaving unanswered a number of controversial questions about Islam, rights, and judicial review.⁵⁴ Because the political branches were given enormous freedom to answer questions that would normally be answered in a constitutional text, the CRC felt compelled to design carefully the country’s political institutions. The CRC debated at length questions of government structure and electoral system. After much discussion, it rejected consociationalism and prescribed for the country an incentivist style of government.

To understand the debate within the CRC and the Commission’s final decision, it is important to remember that in Afghanistan Pashtuns are slightly under 50% of the population. Tajik, Hazara, and Uzbek communities make up most of the remainder, alongside some smaller communities.⁵⁵ Everyone assumed, correctly it turns out, that voting in post-Taliban

⁵² Lombardi & Pasarlay, *supra* note 20.

⁵³ Pasarlay, “Making the 2004 Constitution,” *supra* note 40, at 172–255; Shamshad Pasarlay, *The Limits of Constitutional Deferral: Lessons from the History of the 2004 Constitution of Afghanistan*, 27 WASHINGTON INT’L L. J. 683 (2018).

⁵⁴ See generally Lombardi & Pasarlay, *supra* note 20; Pasarlay, *Limits of Constitutional Deferral*, *supra* note 53.

⁵⁵ BARFIELD, AFGHANISTAN: *supra* note 43, at 23–32.

Afghanistan would proceed as it typically does in divided societies, with members of a community invariably voting for candidates who came from their community. At both the CRC and, eventually at the CLJ, the popular body that formally adopted the 2004 Constitution, members allied with the Pashtun acting president, Hamid Karzai, predictably favored a strong presidential system with a president elected by a simple majority/plurality. They assumed that Pashtuns, who were the largest ethno-linguistic community in Afghanistan, would vote uniformly for a Pashtun president. A Pashtun would always hold the presidency; and, in order to maintain his support among fellow community members, s/he would promote their interests at the expense of others.⁵⁶ For obvious reasons, members of other communities were skeptical about a strong presidency elected through a simple majority/plurality vote.⁵⁷ They insisted that the constitution should include provisions to soften the impact of a permanent Pashtun presidency. They were internally divided, however, on whether the constitution should achieve this end by adopting consociational guarantees or, instead, by requiring incentivist voting systems.

Some CRC non-Pashtun members wanted to include a number of consociational elements in the government.⁵⁸ For example, federalism or expansive grants of regional autonomy were proposed.⁵⁹ Among the CRC members who favored such provisions, some also wanted to use a form of list PR to elect the legislature.⁶⁰ Others pushed for communal vetoes over important issues of concern for minority groups. Finally, some proposed a semi-presidential model with the prime-ministership reserved for a non-Pashtun.⁶¹ Partly on their own and partly after pressure from

⁵⁶ Golnaz Esfandiari, *Loya Jirga Approves Constitution, But Hard Part May Have Only Just Begun*, RADIO FREE EUROPE, 2004, <https://www.rferl.org/a/1340558.html> (accessed Dec. 4, 2018).

⁵⁷ *Id.*

⁵⁸ Pasarlay, "Making the 2004 Constitution," *supra* note 40, at 231–34.

⁵⁹ During the civil war, Afghanistan effectively had been partitioned into regions controlled by 'warlords.' It was felt that delegations of *de jure* power to regions would be, for all practical purposes, delegations of *de jure* power to warlords and might embolden them to threaten the government or to push for secession. The framers believed that a centralized state with a powerful president at its head could counter the influence of powerful warlords and help hold the country together.

⁶⁰ Andrew Reynolds, *Electoral Systems Today: The Curious Case of Afghanistan*, 17 J. DEMOCRACY 104, 106 (2006).

⁶¹ Pasarlay, "Making the 2004 Constitution," *supra* note 40, at 174–235

the international community, a majority of the members of the CLJ rejected almost all of these consociational proposals.⁶² Echoing the arguments of incentivists like Donald Horowitz, a majority of CRC members ultimately concluded that consociational arrangements would politicize ethnic differences and threaten Afghanistan's fragile stability. Instead of granting consociational guarantees, then, they instead put their faith in incentivism.⁶³

Among its incentivist strategies, the 2004 constitution prohibits ethnic and sectarian political parties.⁶⁴ This rule was designed to encourage multiethnic political parties, with the hope that this would encourage institutions that promoted compromise among political leaders from different communities. Similarly, the government rejected a proportional electoral system, which facilitates segmental appeals.⁶⁵ Instead, the constitution requires the president to run with two vice-presidential candidates.⁶⁶ In theory, a team with representatives from three different ethnic and sectarian groups should always beat a team that had representatives from less than three. In the most likely scenario, the president would be from the largest ethnic group, the Pashtuns, while his vice-presidents would be from other ethnic groups (chiefly, the Tajiks, Uzbeks, or Hazaras). Such a system encourages pre-election pacts across ethnic and sectarian lines that would promote political allegiances that transcend groups. It would also lead the president from the largest ethnic groups to moderate his/her behavior while in office and require the vice-presidential candidates to do exactly the same for their political pacts.

(discussing the post of a prime minister in the earlier drafts of the 2004 constitution).

⁶² Western powers wanted Afghanistan to be governed by a strong executive who had unilateral discretion to sign agreements with foreign countries. Without such a figure at the center of the government, Western powers indicated they might be unable or unwilling to finance Afghanistan's rebuilding or negotiate the terms under which Western powers would provide security in the new state. On this point, see the discussions in ZALMAY KHALILZAD *THE ENVOY: FROM KABUL TO THE WHITE HOUSE, MY JOURNEY THROUGH A TURBULENT WORLD* (2016).

⁶³ The few exceptions were limited ones designed to answer non-negotiable demands by smaller ethnic and religious minorities such as the Uzbeks and the primarily Shi'a Hazara. For example, the constitution includes limited provisions for the devolution of power to localities and gives Shi'a the right to be governed by a special family law.

⁶⁴ Constitution of Afghanistan, Art. 35.

⁶⁵ Reynolds, *supra* note 60, at 107.

⁶⁶ Constitution of Afghanistan, Art. 60.

Finally, and most importantly, the presidential ticket is to be elected according to a majority run-off system.⁶⁷ This is not an alternative vote (AV) which Horowitz proposed, but one designed to achieve similar goals. If no candidate wins 50% plus one of the votes, the constitution also requires a second run-off election between the number one and number two finishers.⁶⁸ As Lijphart has noted, for all practical purposes, AV simply accomplishes in one round of voting what requires two ballots in the majority-run-off system.⁶⁹ As in AV, in majority run-off, the lower ranked candidates are eliminated in the first round, and the leading two candidates, who go through to the run-off, have to compete for the votes of the eliminated candidates in the first round. The competition for these votes in the run-off should result in political pacts before the second run-off, thereby leading to moderate behavior on the part of the front-runners.

The decision to adopt an incentivist structure of government rather than a consociational was contested, albeit unsuccessfully. The CRC draft could only become law after being debated and ratified by the CLJ, an elected body that served as the official constituent assembly. CLJ members representing minority communities opposed the draft constitution precisely because it contained almost no consociational guarantees. In particular, they protested the decision to adopt a strong presidential system, rather than a semi-presidential system in which the prime minister would be a non-Pashtun.⁷⁰ Ultimately, the CLJ agreed to ratify the constitution, but only on the express condition that the decision to adopt a presidential system would be revisited after two to three terms—and, if appropriate, the constitution would be amended to include a post for a prime minister. President Karzai gave a speech stating that he accepted this condition and that the review would take place, and the constitution passed.⁷¹ Nevertheless, the promise to reconsider the question of semi-presidential government was the only nod towards consociationalism in the 2004 constitution.

⁶⁷ Constitution of Afghanistan, Art. 61.

⁶⁸ *Id.*

⁶⁹ Lijphart, *The Wave of Power-Sharing Democracy*, *supra* note 12, at 48.

⁷⁰ Pasarlay, "Making the 2004 Constitution," *supra* note 40, at 233; Hamid Karzai, "Address to the Constitutional Loya Jirga Closing Session by the President of the Transitional Administration of Afghanistan, Hamid Karzai" (Jan. 4, 2004).

⁷¹ Pasarlay, "Making the 2004 Constitution," *supra* note 40, at 233.

B. The Failure of Incentivism and Incremental Embrace of Consociation

As good as they may have seemed on paper, Afghanistan's incentivist institutions failed to achieve the results that Afghanistan's constitution-makers had hoped. Apparently, communal enmities had hardened so much during the course of the brutal civil war of the 1990s that they simply could not be overcome. Although the 2004 constitution largely rejects consociationalism in favor of incentivism, the leaders of Afghanistan's rival communities never really trusted government officials to represent the interests of anyone other than members of their own community.⁷² In practice, a *de facto* system of consociational democracy emerged, and recently the country has taken a large step towards formalizing that turn to consociationalism.⁷³

Because no community has an overwhelming demographic majority in Afghanistan and because minority groups are heavily armed, consociationalism looks attractive to many Afghans.⁷⁴ And notwithstanding the constitution's rejection of it, *de-facto* consociationalism began to appear. Despite significant efforts by candidates to moderate their language and platforms and reach out to ethnic groups other than their own, voters in both legislative and presidential elections remained unswayed. Recent data shows that in legislative elections they continue almost uniformly to cast their votes for candidates of their own ethnicity and religion. Because Hazaras and Uzbeks tend to vote as their communal leaders recommend, Hazara and Uzbek leaders tended to offer their support to candidates from their community or—in regions where they were a minority—to candidates who were willing to support the programs of their communities' representatives in parliament.⁷⁵ Not surprisingly, despite the constitution's clear prohibition of ethnic and sectarian political parties, *de facto* ethnic

⁷² Lombardi & Pasarlay, *supra* note 20.

⁷³ See *Afghan Leaders Sign Power Sharing Deal*, THE GUARDIAN, Sept. 21, 2014, <https://www.theguardian.com/world/2014/sep/21/afghanistan-power-sharing-deal-abdullah-ashraf-ghani-ahmadzai>.

⁷⁴ See the discussion above in the text accompanying notes 55–57.

⁷⁵ Mohammad Bashir Mobasher, *Understanding Ethnic-Electoral Dynamics: How Ethnic Politics Affect Electoral Laws and Election Outcomes in Afghanistan*, 51 GONZAGA L. R. 355, 355–415 (2016).

and sectarian political parties began to emerge.⁷⁶

A similar pattern has held true in presidential elections: individuals mostly cast their votes for the candidate of their own ethnic and sectarian group.⁷⁷ To stand a chance of winning, one must be a member of one of Afghanistan's two largest ethnic groups, the Pashtuns and Tajiks. Members of smaller communities, such as the Hazaras and Uzbeks, vote only for candidates who have nominated a member of their community as a vice-president. Hazara and Uzbek leaders have formed political pacts with former Pashtun president, Hamid Karzai, not because Karzai was moderate on divisive issues but because Karzai was likely to win and offered them powerful positions in his cabinet – effectively offering them a share of executive power that they could use to ensure that they had a say in policy-making.⁷⁸

Notwithstanding the constitution-makers' rejection of consociationalism, presidential cabinets now take the form, for all practical purposes, of grand coalitions with representatives from nearly all ethnic and sectarian groups whose leaders would enter into a political pact with the president of the state. As a culture of *de facto* consociationalism took root, the government has taken steps to involve all sizable communities in executive institutions and promote proportionality in the bureaucracy.⁷⁹

The drift towards *de facto* consociationalism has led to something more dramatic – the establishment of a *de jure* consociationalist presidency.⁸⁰ The majority winner-take-all electoral system adopted to elect presidents in Afghanistan created severe crisis every time the country has had a presidential election.⁸¹ Its most recent 2014 presidential election led to a

⁷⁶ For instance, the *Junbish-i Islami* Afghanistan (Islamic Movement of Afghanistan) is almost exclusively an Uzbek ethnic political party. The *Hizb-i Wahdat-i-Islami* is another ethno-sectarian party — comprised only of the Hazara and the *Shia* populations of Afghanistan.

⁷⁷ Mohammad Bashir Mobasher, *Electoral Choices, Ethnic Accommodations and the Consolidation of Coalitions: Critiquing the Runoff Clauses of the Afghan Constitution*, 26 WASHINGTON INT'L L. J. 413 (2017).

⁷⁸ Lombardi & Pasarlay, *supra* note 20.

⁷⁹ See generally Mobasher, *supra* note 75; Mobasher, *supra* note 77.

⁸⁰ *Afghan Leaders Sign Power Sharing Deal*, THE GUARDIAN, *supra* note 73.

⁸¹ Shamshad Pasarlay, Mohammad Qadamshah & Clark B. Lombardi, *Reforming the Afghanistan Electoral System: The Current Debate and Its Implications for the Plans to Amend the Afghan Constitution*, I-CONNECT: BLOG OF THE INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, May 8, 2015, <http://www.iconnectblog.com/2015/05/reforming-the-afghan-electoral-system-the-current-debate-and-its-implications-for-the-plans-to-amend-the-afghan-const>

political crisis that put the country on the brink of violent civil war and partition when both second-round candidates, Ashraf Ghani, a Pashtun candidate, and Abdullah, a Tajik candidate, claimed victory.⁸² Initially, Ashraf Ghani was declared the winner of the second round of the elections. However, Abdullah and his supporters, mostly powerful Tajik elites, accused the Independent Electoral Commission (IEC) of systematic fraud, corruption, and electoral engineering. In the end, they declared that the IEC was illegitimate and preemptively refused to recognize any finding that he had lost.⁸³ Thereafter, Abdullah and his supporters engaged in street protests and threatened violence in case the IEC did not revise the result. The Pashtuns in turn protested in support of Ashraf Ghani in many provinces. The stalemate makes clear that, going forward, neither of Afghanistan's leading communal groups is willing to relinquish their claim to the powerful presidency and see it occupied by the other group no matter how moderate the candidates are.

Although the U.S. had lobbied strenuously in 2004 to prevent a consociationalist government, the 2014 crisis was finally resolved through a US-brokered power-sharing agreement that resulted in what is, for all practical purposes, a consociationalist presidency.⁸⁴ The power-sharing agreement created a government of national unity and provided that Ghani would be recognized as president of Afghanistan and Abdullah as its chief executive – a position not envisioned in the 2004 Constitution.⁸⁵ The vice-presidential candidates from two different ethnic groups who had run on Abdullah's ticket were to be recognized as deputy chief executive officers. The president would cooperate with the chief executive in appointing ministers and setting policy. The cabinet posts were henceforth to be equally divided between the president and the chief executive who would appoint them with the consent of their deputies from two other ethnic groups.⁸⁶ Furthermore, the parties agreed that the move towards consociationalism would not

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⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Agreement between the Two Campaign Teams Regarding the Structure of the National Unity Government*, L.A. TIMES, Sept. 21, 2014, <http://documents.latimes.com/agreement-between-two-campaign-teams-regardingstructure-national-unity-government/>.

⁸⁵ *Id.*

⁸⁶ *Id.*

be a one-off. To constitutionalize the move away from incentivism, the president and the chief executive agreed to appoint a commission to draft proposed amendments to the constitution that will be debated and approved by a *Loya Jirga*, Afghanistan's constitutional amendment convention.⁸⁷

Taken together, Afghanistan's voting patterns, its practice of allotting bureaucratic positions on a proportional basis, and its 2014 power-sharing agreement all suggest that Lijphart was on to something. Afghanistan's ethnic and sectarian groups are simply unwilling to accept a system that does not guarantee them the chance to be represented by their own leaders. At the same time, though, if Afghanistan seems to support Lijphart's claim that consociationalism is a necessary evil in at least certain types of divided societies, it may provide some support for Horowitz's claim that it is not an effective long-term solution. The distrust that leads Afghans to vote only for members of their own community infects the leaders that they bring to power. The members of the National Unity Government mistrust each other so much that they have regularly failed to agree on questions that must, according to the agreement, be reached by consensus. The result has been delay and gridlock.⁸⁸

IV. AFGHANISTAN'S LESSONS FOR CONSTITUTIONAL DESIGNERS

Afghanistan's recent constitutional history provides information that helps us evaluate some theories about constitutional design for divided societies and suggest some productive avenues for future research and experimentation. In divided societies, political behavior is prone to follow ethnic and religious lines. Thus, simple majoritarian democracy risks turning into domination by a more populous ethnic or religious faction over all others.⁸⁹ Because ethno-political groups apparently do not trust each other, they find it hard to reach consensus on important

⁸⁷ Pasarlay, Qadamshah & Lombardi, *supra* note 81.

⁸⁸ See generally Mobasher, *supra* note 77; Richard Ghiasy, *Afghanistan's Political Elite Continues to Jeopardize Stability*, STOCKHOLM PEACE RESEARCH INSTITUTE BLOG, <https://www.sipri.org/commentary/blog/2017/afghanistans-political-elite> (accessed Nov. 3, 2018).

⁸⁹ Choudhry, *Bridging Comparative Politics*, *supra* note 4, at 17.

questions of public policy. The challenge is to create a system in which all relevant communities feel sufficiently represented that they will accept that their concerns are appreciated and rights respected and as a result will accept governmental decisions as legitimate.⁹⁰

The drafters of Afghanistan's 2004 constitution considered carefully whether they should institutionalize a consociational form of government of the sort championed by Lijphart or, instead, a government of the sort championed by Donald Horowitz and like-minded 'incentivists.'⁹¹ They deliberately adopted an incentivist approach. Since that choice was made, Afghanistan's history suggests that any initial and permanent choice in favor of either of these propositions is likely to be problematic. The initial choice in favor of an incentivist system failed to get 'buy-in' from a critical mass of Afghanistan's communities over the short-to medium-term. Because some of the dissenters were heavily armed, government officials were compelled to establish a *de facto* regime of consociationalism; and, eventually in the aftermath of a disputed election, the government agreed to an extra-constitutional, *de jure* regime that consociationally guaranteed one of Afghanistan's largest minority communities a share of executive power.

The first part of this story seems to support Arend Lijphart's suggestion that if (a) you live in a divided democratizing society where (b) there is no majority community or minority communities have the power to disrupt society, and (c) if you have to make an initial and permanent choice between consociationalism and incentivism, then consociationalism is probably the least bad option. Indeed, in the immediate term, it is the only viable solution. On the other hand, in contemporary Afghanistan, as a long-term prospect, the least bad option appears to be quite bad indeed. The poor performance of the new consociational government supports Horowitz's view that consociational governments rarely lead in the long-term to effective, stable governance.

Neither consociationalists nor incentivists have 'cracked the code' for constitutional design for post-Taliban Afghanistan. Afghanistan's recent history suggests, instead, some interesting but unsettling broad conclusions about constitutional design for

⁹⁰ Lombardi & Pasarlay, *supra* note 20.

⁹¹ See Pasarlay, "Making the 2004 Constitution," *supra* note 40, chap. 4.

divided societies. Apparently, each side in the consociationalist/incentivist debate is correct to argue that the other's proposal is unrealistic—at least as a permanent solution to the challenges of governing a divided society. But, if both of the current options are flawed, Afghanistan's suggests that there might be a productive, alternative approach. While the answer of experimenting with hybrids springs immediately to mind, the champions of each approach have to date agreed that their approaches are mutually exclusive, and nothing in Afghanistan's history suggests that they are wrong. On the other hand, the fact that Afghanistan has transitioned from one mode of governance to another reminds us that perhaps one does *not* have to make an initial permanent choice.

Based on the example of Afghanistan, it is probably unwise to engage in constitutional deferral when it comes to the question of basic governmental structure or on voting systems because it is probably risky. But perhaps a pre-planned constitutional program of sequencing may be useful – albeit not the type of sequencing that Afghanistan has tried. Afghanistan needed consociationalism to build trust and to build up habits of living together. But, having achieved the consociational state that Afghanistan needed at the outset, Afghans do not seem to have thought seriously about how they might use a period of consociational governance to build trust between communities sufficient that the country could transition again back to an incentivist system that would be more stable in the long-term. If the constitution had adopted consociational guarantees along with a sunset provision, politicians could, in theory, have established a habit of working with members of other communities to provide for their constituents, while putting them on notice that they would, within a fixed period of time, need to appeal beyond their ethnic group. One cannot say for certain that such an approach would have left Afghanistan in a better position than it is now. But it is certainly possible, and it suggests a possible approach to governing Afghanistan going forward.

The history of Afghanistan suggests that at different stages of its political development the advantages of consociationalism are likely to outweigh the advantages of incentivism and vice versa. If consociationalism is the least bad option at the outset, it can become the worst at some point in the future. If this is true, then scholars should explore whether it is possible to develop constitutions that would permit or even encourage transitions from consociational government to incentivist government. It appears

that scholars who want to develop effective approaches to constitutional design should be asking questions about where, how, and when transitions should occur. They should be asking: “what sorts of countries are ones that, like Afghanistan, require consociational government at the outset?” “how can one draft a constitution that ensures that consociational government does not continue past the moment where its benefits outweigh its harms?;” and “how should a transition from consociationalism to incentivism take place, and on what schedule?.”

If they do, their work may have practical ramifications for Afghanistan. Afghans are now considering the possibility that they may soon have to amend their constitution.⁹² As they do, Afghans could consider changes not only to formalize and legitimize the consociational form of government that was negotiated and established through an extra-legal ‘power-sharing pact’; and, at the same time, create sunset provisions according to which, after a period of consociational governance (and, hopefully, stability), Afghanistan would transition in relatively short order to an incentivist system.

V. CONCLUSION

The history of Afghanistan after the fall of the Taliban provides us with some insight into the merits of consociational vs. incentivist approaches to governance in a divided society. The insights are not entirely happy ones. It appears that Lijphart and Horowitz have each identified fatal flaws in their rival’s approach. Lijphart is right to assume that in post-conflict states such as Afghanistan, a country may have to be governed, at least in the short term, in a consociational fashion. Horowitz is correct to say that consociational government perpetuates and, in the intermediate term, exacerbates the divisions that it was designed to overcome, leading to paralyzing gridlock. While consociational government may for a time be necessary, it contains the seeds of its own destruction. In other words, in deeply divided societies there may not be one system of government and voting that will

⁹² A. *Constitutional Amendment Can Be on Agenda in Peace Process: HPC*, TOLO NEWS, Dec. 2, 2018, <https://www.tolonews.com/afghanistan/constitutional-amendment-can-be-agenda-peace-process-hpc>.

both (i) be recognized immediately as legitimate and trustworthy by a broad cross-section of rival communities and (ii) be likely to establish, over time, a track record of stable, effective governance that is seen as legitimate and fair. Lest one become too pessimistic, though, Afghanistan's recent history suggests that the question of consociationalism vs. incentivism does not have to be a question that is answered once and for all at the constitution's founding. And perhaps it should not be. The solution to the quandary might lie in sequencing.

Keywords

Afghanistan, Constitutional Design, Consociationalism, Incentivism, Sequencing.

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