



Bashir Mobasher, *Constitutional Law and the Politics of Ethnic Accommodation: Institutional Design in Afghanistan* (Routledge, 2024).

Bashir Mobasher's richly researched and theorized book, *Constitutional Law and the Politics of Ethnic Accommodation: Institutional Design in Afghanistan* (2004), is an invaluable addition to the scholarship on comparative constitutional design. Filling a painfully understudied lacuna—unfortunate because Afghanistan's constitutional experiment provides important data points and holds valuable insights for comparative constitutional theory—Mobasher's work makes two important contributions.

First, it adds a crucial case study to the scholarship on constitutional design in “divided societies.” Second, it draws concrete lessons from the recent constitutional experiment in Afghanistan that should help us evaluate with fresh eyes key questions that have troubled scholars for nearly four decades.

The book provides a detailed autopsy of Afghanistan's 2004 Constitution and explains why the institutions that it created failed to accommodate fully the country's diverse ethnic groups in the political process (xv). It is not a story of institutions on paper but, importantly, of how they operated in practice. When the Afghan Constitution was ratified after nearly three decades of war, many hoped that it “would provide a framework for ethnic accommodation and state stability” (1). In fact, this was something that the Constitution's preamble had enshrined (1). Mobasher argues, however, that despite the Constitution's guarantees of an inclusive political process, the institutions it created were unable to accommodate Afghanistan's diverse identity groups. The Constitution also failed to produce a fair set of laws and policies or a more just system of resource distribution (2). Contrarily, the politics of exclusion became the hallmark of the entire constitutional regime (2).

Mobasher contends that constitutional design failed in Afghanistan because it did not account for context, highlighting that constitutional design needs to be heedful of a region's history, political culture, and distribution of identity groups, as well as the nature of communal relationships in the region. These variables inevitably interact with constitutional design and shape constitutional settlements (8). Indeed, Mobasher suggests that designers need to thoroughly scrutinize how the institutions they adopt align with ethnic accommodation. This requires careful attention to how these institutions interact with one another. No single institution can accomplish effective ethnic accommodation if other institutions shift or upend the direction of its influence (10). These crucial insights were not hearkened in Afghanistan, and the constitutional design failed as a result. This is an important observation and holds lessons relevant to other divided societies. Notably, Mobasher goes further and argues that the Afghan Constitution's flawed design undermined the legitimacy of the government and made the collapse of the “Republic . . . perhaps inevitable” (4). When the Afghan state collapsed in August 2021, each Afghan faction blamed the other (23). Some sought refuge behind a false narrative that Afghanistan has always been a “failed nation” and could not be united. This logic, Mobasher observes, would suggest that the 2004 Constitution could not be held liable for the fall of the Afghan state (23). He discredits this narrative with some force and shows ably that Afghanistan was not (and has never been) a failed nation. By contrast, it had a “failed constitution”—one that denied the nation ethnic accommodation and political stability but gave the Taliban sufficient room to regroup and ultimately retake power (chapter 1).

Mobasher's critique of the Afghan Constitution is passionately presented and well argued. He convincingly identifies some of the Constitution's serious flaws, including a faulty runoff system for presidential elections (chapter 2), the supremely powerful presidential executive with a weak

system of checks and balances (chapter 4), and the hypercentralized state (chapter 6). He eloquently explains that these flaws contributed to government underperformance and failure.

Mobasher's book should be required reading not just for those interested in the example of Afghanistan, but also for those who are thinking about how to design constitutional structures for divided societies. It makes a powerful case that certain structures that were built into the Afghan Constitution at the outset came, *over time*, to weaken the state and ultimately bring it down.

I stress the words "over time" because they point to an issue that was not explored as fully as it might have been in the book. Is it true that Afghanistan would still have come into being and, arguably, survived longer if the Constitution's drafters had made different choices? Mobasher seems to suggest that this is the case when he writes that the Constitution's flaws made the fall of the state "inevitable." But he does not elaborate thoroughly the importance of other, extraconstitutional factors, including widespread corruption, the Taliban insurgency, a flawed US-Taliban peace deal, and a disastrous withdrawal of American troops, which played a profound role in bringing down the state. Mobasher argues that these factors were damaging only because the Constitution's flaws prevented the state from developing effective responses to them. He writes that these other factors unfolded in a situation where the Constitution had already undermined the government by failing to facilitate power sharing and accommodate the country's diverse ethnic groups in the political process (4). This is convincing up to a point.

Nevertheless, Mobasher does not explore as fully as he might the thorny question of whether, as a practical matter, Afghanistan's dominant political factions in 2002–2004 would ever have all agreed to a constitution that did *not* include the provisions that later proved so problematic. In fact, there is evidence that some of the choices, including the powerful presidency and the centralized state, that Mobasher criticizes were recognized and accepted as unavoidable compromises—at least for the short term. That is to say, the drafters considered them to be short-term fixes that would be modified, through amendments, in the medium term. If this is correct, the decision to include these elements was not misguided; quite to the contrary, it was wise. Over time, these features destroyed popular legitimacy because they failed to be corrected as the drafters had expected. Elaborating this point might have helped to paint a more nuanced picture of the drafting and performance of the Afghan Constitution.

My critique of the book's "road not taken" should, itself, be taken in context. Although the field of comparative constitutional law has come a long way in recent years, an enormous number of jurisdictions remain woefully understudied, and the scholarly community is, as a result, unable to best appreciate the questions that it can help answer. Mobasher's thought-provoking analysis of Afghanistan is an incredibly valuable addition to the field; moving forward, it should help us understand: (1) under what circumstances it is necessary to adopt, in the short term, constitutional provisions that are predictably counterproductive in the long term, and (2) whether it is possible to include in a constitution mechanisms that will mandate the removal and replacement of such provisions in time to forestall state failure of the type that Mobasher has so eloquently analyzed.

Shamshad Pasarlay
University of Chicago
pasarlay@uchicago.edu