

**AFGHANISTAN'S
FLAWED CONSTITUTIONAL PROCESS**

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AFGHANISTAN'S FLAWED CONSTITUTIONAL PROCESS

EXECUTIVE SUMMARY AND RECOMMENDATIONS

Afghanistan is stumbling on its way to a new constitution. The document that must express the values and aspirations of a people may lack widespread legitimacy because it has been drafted in a secretive and unaccountable manner. International efforts to promote public education and consultation have been inadequate. The Transitional Administration (TA) and the UN are now heading down a well-trodden path in Afghan history whereby a constitution is proclaimed but no one, let alone those in control of state power, has any incentive to respect it.

The political process needs to be substantially rethought and recast. More time is required to fashion a truly democratic institution. The plan to convene an unrepresentative Constitutional Loya Jirga in October 2003 should be dropped. Instead, the national elections mandated for 2004 should be used to create a national assembly that can conclude work on and adopt the constitution.

This can and should be done within the spirit of the Bonn Agreement of 2001. That document provides few details for the democratic transition. Among these is a Constitutional Commission tasked with preparing for a Constitutional Loya Jirga that must be convened not later than January 2004. But the TA and the UN have created a process lacking in transparency that accommodates the factions now in power in Kabul. Both the Constitutional Drafting Commission and the Constitutional Commission, charged respectively with writing a preliminary text and then consulting publicly on it, were appointed without public process though the latter is responsible for building public confidence. Because the groups that dominate the TA, like the ethnic Panjshiri Tajik *Shura-yi Nazar*, heavily influenced the selections, few Afghans are likely to accept the Commissions as representative or neutral bodies.

Compounding the problem of factional domination of the process is the absence of real public education or consultation. The UN-drafted plan contains minimal public education and consultation elements to which scant funds are allocated.

Tentative plans for the Constitutional Loya Jirga involve selecting a group of delegates from the June 2002 Emergency Loya Jirga but as of June 2003 there was no mechanism to do this. There is considerable danger that a selection process that is not transparent and does not exclude the un-elected delegates allowed at the last moment to enter the Emergency Loya Jirga, will undermine any credibility the new Loya Jirga might have.

The UN has justified the absence of a fuller public process with three concerns – security for members of the Constitutional Commission and the public; the risk that the process might be hijacked by extremist groups, and the danger of public confusion. But none of these preclude a public process; all are amplified by the current process.

The U.S. and other NATO members have failed to address the real security deficit. Civil society across Afghanistan consistently identifies provincial governments as an important source of insecurity. Yet, the consultation process is organised mostly in provincial centres with the cooperation of those governments. Deployment of international military personnel, as occurred during the Emergency Loya Jirga process in a handful of places, and training of special Afghan police and army units have not been considered. Nor has a more decentralised process to reduce provincial administration control. More time is essential so real security measures can be taken.

Public debate could also negate some extremist groups' arguments and build coalitions among more

moderate factions. Indeed, this is a singular opportunity to strengthen new democratic groups struggling to find a toehold in the political scene. Some former mujahidin groups, especially *Jamiat-i Islami-yi Afghanistan*, and their allies also contain more progressive elements that could be nurtured during a full public debate on the constitution.

Finally, public confusion is the product of obfuscation by the TA and the UN. Most Afghans know what they want from government and from a constitution. Efforts by some in the UN in particular to paint them as an undifferentiated peasantry lacking meaningful opinions are demeaning.

To restore integrity to a process that has already been considerably compromised, the TA and the UN must first admit candidly to the Afghan people that preparations have been inadequate and more time is needed. The revised political timetable must be underwritten by a renewed international commitment to providing security, particularly outside Kabul. A fresh international conference, called perhaps by NATO, which takes over the international security mission (ISAF) in August 2003, and the UN, could serve as a venue. Having NATO as a co-host might mesh the security and political processes together to provide a coordination that has been lacking.

The Bonn Agreement contains a flexible timeframe that can be used to further its goals of democratisation and pluralism. Its only fixed points are the convening of a Constitutional Loya Jirga by January 2004 and the holding of elections, implicitly for a national assembly, also that year. The role of a Constitutional Loya Jirga should be taken on by that national assembly, much as the 1964 Constitution envisaged legislators acting as a loya jirga to amend that constitution. The initiation of a sequence of rolling elections, conducted province by province, would begin in early 2004. In effect, the Bonn Agreement's requirements to convene a Constitutional Loya Jirga and to hold elections would be combined into a single, democratically legitimate process that could also more readily be synchronised with some security sector reforms.

After two decades of conflict, Afghanistan needs and deserves a richer and better planned and supported public process of constitution making. The Afghan government and the international community still have time to create one.

RECOMMENDATIONS

To the Afghan Transitional Administration (TA):

1. Explain the process that established the Constitutional Commission, with details of members' political affiliations, and provide an opportunity for public comment on members, particularly in regard to allegations of involvement in criminal behaviour and human rights violations, with the possibility of removal of those with a tainted past.
2. Expand the timeframe for public debate on and adoption of the constitution by:
 - (a) cancelling the October 2003 Constitutional Loya Jirga; and
 - (b) beginning a series of rolling elections in early 2004 for a national assembly that would act as the Constitutional Loya Jirga envisaged by the Bonn Agreement, discussing, initiating public debate on, and finally adopting a constitution.
3. Publish the draft constitution prepared by the Constitutional Drafting Commission.
4. Design and implement a process of public education and consultation, with particular attention to radio and television, and a decentralised consultation process that minimises security risks.
5. Replace provincial and district governors and military leaders implicated in political violence and intimidation both during the Emergency Loya Jirga and thereafter.
6. Enact a law regulating and authorising political parties that, unlike the present draft, satisfies Afghanistan's international law obligations in regard to the freedoms of expression, assembly, and association.

To the International Community:

7. Support the Transitional Administration in the creation of a process appropriate to the security and political situation and responsive to the need for accelerated public education efforts, by sponsoring through NATO and the UN an international conference to address timeframe issues.
8. Support and underwrite financially the expansion of public debate about the

constitution, for example by providing technical assistance related to radio and television publicity campaigns and community awareness programs at village and district levels.

9. Identify and encourage new democratic networks and the more professional and less extremist elements within mujahidin parties and their allies to play an active role in the constitutional process, thereby helping to consolidate a moderate base, particularly in the Loya Jirga, to counter extremist mobilisation.
10. Implement security measures around the consultation process and the Constitutional Loya Jirga, including:
 - (a) training of units of Afghan police to minimise security threats around public consultations; and
 - (b) deployment of small teams of Special Forces to protect consultations, and the partnering of these with Afghan police and army units.
11. Implement a program of international monitors for the consultation process and the Constitutional Loya Jirga, and identify publicly through radio and television those provincial leaders responsible for intimidation.
12. Promote disarmament, demobilisation, and reintegration, in tandem with sustainable employment creation schemes.

To the United Nations:

13. Strengthen the managerial and strategic capacities of the United Nations Assistance Mission in Afghanistan (UNAMA) Constitutional Commission Support Unit with the inclusion of staff experienced in logistics, public campaign planning, and political negotiations.
14. Facilitate both Afghan civil society efforts to promote popular understanding and mobilisation around the constitution and international efforts to provide direct technical support to the Constitutional Commission.
15. Implement a protection plan related to political intimidation and coercion, in partnership with international security forces, newly trained units of the Afghan National Army, and the Afghan Independent Human Rights Commission.

Kabul /Brussels, 12 June 2003



AFGHANISTAN'S FLAWED CONSTITUTIONAL PROCESS

I. INTRODUCTION

Afghanistan, prior to the rise of the Taliban, suffered from a complex, internecine civil war that pitted the former mujahidin and their allies against each other and exacted a high toll in human life, particularly in the capital.¹ The conflict tore the country into a patchwork of “warlord fiefdoms”, destabilised by a kaleidoscopic “array of alliances, betrayals and bloodshed”.² Afghanistan after Operation Enduring Freedom bears an uncanny similarity to that situation, with the Transitional Administration exercising little control outside the capital’s limits and death tolls mounting in local conflicts in such areas as Maimana and Baghdis, to name but two places where serious fighting developed in early 2003. The fall of the Taliban, and the Coalition’s rearming of and support for regional commanders, especially of the Northern Alliance, has revived factional conflict on a nation-wide scale.³

A constitution making process, stipulated by the 5 December 2001 Bonn “Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions”, presents an opportunity to formulate new institutional solutions. A new architecture of governance, both within the central administration and between national and sub-national units, can provide respected and accepted channels for the resolution of political conflict. More importantly, a period of constitutional change conducted under the

glare of international attention can empower moderate and progressive leaders, consolidating what peace there is and furthering development of a democratic political culture.

Simultaneously, leaders whose sole aims are personal and factional power can be marginalised by the international community, represented in the first instance by the United Nations Assistance Mission in Afghanistan (UNAMA). Particularly in view of the constricted political space for legitimate political activity, it is critical to nurture new democratic formations that can establish constituencies based on support for a peace process and reconstruction.

Special Representative of the Secretary General for Afghanistan Lakhdar Brahimi acknowledged at a 31 January 2003 open meeting of the UN Security Council that the “drafting and ratification of the new constitution . . . will also be a fundamental state building exercise”. He also stressed the need to “broaden the political base supporting the peace process” because “too many Afghans feel excluded from the government and political transformation which Afghanistan is undergoing”.⁴ Yet he could have continued by linking those urgent tasks with the observation that no Afghan state will survive without popular legitimacy and a culture in which both the Afghan public and those in power respect the rule of law and institutions designed to resolve political conflict.⁵

The first six months of the constitution making exercise, however, have disappointed Afghans who hoped for a sea change in political culture, with new

¹ Amin Saikal, “The Rabbani Government, 1992-1996”, William Maley, ed., *Afghanistan and the Taliban: The Rebirth of Fundamentalism* (London, 2001), p. 29.

² Ahmed Rashid, *Taliban: The Story of the Afghan Warlords*, 2nd ed. (London, 2001), p. 21.

³ Without Western support for the various local commanders, it is far from certain that Afghanistan would be in the turmoil that it faces today.

⁴ Briefing of Special Representative of the Secretary General Lakhdar Brahimi to the Security Council, 31 January 2003.

⁵ See Larry Diamond, *Developing Democracy Toward Consolidation* (Baltimore, 1999) for an argument about the incremental development of democracy, and the importance of culture and legitimacy over outward institutional form.

openness and accountability. Political factions from the former mujahidin parties have manipulated a secretive process. In particular, this is true of the Tajik *Shura-yi Nazar* faction that is ascendant in the Transitional Administration in Kabul. Moreover, President Hamid Karzai failed to grasp the opportunity to establish new constituencies and develop support for the peace-building process. Instead, Afghans have been frustrated by opaque procedures that increase the power of the factions in control of the central government and undermine attempts to create a new public culture of accountability.

The constitution making process as presently conceived is unlikely to reverse these disappointments. Rather, a major reconsideration of its goals and procedures is necessary. Such a review requires more vigorous international engagement, more attention particularly to security, public education and consultation, and the creation and consolidation of more democratic political formations. Afghanistan has had many constitutions that failed because they lacked public legitimacy and tried to subsume underlying political fault lines rather than addressing and negotiating them. Those managing the drafting of the new constitution should learn from the errors of the past and craft solid foundations for a stable political future.

II. AFGHANISTAN'S MANY CONSTITUTIONS

Twentieth century Afghanistan witnessed a rapid parade of constitutions. One compilation contains nine documents promulgated between 1923 and 1992, including the foundational laws issued by President Noor Mohammad Taraki of the People's Democratic Party of Afghanistan (PDPA) in lieu of a formal constitution.⁶ Most significant are the constitutions issued in 1923 by King Amanullah; in 1931 by King Nader Shah; in 1964 by King Mohammad Zahir Shah; and in 1977 by President Mohammad Daoud. The first three embodied constitutional monarchies, in which the king wielded near total authority, while the final one simply shifted this authority to the president.⁷ The subsequent documents were products of governments that never exercised significant control of the Afghan hinterland, and that between 1977 and 1992 were bogged down in fierce and unsuccessful counter-insurgency efforts.⁸

Afghanistan's previous founding documents have consistently suffered from two flaws. First, they reflected basic flaws in the underlying political architecture, flaws that often precipitated the fall of regimes. Secondly, they invariably failed to translate into practice. "The first people to disobey the constitution are the government", according to Afghanistan scholar Sayed Asker Mousavi.⁹ Without public pressure to conform to constitutional norms and enforce constitutional rights, repeated Afghan governments failed to respect the very documents they had drafted.¹⁰ If the first constitution of the twenty-first century is to succeed, Afghans and the UN must learn from past

⁶ *The Constitutions of Afghanistan (1926-1996)* (Kabul, undated).

⁷ The monarchy's enormous power was embodied in the 1923 Constitution, Arts. 1 and 28; the 1931 Constitution, Arts. 2 and 73; and the 1964 Constitution, Art. 8. The 1977 Constitution, Articles 75 and 78, vested almost unchecked authority in the President of the Republic.

⁸ Although the Russians located their forces across a limited "strategic" area composed of "the northern plains from Shibergan to Kunduz, the strategic road from Termez to Kunduz and from Kabul to Jellalabad, the capital and its immediate environs as far as Logar," Kabul was "the only area where the Russians exercise[d] satisfactory control". Olivier Roy, *Islam and Resistance in Afghanistan* (Cambridge, 1986), pp. 189, 192.

⁹ ICG interview, 21 December 2002.

¹⁰ *Ibid.*

mistakes, without falling into the trap of facile, but inaccurate, historical analogy. Perhaps the most fertile grounds for historical insights are the 1923 and the 1964 constitutions, two attempts to accelerate sclerotic social change.

A. THE PUSH FOR MODERNITY: THE 1923 CONSTITUTION

In 1923, King Amanullah convened a Loya Jirga, a national “tradition” invented by his grandfather Amir Abdur Rahman,¹¹ to adopt Afghanistan’s first constitution.¹² This constitution, while creating “an absolute and hereditary monarchy”,¹³ granted citizenship “without respect to religious or sectarian differences”, and vested in all Afghans rights to “personal liberty” and “an education at no cost”.¹⁴ Amanullah also marginalised the role of religiously trained scholar elites, or ulema, in legitimating the state, and accorded Islam only a limited role in the constitution.¹⁵ He moreover initiated a series of educational and social reforms, including new statutes called Nizamnama.¹⁶ A 1921 Family Code, for example, outlawed child marriage as anathema to Islamic principles.¹⁷ The Family Code and the constitutional provisions on Islam provoked dissent, which Amanullah addressed in a

July 1924 Loya Jirga at Paghman that made minor amendments to both.¹⁸ Significantly, Article 2 of the Constitution was altered to endorse the Hanafi fiqh, one of the four schools of Sunni jurisprudence.¹⁹ Amanullah’s reforms nevertheless had only marginal impact because the state lacked a sufficient financial base to implement them: He had lost previous rulers’ British subsidy and never effectively reformed tax collection.²⁰

During his ten-year reign, Amanullah confronted two armed, tribally-based Pashtun uprisings, the January 1925 Khost rebellion of the Mangal tribe, and the November 1928 Shinwari uprising, the second of which led to his downfall.²¹ In both cases, religion, and therefore the ulema, played central roles. The dissent against social change and modernisation, as registered in petitions listing insurrectionary complaints, focused on the compatibility of Amanullah’s reforms with Islam.²² The Khost rebellion was initiated by two mullahs, Mullah Abdullah Akundzada Kharoti (the Lame Mullah), and Mullah Abdul Rashidos Shak, who entered into alliances with the Mangal and Zadran tribes. The tribes themselves raised as grievances educational reforms and a new conscription system based on a lottery method that undermined tribal elites’ traditional state-society arbitrator role.²³

The Shinwari revolt followed tax reforms that alienated influential tribal leaders; new discontent about conscription and corruption; and Amanullah’s 1928 “grand tour of Europe”, which led to an acceleration of reform efforts.²⁴ Yet again, religious

¹¹ Abdur Rahman “co-opted a tribal tradition into a state institution.” Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System*, 2nd edition (New Haven, 2002), p. 51. “Jirga” is a Pashtun word for “assembly.” “The Pashtun word “loya”, ‘big,’ ‘grand,’ . . . was apparently attached to the jirga concept in the early twentieth century, as part of a larger state effort to create a national Afghan identity under the umbrella of Pashtun culture and language”. Christine Noelle-Karimi, “The Loya Jirga – An Effective Political Instrument?”, Christine Noelle-Karimi, Conrad Schetter, and Reinhard Schlagintweit, eds., *Afghanistan – A Country without a State?* (Frankfurt am Main, 2002), pp. 37-38.

¹² Nighat Mehroze Chishti, *Constitutional Development in Afghanistan* (Karachi, 1998), p. 21.

¹³ Vartan Gregorian, *The Emergence of Modern Afghanistan: Politics of Reform and Modernisation, 1880-1946* (Stanford, 1969), p. 251.

¹⁴ Constitution of 1923, Arts. 8, 9 and 14.

¹⁵ Asta Olesen, *Islam and Politics in Afghanistan* (Richmond, Surrey, 1995), pp. 121-22; Mohammad Hasim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (Leiden, 1985), p. 28. Article 4 stated simply that Amanullah would “rule in accordance with principles enunciated in the Sharia”. Constitution of 1923.

¹⁶ Gregorian, op. cit., pp. 239-244.

¹⁷ Ibid., p. 243.

¹⁸ Olesen, op. cit., pp. 138-140;

¹⁹ Chishti, op. cit., p. 44. Sunni Islam contains four schools of differing jurisprudential theory, or *madhabs*. “The schools of Islamic law [were] groups of jurists each following certain doctrine that can be traced back to a prominent pioneer of the second century of the Muslim era, whose name the school carries”. Gamel Moursi Badr, “Islamic Law: its relation to other legal systems”, *The American Journal of Comparative Law* (Vol. 26, 1978), p. 189; Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni usul al-fiqh* (Cambridge, 1997), p. 209.

²⁰ M. Nazif Shahrani, “State Building and Social Fragmentation in Afghanistan: A Historical Perspective”, in Ali Banuazizi and Myron Weiner, eds., *The State, Religion, and Ethnic Politics: Afghanistan, Iran, and Pakistan* (Syracuse, 1986), p. 47; Rubin, op. cit., pp. 54-56.

²¹ Gregorian, op. cit., pp. 254-256, 263-266.

²² Olesen, op. cit., pp. 135, 150-53.

²³ Ibid., p. 135.

²⁴ Louis Dupree, *Constitutional Development and Cultural Change Part II: Pre-1964 Afghan Constitutional*

leaders sparked the uprising. This time, the influential Mujaddidi family of *Naqshbandiyya* Sufi *pirs* (saints) kindled the revolt by publishing a petition claiming the king was trying to “westernise” Afghans.²⁵ The Shinwari, who were joined by the Khugiani, Zadran, and Jaji,²⁶ defeated Amanullah, largely because the king had failed to reform his army; indeed he was the only twentieth century Afghan leader to reduce his military budget.²⁷

Neither tribal revolt can be traced primarily to religious differences, but an impetus from religious leaders evoking Islamic arguments started both insurrections. And in both cases Amanullah mobilised ulema and Islamic rhetoric to shore up support.²⁸ For example, in 1929, Amanullah sought to consolidate his legitimacy by delivering a speech before the Kandahar Shrine of the Holy Cloak, taking the cloak from its resting place and hoisting it to show that divine provenance lay on his side.²⁹ His ministers also wooed ulema and sought fatwas condemning the rebels.³⁰ Use of religious rhetoric by both sides and simultaneous attempts to win support of the ulema thus increased the latter's influence. Nadir Khan, who eventually succeeded Amanullah, granted Islam, and hence the ulema, a more extensive role in the state, making members of the Mujaddidi family minister and deputy minister of justice, and giving the ministry responsibility for enforcing Islamic law.³¹

It is tempting to draw an analogy between Amanullah's reforms and desires to promote social reforms through the 2003 constitution but this analogy is limited. The 1923 constitution played only a small role in the opposition to Amanullah, which centred rather on the Nizamnama and education, tax, and conscription reforms that undercut the power of traditional tribal leaders. The compatibility of modernisation with Islam became

a justification for attacks on Amanullah but it only facilitated an insurrection otherwise driven by economic and political concerns.³²

Amanullah's fate thus does not counsel against reform as such. But his experience suggests that entrenched power holders can make coalitions based on religious opposition to social reform. These elites, although concerned primarily with parochial and pecuniary interests, can use religion as a way of creating a broader social base for their revolt. Amanullah's experience, therefore, highlights a danger in trying simultaneously to transfer power from one elite to another and to effect progressive social change.

In contrast, in the 1950s, Prime Minister Mohammad Daoud, who exercised almost complete control over the state notwithstanding the existence of a hapless legislative assembly, launched far more sweeping social reforms, including an emancipation of women and an expansion of girls' education, but was able to suppress resistance with a more effective army and state apparatus that received considerable economic support from the Soviet Union.³³

B. THE PARTIAL REVOLUTION: THE 1964 CONSTITUTION

After more than 30 years of a regressive “hodgepodge” constitution ratified in 1931 to placate religious leaders,³⁴ King Zahir Shah on 28 March 1963 appointed a seven-member commission to draft a new constitution.³⁵ Following more than a year of deliberation, consultation and extensive publicity through print media and radio, a 455-person Loya Jirga was convened to ratify the new document on 9 September 1964.³⁶ The Loya Jirga comprised 176 members chosen in indirect elections, members of the two legislative houses, the entire Supreme Court, the initial commission, and 34 of the King's appointees.³⁷ Despite meeting for only nine days, the Loya Jirga was not an

Development (May 1965), p. 2; David B. Edwards, *Before Taliban: Genealogies of the Afghan Jihad* (London, 2002), p. 103; Gregorian, op. cit., pp. 256-258; M. Nazif Shahrani, “Afghanistan: state and society in retrospect”, in Ewan Anderson and Nancy Dupree, eds., *The Cultural Basis of Afghan Nationalism* (London, 1990), p. 45.

²⁵ Olesen, op. cit., p. 147.

²⁶ Ibid., p. 149.

²⁷ Rubin, op. cit., pp. 56-57; Gilles Dorransoro, *La révolution afghane* (Paris, 2000), p. 42.

²⁸ Olesen, op. cit., pp. 142, 156-160.

²⁹ Ibid., p. 159.

³⁰ Ibid.

³¹ Gregorian, op. cit., p. 295; Olesen, op. cit., p. 163.

³² Martin Ewans, *Afghanistan: A New History* (Richmond, Surrey, 2001), p. 94.

³³ Louis Dupree, *Afghanistan* (Princeton, 1980), pp. 350-58; Rubin, op. cit., p. 65; Shahrani, “State Building and Social Fragmentation”, op. cit., p. 59.

³⁴ Dupree, *Constitutional Development*, op. cit., p. 3.

³⁵ Dupree, *Afghanistan*, op. cit., pp. 565-566.

³⁶ Ibid., pp. 566-569.

³⁷ Chishti, op. cit., p. 90.

entirely pro forma affair, unlike previous ones, but saw debate and some textual changes.³⁸ Crucial to the passage of a relatively liberal constitution was the presence in the Loya Jirga of progressive ulema, who rebutted complaints raised by their conservative brethren.³⁹

The resultant constitution established the priority of parliamentary legislation over un-enacted Sharia (Islamic) law, and a right of equality for all citizens.⁴⁰ Sharia, albeit in its Hanafi form, was made residual, applicable only when no statute obtained.⁴¹ And legislation had only to conform to “basic principles of Islam”, not the narrower Hanafi fiqh.⁴² The equality provision, however, was not reconciled with the remainder of the text. Article 2, to give one example, raised the Sunni Hanafi school of law to the status of national religion and permitted non-Muslims to exercise their faith only “within the limits determined by the laws for public decency and public peace”.⁴³

Whatever progressive impulse was behind the 1964 Constitution never entirely materialised. In debates over a 1971 marriage law, Article 25's promise of equality was lost in furious debate over the Islamic norms appropriate to family law.⁴⁴ And despite contemporaneous optimism about the “basic principles” language,⁴⁵ its ambiguity rapidly became clear.⁴⁶ In addition, other statutes, including the penal code, passed under the 1964 Constitution essentially codified Hanafi fiqh.⁴⁷ The incorporation of Islamic norms into criminal and civil law formalised other gender-related inequalities.⁴⁸

Notwithstanding its narrow applicability, the 1964 Constitution also sowed the seeds of its own demise.⁴⁹ Article 24 barred members of the Mohammadzai royal family from public life, but because the monarchy had previously blocked non-Mohammadzais from emerging as national leaders, “no nationally recognised leaders outside the royal family were in sight”.⁵⁰ The Constitution's bicameral parliament also foundered. Despite Article 32's guarantee of the right to form political parties, Zahir Shah never ratified a law authorising such parties.⁵¹ The 1965 and 1969 elections were marred by turnouts as low as 15 to 20 per cent⁵² and produced a legislative body “composed of 216 representatives and 216 parties”.⁵³ Compounding pressure within the political system, educational reforms created a new class of educated youth without job opportunities or political prospects.⁵⁴ As the economy stagnated, famine developed, and the political realm remained closed, clandestine parties with a leftist or Islamic orientation began to flourish.⁵⁵ These pressures, only partly the consequence of the constitutional framework, precipitated the 17 July 1973 coup d'état of Zahir Shah's cousin, former Prime Minister Daoud, abetted by leftist groups.⁵⁶

If Amanullah's experience is a caution against excessive haste, the fate of the 1964 Constitution warns of the hazards of insufficient reformist vigour. The 1964 Constitution failed to satisfy new, heightened expectations that the monarchy had created but was unwilling to fulfil. Further, it reflected an unstable allocation of elite power, ultimately rejected by Daoud. It will never be possible to know if further liberalisation of political and administrative institutions could have accommodated such pressures. Yet the experience of the 1964 Constitution, like that of the 1923 document, illuminates the insurrectionary risks of failing to translate constitutional theory into practical realities and to achieve popular consensus.

³⁸ Dupree, *Afghanistan*, op. cit., pp. 573-85; Chishti, op. cit., pp. 91-96.

³⁹ Olesen, op. cit., p. 208.

⁴⁰ Constitution of 1964, Arts. 25, 69.

⁴¹ Ibid., Art. 69.

⁴² Ibid., Art. 64.

⁴³ Ibid., Art. 2.

⁴⁴ Olesen, op. cit., p. 215; Kamali, op. cit., p. 48.

⁴⁵ Abdul Satar Sirat, “The Modern Legal System of Afghanistan”, *The American Journal of Comparative Law*, Vol. 16, 1968, pp. 566-567.

⁴⁶ Kamali, op. cit., p. 48.

⁴⁷ ICG interview with professors at Kabul University Law Faculty, December 2002.

⁴⁸ These inequalities have been better charted in the Pakistani system. See Asma Jahangir and Hina Jilani, *The Hudood Ordinances: A Divine Sanction?* (Lahore, 2003), pp. 85-130; Rubya Mehdi, *The Islamization of the Law in Pakistan* (Richmond, Surrey, 1994), pp. 36-37.

⁴⁹ ICG interview with Yama Sharaf, Dean of Law Faculty, Balkh University, Mazar-i Sharif, 16 April 2003.

⁵⁰ Kamali, op. cit., p. 52.

⁵¹ Rubin, op. cit., p. 73.

⁵² Olesen, op. cit., p. 211.

⁵³ Edwards, op. cit., p. 120 (quoting Samiullah Safi).

⁵⁴ Ibid., pp. 15-16; Rubin, op. cit., pp. 76-77.

⁵⁵ Ewans, op. cit., pp. 122-26; Rubin, op. cit., pp. 76-77, 79.

⁵⁶ Ewans, op. cit., pp. 126-27; Edwards, op. cit., pp. 46, 216.

III. SUBSTANTIVE TRIGGERS FOR CONFLICT IN THE CONSTITUTIONAL DEBATE

A full public debate before ratification of the constitution is needed because the constitution must confront in some fashion at least two divisive issues: the role of Islam and the specification of relations between the centre and the periphery. Regarding the latter, there are sharp divisions between the *mujahidin* parties and their allies that could deepen factional conflict if improperly handled. Islam, in contrast, could become an umbrella issue that would facilitate a coalition between disparate regional commanders who are discontented with the Karzai administration or searching for ways of expanding their territorial influence. Further, there is a long-term risk that the incorporation of Islam into the constitution will empower extremist groups, like *Ittehad* and factions within *Jamiat*, at the cost of weakening new democratic groups and undermining the foundations of civil liberties, particularly for women and the Shia minority.

In both cases, no one textual solution offers a panacea. The challenge for the UN and the Transitional Administration to avoid armed conflict and long-term erosion of civil liberties is whether the process of drafting and ratification will channel inevitable discussions into a legal form with broad legitimacy and not alienate any group to the point of exclusion.

A. RELATIONS BETWEEN CENTRE AND PROVINCES

The debate over centre-periphery relations transpires in a fragile and hazardous environment that current analysis often obscures.⁵⁷ The central government does not exercise effective control over most of the country's territory, which is in the hands of a patchwork of regional commanders, the majority of whom are loosely affiliated with one or other *mujahidin* party.⁵⁸ Even where the party

connected to a given local commander is comfortably ensconced in the Kabul administration, like those affiliated with the *Shura-yi Nazar*, that faction cannot necessarily rein in its commander. For example, in April 2003, fighting erupted between *Jamiat* and *Junbish* commanders around Maimana, in the northern province of Faryab.⁵⁹ Staff of international organisations there reported that the conflict began as a local dispute and escalated, rather than being symptomatic of broader *Junbish-Jamiat* hostilities.

UN staff affirm that notwithstanding the webs of loyalty traced through *mujahidin* party connections, local commanders preserve a great deal of autonomy.⁶⁰ In fact, they can drag the faction with whom they are allied into reluctant conflict. Local commanders have a great stake in preserving this local autonomy; some are able to gather tax revenues from inhabitants⁶¹ or permit their troops to engage in criminal activities from simple robbery to kidnappings.⁶² Commanders like Ismail Khan in Herat, who retain access to lucrative revenues sources like customs from cross-border trade, have even less incentive to cede control to the Kabul government.

Yet the structure of surviving government administration in Afghanistan is highly centralised, with all important policy decisions putatively made in Kabul. Each provincial periphery has a set of departments that mirrors the ministries in Kabul, although not all ministries have a department in every province.⁶³ Kabul ministries fix budgetary allocations, and "there is little concept of a provincial or district budget".⁶⁴ Indeed, in spite of the disruptions caused by 23 years of war, and attempts by provincial or local commanders at co-option, a recent study of the western provinces of Herat and Faryab found that "administrative and fiscal mechanisms, which had been standardised before the war, have continued in use throughout

⁵⁷ For example, see Reeta Chowdhari Tremblay, "A federal arrangement for Afghanistan", *Federations*, October 2001, p. 9.

⁵⁸ Barnett R. Rubin and Helena Malikyar, "The Politics of Center-Periphery Relations in Afghanistan", Center for International Cooperation, New York University, March 2003, pp. 11-15.

⁵⁹ ICG interviews, April 2003.

⁶⁰ ICG interview with UN staff, Mazar-i Sharif, April 2003.

⁶¹ ICG interview with trader, Mazar-i Sharif, April 2003.

⁶² ICG interviews with tribal elders and traders, Jalalabad, April 2003.

⁶³ World Bank, Afghanistan Research and Evaluation Unit and the Adam Smith Institute, "A guide to government functioning outside of Kabul: early findings based on missions to Herat and Faryab: Working Draft", 28 February 2003, p. 7.

⁶⁴ *Ibid.*, p. 8.

the country, despite the lack of an ongoing relationship with Kabul".⁶⁵

ICG also found that there remain strong links between provincial courts, which are tribunals that for the most part hear appeals from district-level courts of first instance, and the Supreme Court in Kabul.⁶⁶ Judges are nominated by the Kabul-based Supreme Court and approved by President Karzai, although they lack effective tools to deal with local commanders. This relation holds true even in Kandahar, where Governor Gul Agha Sherzoi maintains an occasionally hostile relationship with Kabul.⁶⁷ Further, there is some evidence of a persistent sub-provincial network of local councils, called shuras or jirgas, which settle many disputes and address local administrative problems.⁶⁸ Besides being a channel for those disenfranchised by the formal state structures, these councils could be revived, given a suitable security framework, as a traditional and trusted vehicle for effective governance.⁶⁹

The most important group within Afghanistan pressing the Constitutional Commission openly now for extensive devolution of governmental power to a sub-national level is the *Junbish* party of General Abdul Rashid Dostum, who developed power bases in the northwest of Afghanistan because of President Najibullah's patronage and expanded his authority after the Communist collapse.⁷⁰ The *Junbish* recommendation to the Constitutional Commission is for a new national state, the "United Republic of Afghanistan", divided into multi-province states.⁷¹ Each state

would have an elected governor, and could determine its own budget. Despite strenuous denials by *Junbish* party members that federalism would have no ethnic component, they envisage state lines cutting between predominantly Uzbek and Tajik areas in the north, and separating out Hazarajat and the largely Pashtun south.⁷² It seems likely that *Junbish's* primary concern is to consolidate power within areas it presently controls. Particular attention was paid by *Junbish* officials to the delineation of an area they call "Turkestan", which is now largely under General Dostum's control. Civil society sources in Mazar-i Sharif contend that the *Junbish* position has little appeal in the north, even among Uzbeks who make up General Dostum's traditional base of support.⁷³

In addition to *Junbish*, Ismail Khan and the leaders of the Hazara party, *Hizb-i Wahdat*, have evinced support for a less-defined federalism.⁷⁴ Yet, officials from both wings of *Hizb-i Wahdat* who were interviewed by ICG in Kabul and Mazar-i Sharif were only lukewarm advocates for a federal structure. A deputy of *Hizb-i Wahdat* affiliated with the faction of Vice President Abdul Karim Khalili explained "the main thing is for all the different ethnic groups to be satisfied, whether the government is local or in the centre".⁷⁵ According to a deputy of *Hizb-i Wahdat Akbari*, in contrast, "federalism is a good idea, but we still need a strong central government because there is a danger of disintegration".⁷⁶

Outside these parties, few Afghans muster any enthusiasm for federalism. The vast majority queried by ICG rejected it, citing fear of the country's disintegration under the influence of Iran and Pakistan.⁷⁷ Many identified the problem of "warlordism", and the danger it would be exacerbated by a federal constitution. Despite near universal trepidation, however, two distinct variants on this attitude emerged.

Among Tajiks, Uzbeks, and Hazaras, the fear of centrifugal disintegration is tempered by recognition

⁶⁵ World Bank, Afghanistan Research and Evaluation Unit and the Adam Smith Institute, "Assessing sub-national administration in Afghanistan: Early findings and recommendations for action", 28 February 2003, p. 2; see also Robert Kluijver, "Study of Sub-National Administrative Structures in Afghanistan: Wardak", April 2003 (unpublished paper made available to ICG), p.3.

⁶⁶ ICG interviews with chief judge, Nangarhar Provincial Court, Jalalabad, and Balkh Provincial Court, Mazar-i Sharif, April 2003.

⁶⁷ ICG interview with legal researcher, January 2003.

⁶⁸ ICG interviews with Shinwari, Mohmand and Kuchi Ahmadzai elders, Kabul and Jalalabad, March and April 2003.

⁶⁹ Chris Johnson, William Maley, Alexander Their and Ali Wardak, "Afghanistan's political and constitutional development", Overseas Development Institute, 20 January 2003, p. 20.

⁷⁰ Rashid, *Taliban*, op. cit., pp. 56-57.

⁷¹ ICG interviews with *Junbish* party intellectuals, 8 April 2003.

⁷² Ibid.

⁷³ ICG interview with district shura leaders and traders, Balkh province, April 2003.

⁷⁴ Rubin and Malikyar, op. cit., p. 15.

⁷⁵ ICG interview, Mazar-i Sharif, April 2003.

⁷⁶ ICG interview with *Hizb-i Wahdat Akbari* deputy, Mazar-i Sharif, April 2003.

⁷⁷ This finding is borne out by other recent studies. See Johnson et al., op. cit., p. 20

of the need for local autonomy. *Jamiat* officials in the north, despite being affiliated with the *Shura-yi Nazar* faction that dominates Kabul, expressed equivocal feelings about fully centralised control. "We can't have a federal government now in Afghanistan, because it would extend the control of the warlords", noted the political advisor to a senior northern *Jamiat* leader, "But in the future it would be a good idea to have more power and more money for local leaders".⁷⁸ Similarly, Hazara civil society figures emphasised both the need for equity in central administrative arrangements and reinvestment in local administrative bodies like shuras.⁷⁹

But Pashtuns in Kabul and Jalalabad would not brook any mention of federalism in the constitution. "I am as much against federalism as I was against communism", declared one former *mujahid*, now an important figure in the Nangahar provincial government.⁸⁰ Similarly, elders in a Mohmand village in Nangahar province close to the Pakistani border declared, without any prompting about federalism, that "there should be a strong central government, and even a mention of federalism [in the constitution] will cause problems".⁸¹ At the same time, elders from this and other villages expressed strong disapproval of state attempts to interfere with traditional shuras at the village and district levels. Thus, even these groups as a practical matter endorse local control over local affairs, although they would not call it federalism.

In conclusion, Afghans share a broad consensus about the minimal role of federalism, the only exceptions being political factions that stand to gain from more decentralisation. Furthermore, Afghans share a desire for a strong central administration that will shake loose the power of the so-called warlords, but would resist overly insistent central regulation of local affairs. Centre-periphery relations, then, are a potentially divisive issue on the elite level at present, but could only become a basis for popular mobilisation against a new

constitutional order if significant steps toward a federal system were made in the new document.

B. THE ROLE OF RELIGION IN THE CONSTITUTIONAL DEBATE

Islam has been deployed in Afghan political discourse since Amanullah's time to establish or attack a regime's legitimacy. Consequently, even debates about modernisation have used an Islamic frame of reference. Discussions in the 1924 Loya Jirga about Amanullah's statutory reforms to family law, for example, were pitched in Islamic terms.⁸² One of the few changes it made to the 1923 Constitution was inclusion of a reference to the Hanafi fiqh as the "official religious rite" of Afghanistan.⁸³ In 1971, a similar dispute raged over a new family code.⁸⁴ One commentator, now a member of the Constitutional Commission, has praised "the vital role that Islam and Sharia play as a stabilising influence amidst conflicting changes imposed by different regimes".⁸⁵ But during the reigns of Amanullah and Zahir Shah, Islam was a tool, principally but not exclusively in the hands of tribal and religious elites like khans, mullahs and ulema, to preserve political influence.⁸⁶

In particular, Islam has always been part of the constitutional debate, and all four constitutions between 1923 and 1977 incorporated it in manifold ways. Each stipulated Islam as the "national religion".⁸⁷ Even the 1987 Constitution of PDPA President Najibullah, an avowed Communist, declared Islam the "sacred religion" of Afghanistan.⁸⁸ The amended 1923 constitution, the 1931 constitution, and the 1964 constitution all incorporated in the national religion provision a reference to the Sunni school of jurisprudence, Hanafi.⁸⁹ The 1964 Constitution further wove Islamic norms into the legislation process, limiting the ambit of statutory law by the "basic principles

⁷⁸ ICG interview, April 2003. In contrast, *Jamiat* leaders in Kabul were firmly against any kind of federalism at any point in time. ICG interview with *Jamiat* official, Kabul, March 2003.

⁷⁹ ICG interviews with member of *Hizb-i Wahdat* Kabul council and with Hazarajat-based NGOs, February and March 2003.

⁸⁰ ICG interview, April 2003.

⁸¹ ICG interview with Mohmand elders, Eastern Nangahar, 2003 April.

⁸² Olesen, op. cit., pp. 138-39.

⁸³ Constitution of 1923, Art. 2 (amended).

⁸⁴ Olesen, op. cit., p. 215; Kamali, op. cit., p. 48.

⁸⁵ Kamali, op. cit., p. 53.

⁸⁶ Hence, mullahs played a critical role in Amanullah's downfall. Roy, *Islam and Resistance*, op. cit., p. 46.

⁸⁷ Constitution of 1923, Art. 2; Constitution of 1931, Art. 1;

Constitution of 1964, Art. 2; Constitution of 1977, Art. 22.

⁸⁸ Constitution of 1987, Art. 2.

⁸⁹ Constitution of 1923, Art. 2 (amended); Constitution of 1931, Art. 1.

of Islam”, permitting the Hanafi fiqh to operate whenever no statute could be found on point.⁹⁰

Further, Islam, as a shared frame of reference, has de facto linked insurgency groups otherwise actively hostile. For example, although the 1929 Shinwari uprising was a catalyst for Amanullah's uprising, it was not the Shinwari that ultimately toppled the king. Rather, a Tajik bandit, Bacha-i-Saqao, took Kabul in January 1929, to be crowned amir with the promise that he would re-establish Islamic law “in all its purity”.⁹¹ Yet the Shinwari tribe rejected the Bacha's authority, and the new amir failed to gain the support of other significant tribal forces.⁹² Amanullah, in other words, fell before disparate, local revolts united only in their common commitment to the faith. Islam may today again serve as a bridge between groups with grievances with the central government that otherwise might not form alliances. Faith can serve this end because “where the concept of the nation has developed but recently, where the state is seen as external to society and where people's allegiance is directed primarily towards their local community, the only thing which all Afghans have in common is Islam”.⁹³

Islam thus still maintains a powerful rhetorical or emotional hold on an overwhelming majority of Afghans. Every Afghan interviewed by ICG, whether from civil society, government, or a *jihadi* party, stated that Afghanistan was a Muslim country, and that the constitution would have to be Islamic. Certain respondents indicated that in a more secure environment, secularism might have been an option.⁹⁴ It was clear, however, that in the present situation, few would be willing to endorse a secular position. Thus, as in 1929 and 1964, it is likely that debates within Afghan society about modernisation and cultural change will be conducted using an Islamic frame of reference.

There are several fault lines along which discontent could develop into, for example, a confrontation and walk-out from the Constitutional Loya Jirga, or a repudiation of a draft. First, some respondents

mentioned that the name of the country should include the phrase “Islamic state”.⁹⁵ Secondly, some members of *Jamiat* and *Ittehad* stressed the practical application of the Sharia “as much as possible”. An *Ittehad* deputy noted that while democracy was acceptable, it must be limited because it could not justify a government that contravened divinely established rules.⁹⁶ These groups also expressed a clear desire for a more significant constitutional role for Islam than in the 1964 constitution.⁹⁷

A group of Islamic scholars led by Deputy Supreme Court Justice Fazel Ahmad Manawi have advocated that Sharia be the sole source of law, a very restrictive position that would compromise most efforts at modernisation and moderation.⁹⁸ In contrast, *Junbish* officials rejected any need to include a reference to Sharia.⁹⁹ Even if Sharia is not embedded deeply into Afghan law, the role of *ijtihad*, or independent “reasoning based on authoritative texts”¹⁰⁰ will be important in battles to contextualise Islamic norms.¹⁰¹ Among these groups, however, there is no detailed understanding of how other countries have incorporated Sharia into their constitutions or of the effect of its application in other countries. In particular, none evinced an awareness of the instability caused by Islamic provisions in Pakistan's constitutions that “could be replaced or reinterpreted, depending on which faction of Muslims were ruling”.¹⁰²

Thirdly, members of *jihadi* parties, including *Ittehad* and the former *Hizb-i Islami Khalis*, expressed a desire to see some reference to *hijab*, the garb stipulated as appropriate according to

⁹⁰ Constitution of 1964, Arts. 64 and 69.

⁹¹ Gregorian, op. cit., pp. 264-265.

⁹² Ibid., p. 280.

⁹³ Roy, *Islam and Resistance*, op. cit., p. 30; Larry Goodson, “Afghanistan's Long Road to Reconstruction”, *Journal of Democracy*, Vol. 14, No. 1, January 2003, p. 91.

⁹⁴ ICG interview with NGO chairman, Kabul, November 2002.

⁹⁵ ICG interviews with former *mujahidin* leaders, March 2003.

⁹⁶ ICG interview, March 2003.

⁹⁷ ICG interviews, March and April, 2003.

⁹⁸ “Islam only source of law in Afghanistan”, *The Independent Bangladesh*, 4 May 2003. This is similar to Article 2 of the Egyptian Constitution of 1980.

⁹⁹ ICG interview with *Junbish* provincial government official, April 2003.

¹⁰⁰ Hallaq, op. cit., p. 19.

¹⁰¹ This is particularly true in relation to the rights of women. See ICG Asia Report, *Afghanistan: Women and Reconstruction* (14 March 2003), pp. 18-21; Nancy Hatch Dupree, “Constitutional Requirements for Afghan Women”, March 1990, (unpublished paper made available to ICG), pp. 8-9.

¹⁰² Mehdi, op. cit., pp. 107-08.

Islamic principles,¹⁰³ in the constitution.¹⁰⁴ Surprisingly, some women's rights activists were reluctant to take a position on *hijab*, saying that economic and educational issues were more important.¹⁰⁵ All these issues may be used by extremist factions within the *jihadi* parties as a way of mobilising support.

Finally, both civil society and *jihadi* party members expressed a desire to retain the 1964 constitution's reference to Hanafi fiqh, one of the four schools of Sunni jurisprudence.¹⁰⁶ This would implicitly reject religious equality for the country's Shia communities, which include the Hazara inhabitants of the Central Highlands and the Qizilbash.¹⁰⁷ The Hazara have suffered particularly heavy persecution,¹⁰⁸ notwithstanding previous constitutions' guarantees.¹⁰⁹ Sunnis who expressed a preference for Hanafi fiqh in the constitution contended that one school had to be chosen because otherwise multiple courts would be necessary.¹¹⁰ But this argument has little substance. Codified Afghan law is a mixture of different jurisprudential schools, drawing mainly from Hanafi fiqh but also including, for example, family law provisions based on Maliki fiqh, another Sunni school.¹¹¹

In sum, a variety of issues related to the position of Islam, or a sectarian aspect of Islam, must be considered. Yet, there is no feasible way in the official constitutional process to modulate these debates and prevent extremist groups from using them to build coalitions and increase their influence. UNAMA is unlikely to facilitate a reasoned or stable outcome. At a December 2002 conference on civil society and the constitution in Germany, its representative stated that the preferred

solution for the new constitution would be the oxymoronic outcome of "mild Sharia".¹¹² Real public debate that facilitates coalition building by moderate groups alone will facilitate the negotiation of an incorporation of Islam into the constitutional fabric that is not destabilising.

¹⁰³ The term '*hijab*' incorporates "a wide range of 'styles of veil,'" Helen Watson, "Women and the veil: Personal responses to global process", in Akbar S. Ahmed and Hastings Donnan, eds., *Islam, globalisation and postmodernity* (London, 1994), p. 141.

¹⁰⁴ ICG interview with *Ittehad* deputy, March 2003.

¹⁰⁵ ICG interview with lawyer and NGO leader, Kabul, March 2003.

¹⁰⁶ ICG interviews, Kabul and Jalalabad, March and April 2003.

¹⁰⁷ Rubin, op. cit., pp. 30-31.

¹⁰⁸ See Sayed Askar Mousavi, *The Hazaras of Afghanistan* (London, 1998).

¹⁰⁹ Dupree, *Afghanistan*, op. cit., p. 465.

¹¹⁰ ICG interviews with provincial officials and judges, Jalalabad, April 2003.

¹¹¹ ICG interview with faculty at Kabul University Department of Law, December 2002.

¹¹² ICG e-mail correspondence with NGO observer at Bad Honnef Civil Society and the Constitution conference, January 2003.

IV. THE LEGAL FRAMEWORK FOR THE CONSTITUTIONAL PROCESS

A. THE BONN PROCESS

The current political transition follows a course set forth in the 5 December 2001 Bonn Agreement, which, unlike a peace treaty that distributes power, envisages a three-year phased process of political transformation. This is to be conducted under an Interim Administration, succeeded by a Transitional Administration selected in June 2002 by an Emergency Loya Jirga, with “free and fair” elections to occur no later than June 2004.¹¹³ The Agreement also mentions a new constitution, whose distribution of powers is necessarily a critical component of the Bonn conference’s unfinished business of political settlement.

The Bonn Agreement gives only skeletal guidance about what such a process might involve, thus leaving sufficient flexibility to accommodate changes in the political landscape after December 2001 and maximise achievement of its goals. In particular, the Agreement clearly articulates the goal of the transition as a “political future in accordance with the principles of Islam, democracy, pluralism and social justice,” but sets down few practical rules on how to realise these goals¹¹⁴

The Agreement’s General Provisions provide that a “Constitutional Loya Jirga shall be convened within eighteen months of the formation of the Transitional Authority, in order to adopt a new constitution for Afghanistan”.¹¹⁵ The size, composition, or procedures for this Constitutional Loya Jirga are not specified. An elected national assembly could satisfy this requirement, as indeed it did in somewhat similar circumstances between 1964 and 1973 when there was a Loya Jirga composed of members of the national legislatures.¹¹⁶ Nor does the Agreement mandate a particular result, like adoption of a new constitution by a particular date. Only the date of the *convening* of the Constitutional Loya Jirga – January

2004 at the latest – not its closure, is determined by the Bonn Agreement. Beginning a process of electing a national assembly to act as a Constitutional Loya Jirga would meet this requirement. Under its plain language, that step might be only the first in a longer adoption and ratification process that could make use of various auxiliary institutions. Critically, there is no textual compulsion to adopt the constitution before January 2004.¹¹⁷

At least some elements of the process for working up a draft or drafts for presentation to the Loya Jirga are articulated. The Bonn Agreement states that the Transitional Administration “shall, within two months of its commencement and with the assistance of the United Nations, establish a Constitutional Commission”¹¹⁸ to aid in the preparation of a new constitution. Again, the mode of appointment, mandate, and composition of this commission remain undefined.

Thus, the Bonn Agreement requires initiation, but not completion, of the constitution-making process by January 2004, and places almost no restriction on the kind of process leading up to the Loya Jirga, how that Loya Jirga is constituted or how it operates.¹¹⁹ Leaving procedural decisions open in this fashion preserves much-needed flexibility in a volatile security and political climate.¹²⁰

¹¹⁷ In contrast, the references to the Interim Authority, the Emergency Loya Jirga, the Transitional Administration, and the elections all use mandatory terms like “shall be established” and “to be held.” Agreement on Provisional Arrangements in Afghanistan, Pending the Re-establishment of Permanent Government Institutions, op. cit., Section I, Arts. 1-4.

¹¹⁸ Ibid.

¹¹⁹ For example, the national assembly might break out into subcommittees to look at defined constitutional issues, and then reconvene to hold plenary discussions on these issues, the results of which might in turn be referred to or otherwise considered by the full assembly itself.

¹²⁰ Rather than use this flexibility productively, the Transitional Administration failed to lay out a clear legal framework for its plans. This created uncertainty that undermined public confidence in the process. Unsurprisingly, ICG interviews revealed a startling degree of confusion in March and April about the constitutional process. ICG interviews with Kabul, Mazar, and Herat civil society and governmental actors, March and April 2003. For example, some of those interviewed thought that there would be a referendum on the constitution. Others thought that there would be an election for the Constitutional Loya Jirga. Both conceptions are unfounded. The Transitional Administration could have redressed any confusion by issuing a clear decree upon the

¹¹³ Section I of the Agreement on Provisional Arrangements in Afghanistan, Pending the Re-establishment of Permanent Government Institutions. Available at: <http://www.uno.de/frieden/afghanistan/talks/agreement.htm>.

¹¹⁴ Ibid. Preamble.

¹¹⁵ Ibid. Section I, Art. 6.

¹¹⁶ Constitution of 1964, Art. 78.

B. BACKGROUND LAW OF CONSTITUTIONAL CHANGE

One way to address the absence of predictable constitution-making procedures is by reference to existing laws that map amendment or renewal procedures.¹²¹ Currently applicable Afghan laws indeed provide some guidance on constitution making that could produce important public legitimacy by adding clarity and predictability to the drafting process. Also, cementing amendment procedures in advance would reduce an infant constitution's vulnerability to politically motivated change after adoption.¹²²

The Bonn Agreement explains that the transitional legal system includes the 1964 Constitution "to the extent that its provisions are not inconsistent with [the Bonn Agreement and] with the exception of those provisions relating to the monarchy and to the executive and legislative bodies".¹²³ The 1964 Constitution devotes three articles to the process of constitutional amendment, which are only partially abrogated by the Bonn Agreement.

Articles 121 and 122 of the 1964 Constitution provide that constitutional amendments are drafted by a committee of a Loya Jirga, in consultation with the Council of Ministers and the Supreme Court, or by that Loya Jirga as a whole. Proposed amendments are then submitted to the same Loya Jirga for ratification by a two-thirds majority.¹²⁴ While these articles relate to executive and legislative structures, and are thus void pursuant to the Bonn Agreement, they set forth procedures similar to those in use now, in which

creation of the Constitutional Commission, outlining the drafting process.

¹²¹ For example, Chapter IX of the Tunisian Constitution of 1959 and Article V of the United States Constitution prescribe procedures for the amendment of those basic documents.

¹²² The successful amendments to Pakistan's 1973 constitution by General Muhammad Ziaul Haq during his imposition of martial law illustrate the dangers of permitting easy constitutional amendment. See Zulfikar Khalid Maluka, *The Myth of Constitutionalism in Pakistan* (Karachi, 1995), pp. 259-274.

¹²³ Section II, Art. 1 of the Agreement on Provisional Arrangements in Afghanistan, Pending the Re-establishment of Permanent Government Institutions, op. cit. Also part of the legal framework are "existing laws and regulations, to the extent that they are not inconsistent with [the Bonn Agreement] or with international legal obligations to which Afghanistan is a party, or with those applicable provisions contained in the Constitution of 1964".

¹²⁴ Constitution of 1964, Art. 122.

drafting by a committee is followed by a ratifying Loya Jirga.¹²⁵ Absent a clear mandate for the constitutional commission, and in the light of uncertainty about how the Constitutional Loya Jirga will function, these rules can provide a structure lacking from the Bonn Agreement. The Transitional Administration could invoke them publicly as a precious source of legitimacy for the process, including rules like the two-thirds voting requirement. The knowledge that preparation of the constitution was following a path preordained in law prior to the formation of the Transitional Administration would bolster the process's credibility.

Furthermore, Article 120 states that "adherence to the basic principles of Islam, [and] Constitutional Monarch[y] . . . shall not be subject to amendment".¹²⁶ Again, only the first part of this article, which does not concern governmental structure, remains in force. This provision may be useful because it could provide a textual anchor for a constrained role for religion in the new constitution, as a guiding principle of government, rather than a source of law (as Sharia) or a commitment to a particular jurisprudential school. For example, this provision could be part of an argument, to be rehearsed at the Constitutional Loya Jirga, to the effect that Afghanistan already has an Islamic foundation for the state, and additional accretions of religious referents are unnecessary.

In summary, the legal framework within which present Afghan constitutional development occurs has many gaps and ambiguities. Almost the only mandated feature of the Bonn process is an extremely tight timeframe, which provides eighteen months for the writing of and public debate on a constitution. The uncertainty and confusion about the drafting process needlessly undermines the legitimacy of that process by creating the impression that factions in power can manipulate the process to their own ends. Given the magnitude of the decisions to be made, a clear legal procedure would contribute to the legitimacy of the process and the acceptability of the final draft. Recourse to norms that have been enshrined in Afghan law since 1964, well before the advent of the Transitional Administration, would go some way toward dispelling impressions of factional manipulation.

¹²⁵ The constitutional process pursuant to the Bonn Agreement, in contrast, does not require that the commission be part of a Loya Jirga.

¹²⁶ Constitution of 1964, Art. 120. This provision also refers to Art. 8, which is a broad enumeration of monarchic powers.

V. THE CONSTITUTION-MAKING PROCESS

Confusion due to the absence of a legal framework has been exacerbated by the Transitional Administration's delay in issuing a governing legal decree. The first decree related to the process was issued only in April 2003, six months after the process began – and even then appeared initially only in Pashto. Nonetheless, a three-phase constitution making process that has been roughly honoured was first articulated in a working paper of the UNAMA Constitutional Commission Support Unit in 2002.¹²⁷

First, a small group of “pre-eminent and well-known Afghan legal scholars, jurists, and other qualified individuals” would be selected by the Karzai administration as a drafting (*tasweed*) committee. Secondly, the drafting committee would be expanded in January 2003 to a thirty-five-member commission of “prominent national personalities and representatives of political parties, in addition to scholars from various fields” tasked with preparing, reviewing, and finalising the draft, a process known as *tadqiq*. After that commission had met for ten months, a Constitutional Loya Jirga could adopt (*tasweed*) the draft constitution.¹²⁸ This initial structure did not reference plans for public consultation or debate.

UNAMA has consistently stated that it has the lead in coordination and on technical support with respect to preparation of the constitution.¹²⁹ But the process has been plagued by delays and repeatedly compromised by institutional in-fighting and conflict between the UN, factions within the Transitional Administration, and the international community.

A. THE DRAFTING COMMISSION

One of the few requirements of the Bonn Agreement was the creation of a Constitutional Commission “within two months” of the Transitional Administration's inception.¹³⁰ In a pattern to be repeated, the Transitional Administration failed to act in a timely manner. Only on 5 October 2002, four months after the Emergency Loya Jirga of June 2002, did President Karzai announce the establishment of a drafting commission. And former King Zahir Shah did not inaugurate this commission until 7 November 2002.¹³¹ Of the eighteen months envisaged in the Bonn Agreement for a constitution-making exercise, only thirteen remained when this commission began work.

The selection of the drafting body occurred through a series of private negotiations between the UN and the Transitional Administration. No criteria were ever published. In contrast to two other commissions mandated in the Bonn Agreement, the Afghan Independent Human Rights Commission, and the Judicial Reform Commission, no decree detailing powers and responsibilities was released.¹³² This omission, all the more striking because the Bonn Agreement makes no mention of a drafting body, had significant consequences because it enabled the drafting commission to evade the responsibility of releasing an actual draft. The absence of a decree that laid out the commission's obligations also facilitated the gradual lengthening of the drafting period, increasing the delay in the formation of the full commission.¹³³

¹²⁷ Working Paper for the Constitutional Commission (Kabul, undated), p. 1. This is not a document with legal effect.

¹²⁸ Ibid. pp. 1-2.

¹²⁹ ICG interview with UNAMA official, 1 March 2003. See also Islamic Transitional Administration of Afghanistan, UNAMA, UNDP, “Support to the development of a new Constitution for Afghanistan”, (undated document), p. 6.

¹³⁰Section I, Art. 6 of the Agreement on Provisional Arrangements in Afghanistan, Pending the Re-establishment of Permanent Government Institutions, op. cit.

¹³¹ICG interview with Secretariat of the Constitutional Commission, December 2002.

¹³² For example, the “Decree of President Karzai Regarding the Constitution of the Judicial Commission and its Duties” (2 November 2002) identified the members of the Judicial Commission and enumerated with reasonable precision their powers and responsibilities. The Bonn Agreement mandated a fourth commission, “an Independent Civil Service Commission”, which has yet to function. Section V, Art. 5 of the Agreement on Provisional Arrangements in Afghanistan, Pending the Re-establishment of Permanent Government Institutions, op. cit.

¹³³ The Constitution Drafting Commission did write by-laws, although these have never been widely publicised. Moreover, they concern the internal workings of the

The Constitutional Drafting Commission had nine members, and was chaired by Vice President Neamatullah Shahrani. Two further members of this initial commission held ministerial posts – Qasim Fazili as Minister Advisor for Legal Affairs, and Rahim Sherzoy as Deputy Minister of Foreign Affairs. This overlap between the present administration and the commission inevitably fostered at least a suspicion of conflicting interests. Fazili, however, reportedly never attended a commission meeting. Only two members, Asifa Kakar and Mukarama,¹³⁴ were women. Each commissioner received U.S.\$2,000 compensation per month, 50 times the salary of an average Afghan civil servant. The only justification for this extraordinary expenditure was that the Human Rights Commission received the same wage, notwithstanding the absence of any legal requirement of salary equality in the Bonn Agreement or elsewhere.¹³⁵

Some observers believe that Vice President Shahrani, an ethnic Uzbek from Badakshan, a former Chancellor of Kabul University, and an associate of the mujahidin leader Abd al-Rab al-Rasul Sayyaf, would be effective in communicating to ulema and mullahs as well as to Western donors: “Shahrani has a double face. He has a long beard but also a modernising mindset”.¹³⁶ It is believed that the vice president can deliver a significant portion of the religious community through his connections with mullahs and with former *jihadi* leaders like Sebghatullah Mujaddiddi, and Burhanuddin Rabbani, who also hails from Badakshan.¹³⁷ Indeed, Vice-President Shahrani has impressed diplomats who have queried him about the constitution’s direction.¹³⁸ He has also responded positively to civil society

commission, focusing on the duties of the chairman and the division of responsibilities within the commission between three sub-committees responsible for writing, research and drafting. See Unofficial Translation of By-Laws of the Constitutional Drafting Commission.

¹³⁴ It is not uncommon for Afghans to use a single name.

¹³⁵ ICG interview with UN staff, April 2003.

¹³⁶ ICG interview with Afghanistan political analysts, December 2002 and January 2003.

¹³⁷ Ibid. Sebghatullah Mujaddiddi, who is descended from *Naqshbandi pirs*, but not a *pir* himself, was leader of the *Jabha-yi Nejay-i Milli*, one of the political parties that formed the core of the resistance to the Soviet occupation. Roy, *Islam and Resistance*, op. cit., pp. 115-116. Burhanuddin Rabbani’s political involvement can be traced from his leadership of Kabul University’s Muslim Youth shura in the early 1970s to his leadership of the *Jamiat-i Islami Afghanistan*. Ibid. p. 73; Edwards, op. cit., p. 235.

¹³⁸ ICG interviews with diplomats, February and March, 2003.

suggestions of collaboration.¹³⁹ Vice President Shahrani displayed this ability to address divergent audiences at the first public meeting of the Constitutional Drafting Commission, on 26 November 2002, when he spoke on the role of Islam in the new constitution:

Afghanistan is a Muslim society, and so we will respect Muslim values. But we are also member of the international community, and want to end our isolation. The values and standards of the international community will be reflected in the constitution.¹⁴⁰

Nevertheless, there are reports that consensus within the commission quickly broke down. The Constitutional Drafting Commission fractured into two factions, each of which worked on its own draft. Four of the other active members of the commission have connections to Shahrani, having been associated with him at Kabul University. Abdul Salam Azimi and Mohammad Musa Ashari, who taught Shahrani in Kabul, both also have degrees from Al-Azhar University. The two women, Asifa Kakar and Mukarama, were both Shahrani’s students, and according to one commentator, regularly followed his lead.¹⁴¹ This group produced one draft. Two other members of the commission, Musa Marufi and Rahim Sherzoy, who both spent considerable time in the United States and were reportedly appointed for their legal qualifications, are said to have taken more liberal positions than the Shahrani faction.¹⁴² Thus, by February 2003, two drafts were in circulation, associated with the Shahrani and Marufi factions respectively.¹⁴³ According to the commission’s by-laws, all decisions are by majority vote, making adoption of the Shahrani draft more likely.¹⁴⁴

In early 2003, the Constitutional Drafting Commission and UNAMA began to state in public

¹³⁹ Letter from Vice President Neamatullah Shahrani to Representatives of Afghan Civil Society Forum, April 2003.

¹⁴⁰ Speech of Vice President Shahrani at a public meeting of the Constitutional Commission, 26 November 2002.

¹⁴¹ “They are basically there to be his secretaries”, ICG interview with political analyst, February 2003.

¹⁴² ICG interview with Kabul diplomat, March 2003.

¹⁴³ ICG interviews, February and April 2003. According to one diplomat, “Sherzoy is not pushing anything”, making Marufi the prime force behind the alternative draft. ICG interview with diplomat, April 2003.

¹⁴⁴ Unofficial Translation of the By-laws of the Constitutional Drafting Commission, Art. 21.

meetings that the former would not release the results of its work, to the considerable surprise of Afghan civil society and Kabul-based diplomats. To justify the refusal to publish, Commission and UNAMA officials claimed that a published draft would have a negative impact on public debate because it would polarise opinion. The failure to release a draft precipitated foreseeable confusion. Within two days of the formation of the full commission, news stories detailing a leaked draft had appeared.¹⁴⁵ The draft described in those stories, however, appears to be the Marufi, rather than the Shahrani, version.

According to informed sources, the Shahrani draft, which is most likely to have been forwarded to the full Commission, has 172 articles, 44 more than the 1964 Constitution, and appears to be “cut and pasted” together.¹⁴⁶ Its poor technical quality is unsurprising given the relative paucity of legislative drafting experience within the Commission, whose members hold degrees in Islamic law and not statutory or civil law. Although technical assistance from international experts could have ameliorated the draft,¹⁴⁷ UNAMA, citing a concern that the constitution would appear to be written by non-Afghans, has resisted attempts to provide such help. One donor’s early attempt to identify and provide long-term legal consultants on

whom the Commission could draw was initially blocked by UNAMA, who described it as “a slap in the face [of the UN]”.¹⁴⁸ Such technical assistance as UNAMA has provided has taken the form of options papers by legal academics.¹⁴⁹

B. THE CONSTITUTIONAL COMMISSION

The envisaged second stage of the constitution-making process is the creation of a larger Constitutional Commission. Even before the commission was announced, its creation and obligations had provoked concern. First, the appointment of the commission was not transparent and was marred by internal politicking that may compromise its ability to create consensus and legitimacy. Secondly, the public education and consultation elements were not only poorly designed but have also been consistently resisted by UNAMA, which envisages the process as primarily top-down. Further, the process has demonstrated a considerable planning deficit.

President Karzai has direct responsibility for appointing commission members “after broad consultations”.¹⁵⁰ The principal responsibilities of the full Commission are two-fold: the technical responsibility for finalising the draft and the political responsibility for public education and consultation.¹⁵¹ After adopting a procedural framework, the Commission, with the assistance of its secretariat, is “to ensure that the public has accurate information about the constitution making exercise and their role in the process,” so that “meaningful public consultations are possible”.¹⁵²

Commissioners divide into eight mobile consultation teams to travel to the capitals of each of Afghanistan’s 32 provinces as well as Iran and Pakistan, to hold public meetings with “homogenous groups” of, among others, “community and tribal elders, ulema, women, members of the [Emergency Loya Jirga], businesspersons, university professors, professionals, youth and Afghan members of NGOs and

¹⁴⁵ Amin Tarzi, “Afghanistan’s New Draft Constitution: A Sneak Preview”. RFL/RC Afghanistan Report, Vol. 2, No. 14, 24 April 2003. In press interviews, the Commission has denied that this is their draft. ICG interview with UNAMA staff, May 2003.

¹⁴⁶ ICG interviews with Afghan legal professionals and international experts, April 2003.

¹⁴⁷ Soon after the appointment of the Constitutional Drafting Commission, it received visits from American, German and Swiss constitutional law experts. A European Union offer to organise a conference for the Commission that would bring to Kabul experts was blocked by UNAMA and President Karzai. At the end of 2001, President Jacques Chirac of France met with President Karzai and offered technical assistance. At the Afghan president’s request and after private meetings with him, a French constitutional law expert, Guy Carcassone, drafted a constitution. It appears that this first draft did not meet President Karzai’s satisfaction because it did not accord sufficient power to the president: Carcassone thereafter produced two further drafts that accentuated the presidential aspects of the system. ICG interview with European Union official, 19 December 2002; ICG interviews with American, German and Swiss constitutional law experts, Kabul, November and December 2002.

¹⁴⁸ ICG interview with UNAMA official and independent commentators, December 2002.

¹⁴⁹ They include Bruce Ackerman, Yash Ghai, Donald Horowitz, and Pasquale Pasquino.

¹⁵⁰ Secretariat of the Constitutional Commission of Afghanistan, “The Constitution-Making Process in Afghanistan”, Kabul, 10 March 2003, p. 2.

¹⁵¹ *Ibid.*, p. 3.

¹⁵² *Ibid.*, p. 6.

intergovernmental agencies".¹⁵³ To aid them, eight regional offices and four foreign offices have been established.¹⁵⁴ In August 2003, commissioners are to reconvene in Kabul to consider the consultations' results. A draft will then be published at the end of that month with a report "analysing the views of the public as expressed during the consultation process". Commissioners should return to the provinces in September to "begin educating [the] public about [the] Final Draft".¹⁵⁵ The Constitutional Loya Jirga is to follow in October 2003.

1. Selection of Commission Members

The formation of the Constitutional Commission was marked by considerable delay and involved primarily factional bargaining at the cabinet level without significant consideration of the public interest.

As with the initial drafting commission, the formation of the full commission was delayed several times. An UNAMA working paper stated that the drafting body would complete its tasks "within six months from its creation", suggesting that the full commission would be formed in February 2003. Subsequent documents, including one prepared for the national cabinet, stated that the full Constitutional Commission would begin work in the first week of March.¹⁵⁶ Despite repeated assurances from UNAMA officials throughout March that inauguration was but a few days away,¹⁵⁷ the full Commission was inaugurated only on 26 April 2003. This delay further compromised the possibility of real public debate, or even public education, about constitutional issues.

Worse, in spite of the promise of "broad consultations"¹⁵⁸ on the commission's composition, the appointment process was opaque and secretive. ICG interviews with provincial government officials, *jihadi* party officials, and civil society figures in Kabul, Mazar-i Sharif, and Jalalabad

revealed little understanding of the process, let alone acceptance or buy-in.¹⁵⁹ No criteria or explanations of the selection procedures have been published. In the long silence, Afghans have grown increasingly concerned that the constitution-making process will, like the Emergency Loya Jirga,¹⁶⁰ be another exercise in political theatre wherein their views are sidelined in favour of a consensus fashioned by and favouring only those who currently hold governmental positions.¹⁶¹

The manner in which the commission was appointed does little to dispel these fears. Although President Karzai bears primary responsibility for the appointments, and could use this to strengthen his ability to influence final substantive outcomes,¹⁶² he has worked with a small group called the "Security Cabinet" within the national council of ministers. This smaller group includes Minister of Education Younus Qanooni, Minister of Foreign Affairs Abdullah Abdullah, Vice-President and Minister of Defence Marshall Mohammad Qaseem Fahim, and Minister of Finance Ashraf Ghani Ahmadzai.¹⁶³ The group is dominated by powerful officials from the Panjshiri *Shura yi-Nazar* component of the United Front formerly affiliated with mujahidin leader Ahmed Shah Masoud and is widely seen as having a lock on military and political power at the national level.¹⁶⁴ It achieved this grip because of its key role in Coalition strategy during Operation Enduring Freedom.¹⁶⁵ Hence, one political faction among many has dominated the selection process.

Such a selection procedure was never likely to yield individuals who could be viewed as legitimate national figures capable of transcending narrow,

¹⁵³ Ibid., p. 7. ICG interviews with UNAMA and UNDP officials, March and April 2003.

¹⁵⁴ The four foreign offices are in Meshad, Tehran, Quetta and Peshawar. ICG interview with Commission staff, April 2003.

¹⁵⁵ Secretariat, op. cit., pp. 10-11.

¹⁵⁶ Only the document for cabinet use mentions the first week of March. Public documents are more vague and refer to "March 2003". Ibid., p. 3.

¹⁵⁷ ICG interviews with UNAMA and UNDP officials, March and April 2003.

¹⁵⁸ Secretariat, op. cit., p. 2.

¹⁵⁹ ICG interviews with Kabul, Mazar-i Sharif and Jalalabad political leaders, April 2003.

¹⁶⁰ For details of the "false promise" of the Emergency Loya Jirga, see ICG Afghanistan Briefing Paper, *The Afghan Transitional Administration: Prospects and Perils* (30 July 2002), pp. 2-7.

¹⁶¹ ICG interviews with Afghan civil society persons, March and April 2003.

¹⁶² It should be no surprise that "to the extent that the president is involved in the constitution-making process, he will tend to promote a strong presidency", Jon Elster, "Forces and Mechanisms in the Constitution-Making Process", *Duke Law Journal* (November, 1995), p. 381.

¹⁶³ ICG interview with UN official, March 2003.

¹⁶⁴ ICG interviews in Jalalabad and Kabul, March and April 2003.

¹⁶⁵ Goodson, op. cit., p. 86.

sectarian interests. Indeed, the eventual list of 35 reflects in particular the interests of *Shura-yi Nazar* and other *jihadi* groups, including Abd al-Rab al-Rasul Sayyaf's *Ittehad-e Islami Afghanistan*, a group with Salafist¹⁶⁶ inclinations and financial links to Saudi Arabia.¹⁶⁷ One *Shura-yi Nazar* appointee is known for his attempts to suppress civil society independent of his party in Kabul.¹⁶⁸ Because several experienced politicians from *jihadi* groups have been included but respected moderate leaders and members of democratic groups are conspicuously absent, it is likely that the commission will be dominated by the former.¹⁶⁹

The full commission also includes only seven women, some connected to *Shura-yi Nazar*. None are lawyers, despite the presence in Kabul of several eminent women legal professionals, including one who sat in a previous constitutional Loya Jirga. The two women members of the Constitutional Drafting Commission have been dropped. According to UNAMA, they had made little contribution to that body.¹⁷⁰ The experience of the drafting commission suggests that qualified, articulate and effective Afghan women have been passed over in favour of individuals who can be manipulated to serve factional ends.

Compounding this sense of factional domination is President Karzai's perceived inability to execute decisions. "Karzai has no sense of direction or follow-up", asserted one respected commentator.¹⁷¹ According to a Kabul-based diplomat, "Karzai's skills are a matter of concern" generally to the diplomatic community because of his failure to develop effective policy and lack of foresight.¹⁷² He is hampered by the absence of an experienced policy staff in the presidential office. Another diplomatic source explained that President Karzai has been under pressure from numerous political factions, not least the Panjshiri Tajik one within the administration, to include their agents in the

commission.¹⁷³ This conforms to a pattern of clientalist behaviour whereby "people in government are simply trying to satisfy those they have relationships with".¹⁷⁴ Karzai's response to these factional demands has been to acquiesce rather than negotiate between groups.

Independent of its outcome, the selection process harmed growth of accountability norms within governmental institutions. It reinforced the power of *Shura-yi Nazar* and other *jihadi* groups that already have a strong presence in the Kabul administration, at the cost of accountability and transparency. Nor did it generate a group suited to serve national interests. How this group can be trusted to handle public consultation or create a sense of national ownership in the draft remains unclear. In sum, a non-transparent process, manipulated by *Shura-yi Nazar* and its allies, has yielded a group ill suited to its tasks and without popular legitimacy, in what has been almost a reprise of the process of cabinet formation at the Emergency Loya Jirga in June 2002.¹⁷⁵

2. Public Education

The flaws, and consequent loss of legitimacy, in the selection of the Constitutional Commission could be partially redressed through an effective process of public education and consensus building that results in a constitution accepted by Afghans broadly and not hostage to partisan interests. UNAMA has grandly promised "a month of intense public education to prepare, linked to TV, media, and government magazines".¹⁷⁶ Unfortunately, the public education and consultation is not properly planned or funded. It is unlikely to be more than a way for the Transitional Administration and UNAMA to claim that Afghans have indeed been consulted. Like the promise of "broad consultation" in the creation of the Commission itself, the Afghan public's role in the substance of constitution-making is likely to be illusory.

¹⁶⁶ Salafism involves a rejection of contemporary politics for a return to the original texts of Islam and a model of society dating back to the religion's founding. Olivier Roy, *L'islam mondialisé* (Paris, 2002), p. 133.

¹⁶⁷ William Maley, *The Afghanistan Wars* (New York, 2002), p. 63; Rubin, op. cit., p. 209.

¹⁶⁸ ICG interview with Kabul NGO staff, May 2003.

¹⁶⁹ ICG interview with Kabul diplomat, May 2003.

¹⁷⁰ ICG interview with UNAMA staff, April 2003.

¹⁷¹ ICG interviews with Afghanistan commentators, December 2002 and February 2003.

¹⁷² ICG interview with diplomatic source, 12 April 2003.

¹⁷³ ICG interview with Kabul diplomat, 17 April 2003.

¹⁷⁴ ICG interview with Afghanistan specialist, December 2002.

¹⁷⁵ The present cabinet was approved on the ninth and final day of the Loya Jirga "without formal vote, count, written slate or opportunity to discuss". ICG Briefing, *The Afghan Transitional Administration*, op. cit., p. 7.

¹⁷⁶ Statement of UNAMA Constitutional Support Unit at public meeting, 14 April 2003.

A budget prepared by the UN in March 2003 for presentation to the international community reflects the limited provision and insufficient planning for public education. The timing of the budget also betrays the absence of a real commitment to broad involvement of the Afghan public. It was drafted and released to donors in March 2003.¹⁷⁷ At that point, no public education staff had been hired, no plans drafted, and no public education material prepared. Five months in which public education could have been planned and executed had been lost. The seven months between submission of the budget and the Loya Jirga, moreover, cannot be entirely devoted to public education. Such education must precede actual consultation, which must in turn be followed by a month of redrafting and a month of sharing the final draft. Tardiness in planning has thus left bare months for public education on the complex, interlocking constitutional questions that engage the entire country's future. The importance of this loss cannot be overestimated, given the need for saturation coverage of unfamiliar issues, with repetition through several media, if public education is to be effective.¹⁷⁸

Aside from this lost time, the budget is incomplete. Although it provides for staff and materials, there is no specific provision for distribution of educational materials to the public. Nor, except for salaries, is there financial provision for staff in regional offices to conduct activities like training or outreach. No line item covers travel to disseminate educational materials, although the Commission's secretariat contends that unspecified funds will be available.¹⁷⁹ To the extent that these activities occur, they must be financed from other budget lines. The Commission has developed a newsletter and some posters of dubious quality.¹⁸⁰ But even if such

materials were distributed in a timely fashion, reliance on written material in a nation with widespread illiteracy is questionable.¹⁸¹ In developing the budget, the UN and the Commission gave little thought to how, in practice, to give people information. In contrast, Afghan staff members at the commission's secretariat have demonstrated great ingenuity and industry in assembling posters, cartoons, and radio scripts.¹⁸²

Further, the budget sets aside only U.S.\$61,000 for public education, excluding salaries.¹⁸³ In contrast, the UN has agreed to pay each commissioner U.S.\$2,000 each month. Thus, U.S.\$70,000 will go to their salaries monthly, with U.S.\$480,000 allotted specifically to commissioners' compensation during the entire process. These sums suggest the relative attention paid by the Transitional Administration and the UN to public legitimacy on the one hand, and elite co-option and consolidation on the other.

The budget also promises "in-kind" provision of education materials, which UNAMA claims are to be obtained from civil society and particularly NGOs.¹⁸⁴ But interested advocacy and media NGOs, meeting regularly under the auspices of the umbrella Afghan Civil Society Forum, were not informed of their putative responsibility to provide

¹⁷⁷ An initial budget, prepared by an Asia Foundation consultant with no prior experience of Afghanistan, had been rejected by donors as "excessively vague", "unrealistic" and "exorbitant". ICG interviews with Kabul diplomats, March and April 2003.

¹⁷⁸ ICG interview with USAID staff, 4 March 2003.

¹⁷⁹ Commission documents state that "provincial staff will travel to the districts to educate the public on the process and schedule meetings with the commissioners and ensure wide geographic participation", Secretariat, *op. cit.*, p. 7. But the budget contains only a line item for "Domestic Travel for Consultation" and no line item for travel related to education.

¹⁸⁰ One poster centres on a book, which is intended to be the constitution but which could be mistaken for the Koran,

surrounded by a sea of saluting hands. Staff of one Afghan NGO suggested that the poster could be taken to promote unswerving allegiance to Sharia. In Pakistan's October 2002 national elections, the Muttahida Majlis-i-Amal, a religious alliance, manipulated religious sentiments by depicting their election symbol, the book, as the Koran.

¹⁸¹ UNESCO estimates that only 51.9 per cent of Afghan men over the age of fifteen and 21.9 per cent of women in the same age group can read and write. "UNESCO and the government of Afghanistan launch nation-wide literacy project", 28 January 2003 at <http://www.reliefweb.int/rwb.nsf/c7ca0eaf6c79faae852567af003c69ca/2cdc3fe5c11vf9m>.

¹⁸² ICG interview with Constitutional Commission staff, April 2003.

¹⁸³ The budget provides for two public education staff based in Kabul and eight in the provinces. For the conduct of public education, U.S.\$4,000 has been allocated for stationary and U.S.\$15,000 for radio and television programming. The budget indicates under line items for civil education material, posters, calendars, cassette tapes, and mobile cinema that in-kind contributions are expected, so that no financial provision need be made by the UN or donor governments.

¹⁸⁴ Statements of UNAMA and Commission officials at 14 April 2003 public meeting.

these materials.¹⁸⁵ NGOs that have approached UNAMA with proposals for public education and consultation have found little readiness to collaborate on the part of UNAMA's Constitutional Commission Support Unit. For example, a consortium of ten NGOs developed in February-March 2003 a plan for village-level public education and consultation but were blocked for weeks with objections unrelated to the substance of the proposal.¹⁸⁶ Another offer early in the process by a respected international NGO to fund a weekly newsletter was turned down.¹⁸⁷

To conclude, when the Constitutional Commission began its work, no useful public education had occurred, and UNAMA and the Commission had no effective plan for such education. This has compromised the possibility of any genuine public consultation.

3. Public Consultation

Even if public education had been adequate, the public consultation process is not presently designed to gather a wide segment of views. Repeatedly, staff of the UNAMA Constitutional Support Unit have stressed that the constitution-making exercise is "not a referendum", that the goal of consultation is "quality", not quantity,¹⁸⁸ and that "people in rural Afghanistan don't have the ability to distinguish the facts and issues".¹⁸⁹ Thus, public meetings will be small and held in provincial capitals. Even if some transportation is provided from districts,¹⁹⁰ the number of people to be consulted will be limited.

Furthermore, security arrangements have been minimal despite Special Representative Brahimi's warning on 6 May 2003 that consultations "can be conducted only if there is security".¹⁹¹ UNAMA plans to work with "relevant government officials

to facilitate secure consultations".¹⁹² The Ministry of the Interior has written to provincial governments requesting cooperation,¹⁹³ and UNAMA's eight regional offices will provide advice on security, although no formal mechanism has been designed to collect and address complaints of intimidation and coercion.¹⁹⁴ Despite Special Representative Brahimi's caution, the UNAMA Constitutional Commission Support Unit insists that security problems are unlikely: "Because these are not elections, we don't expect much difference in views".¹⁹⁵

The arrangement of consultations in provincial capitals in collaboration with provincial governments seems designed to minimise the ability of Afghans to speak freely. Repeatedly, civil society figures from Faizabad, Gardez, Herat, Jalalabad, Kabul, and Mazar-i Sharif have stressed that an important source of insecurity is the provincial government.¹⁹⁶ Further, the consultations will coincide with the July 2003 start of the "New Beginnings" disarmament program,¹⁹⁷ and the harvesting of 2003's bumper opium crop, both of which have the potential to increase instability across the country. Both the structure and timing of the UN plan for consultation thus maximise insecurity for the commission's potential interlocutors. Given the failure of the UNAMA Constitutional Commission Support Unit to seek the advice of UNAMA's security advisors, this might appear unsurprising, except that a similar dynamic operated in May and June 2002 to the detriment of the Emergency Loya Jirga process.¹⁹⁸

4. The Planning Deficit

One explanation for this paucity of strategic planning is that neither the Commission nor UNAMA initially intended to orchestrate useful public education or consultation. UNAMA is

¹⁸⁵ ICG interviews with NGO staff in Kabul, April 2003.

¹⁸⁶ ICG interview with NGO staff, April 2003.

¹⁸⁷ ICG e-mail correspondence with international NGO staff, May 2003.

¹⁸⁸ ICG interview with UNAMA staff, 26 March 2003. Statements of UNAMA official at public meeting, 14 April 2003.

¹⁸⁹ ICG interview, 14 May 2003.

¹⁹⁰ Such transportation has been promised. See Secretariat, *op. cit.*, p. 7.

¹⁹¹ Briefing by Special Representative of the Secretary General Lakhdar Brahimi to the Security Council, 6 May 2003.

¹⁹² Secretariat, *op. cit.*, p. 7.

¹⁹³ ICG interview, UNAMA Constitutional Commission Support Unit staff, 14 May 2003.

¹⁹⁴ *Ibid.* These offices, however, lack capacity to do more than give advice.

¹⁹⁵ *Ibid.*

¹⁹⁶ ICG interviews in Kabul, Jalalabad, and Mazar-i Sharif with Afghan civil society leaders, students and journalists, March and April 2003.

¹⁹⁷ For example, one local faction could seize on disarmament as an opportunity to move militarily against other local groups.

¹⁹⁸ ICG interview with UNAMA military advisors, April 2003.

responsible for technical assistance and has produced most of the documentation related to the nature and structure of the process. But diplomatic sources report that it has repeatedly resisted consultations with the Afghan public. UNAMA officials have cautioned that the consultation process must not constrain commission choices, suggesting a desire for a process that appears to harvest public input but does not incorporate it meaningfully. Diplomats say that UNAMA staff describe the Bonn framework as the beginning of a “slow and cautious process of change”, focused on political negotiations with a select few political leaders, with a “minimalist” commitment to the creation of democratic institutions. One diplomat added that intense pressure by the European Union and others was exerted before the UN acquiesced to public consultation at all.¹⁹⁹

Once UNAMA and the Transitional Administration found themselves obliged to engage in some kind of public process, they dallied rather than developing a minimally effective plan. An early work plan for the commission envisaged consultations in only eight urban locations.²⁰⁰ As late as November 2002, the Transitional Administration was planning on limiting consultation to key political constituencies.²⁰¹ In late November 2002, Vice President Shahrani stated that only after the full commission had completed its work would consultation begin through print media and radio.²⁰²

The process for writing and consulting on the draft constitution was thus severely compromised before it even began, insofar as it lacked a legitimate selection procedure for the Constitutional Commission and a plan for public involvement. The process entrenches the power of the *Shura-yi Nazar*, and provides no method for Afghans who do not already have a place in the power structure to articulate their views safely. Therefore, it tilts Afghan politics further toward a model of unaccountable backroom dealings, unresponsive to a disenfranchised public. This process will not

foster either accountability within the government or an environment of open public debate in advance of 2004 elections.

C. THE CONSTITUTIONAL LOYA JIRGA

The constitution-making exercise is slated to conclude with a Constitutional Loya Jirga in October 2003, and the UN is budgeting for that assembly to be made up of 500 persons. But the secretariat of the commission, which provides much logistical support, has already disclaimed responsibility for the Loya Jirga, reasonably fearing the overwhelming and highly politicised nature of the task. And UNAMA, which putatively has responsibility for technical assistance, had not developed a strategy for the event when the Constitutional Commission was initially formed. The first internal UN meeting to discuss the Loya Jirga was scheduled in mid-April 2003, and then only as a result of ISAF requests for information.²⁰³ The last stage of the constitution-making process thus threatens to fall victim, like the public education and consultation phases, to the failure of the Transitional Administration and the UN to engage in long-term and timely strategic planning.²⁰⁴

Failure to plan ahead will lead to repetition of the Emergency Loya Jirga's flaws, like the failure to release clear procedural rules in a timely fashion, the last-minute inclusion of provincial governors and commanders, and the intimidating deployment of National Security personnel within the meeting tent.²⁰⁵ All these compromised a process that, until its final stage, had at least preserved a margin of democratic procedure.²⁰⁶ It is imperative that planning for the Constitutional Loya Jirga commence in a serious fashion as soon as possible and that plans for it, including selection of delegates, are released early in the process in a

¹⁹⁹ ICG interview with Kabul diplomats, April 2003.

²⁰⁰ Kunduz, Mazar-i Sharif, Bamyan, Herat, Kandahar, Khost, Jalalabad, and Kabul. Work Plan for the Constitutional Drafting Commission, October 2002-March 2003. This document placed the responsibility for consultation with the Constitutional Drafting Commission, a sensible idea since abandoned.

²⁰¹ ICG interview with Kabul diplomat, December 2002.

²⁰² Speech of Vice President Shahrani, public meeting of the Constitutional Commission, 26 November 2002.

²⁰³ ICG interview with UN staff, April 2003.

²⁰⁴ In the words of one aid agency official who has worked closely on the constitutional process, “there is no management capacity at UNAMA”, and the designated staff members within the Constitutional Commission Support Unit are “out of their league”. ICG interview with aid agency official, 15 February 2003.

²⁰⁵ ICG Briefing, *The Afghan Transitional Administration*, op. cit., p. 4; Goodson, op. cit., at p. 94.

²⁰⁶ ICG interview with former UN staff involved in the Emergency Loya Jirga, March 2003.

manner that maximises transparency, and hence public trust.

UNAMA envisages that delegates will be selected from the pool of about 1,600 Emergency Loya Jirga delegates although a mechanism for this has yet to be specified.²⁰⁷ Although the Emergency Loya Jirga delegates are considered, by some observers, as “the most representative group that Afghanistan has seen in decades”,²⁰⁸ this method presents certain barriers to achieving a legitimate body because not all Emergency Loya Jirga members command respect. Some delegates to the Emergency Loya Jirga are seen as having been selected by provincial governors and regional military commanders.²⁰⁹ Also, to include those un-elected delegates who were brought in at the last minute would damage beyond repair the Constitutional Loya Jirga’s standing. Further, if the process for selecting the Constitutional Loya Jirga delegates is not transparent, there is a danger that even the most balanced and representative selection will be compromised due to a perceived association with the Karzai administration and the *Shura-yi Nazar*.²¹⁰

VI. THE RISKS AND REWARDS OF A MORE PUBLIC PROCESS

The present process is unsatisfactory. But would a more public and open one be more desirable? According to the UN, the answer is clearly “no”. A UNAMA official identified three risks associated with a public process.²¹¹ First, there remain considerable security dangers for both commission members and the public attending meetings. Barnett Rubin, a prominent commentator on Afghanistan, has noted that the constitutional drafting process “could become a meaningless exercise” in light of the continuing “power of Afghan warlords”, who in many places retain U.S. support.²¹² Secondly, public discussions may be “hijacked” by factions of *Jamiat*, *Ittehad* and other *jihadi* groups. UNAMA officials suggested that any process lasting more than three months would empower such groups.²¹³ Finally, there is a possibility of public confusion.

A combination of security concerns, ideological capture, and public confusion are thus deployed to justify a limited process. None of these, however, warrants the weak public education and consultation process that has been designed. A series of specific and local solutions exist that can at least in part improve the security situation around consultations. The risk of capture by the aforementioned factions is exacerbated rather than assuaged by the current process. And any public confusion can be remedied because it is caused in the first instance by the failure of the Transitional Administration and the UN to conduct a transparent drafting process and to craft a meaningful public education program. Finally, the UN arguments fail to recognise the importance of public legitimacy even in a moment when action by those with arms is more likely than popular mobilisation.

Critically, more time is needed to deploy necessary security measures, develop and implement an adequate education campaign, and foster public debate. These tasks can, however, be accomplished

²⁰⁷ ICG interviews with UN staff, April 2003.

²⁰⁸ ICG telephone interview with former UN staff member involved in Emergency Loya Jirga process, April 2003.

²⁰⁹ ICG interviews with civil society leaders and provincial government officials, March and April 2002. See also ICG Briefing, *The Afghan Transitional Administration*, op. cit., p. 2.

²¹⁰ Indeed, any significant association with the Karzai administration might compromise the process. One civil society leader from Herat said, “Karzai and his government are useless, and the constitution will be just one more useless thing”. ICG interview, 13 April 2003.

²¹¹ ICG interview with UNAMA Constitutional Support Unit, 26 March 2003.

²¹² “Drafting of new Afghan Constitution may be ‘Meaningless Exercise’ without Greater Security – Expert”, *Eurasia Insight*, 11 April 2003, at <http://www.eurasia.net>.

²¹³ ICG interview with UNAMA Constitutional Commission Support Unit staff, 14 May 2003.

within the flexible framework of the Bonn Agreement. A secretive and undemocratic process is easier, in the short-term, for the UN to manage and serves the partisan interests of factions within the Transitional Administration. But it is high time broader Afghan interests took priority over bureaucratic deficiencies and naked self-interest.

A. SECURITY

Security around consultations is unequivocally the central concern of members of civil society and even some provincial government officials interviewed by ICG. Special Representative Brahimi has rightly underscored that:

There are many signs that the security situation throughout Afghanistan is worsening precisely when the next phases of the Bonn process need it to improve. There is a real but still avoidable risk that the Bonn process will stall if security is not extended to the regions.²¹⁴

The security deficit is directly attributable to the failure of the United States and other members of NATO to articulate and execute a strategy to deal with the multiplicity of regional military groups, many headed by serial human rights violators, and often seeded by Operation Enduring Freedom.²¹⁵

Civil society members from Faizabad, Herat, Jalalabad, Kabul, and Mazar-i Sharif all rehearsed the same theme: After the fall of the Taliban, local military commanders, mostly loosely affiliated with the *mujahidin* and their allies, took over provincial and local administration, creating insecurity and undermining any rule of law.²¹⁶ “Without disarmament, we cannot have any constitution, and it is useless to discuss it”, stated one member of a district shura in Balkh Province. “We want disarmament, disarmament, disarmament”.²¹⁷

Respondents clearly identified provincial government as an important locus of insecurity.²¹⁸ In some interviews in Jalalabad, civil society leaders were too afraid to mention the name of Eastern Corps Commander Hazrat Ali, a Pashai military commander affiliated with the *Shura-yi Nazar*, but used elaborate circumlocutions to identify their concern precisely.²¹⁹ In many areas, including Badakshan, Kandahar, and Jalalabad, local commanders have co-opted not only provincial government, but also district and village councils, or “shuras”.²²⁰ “Where the wali [governor] is not involved, shuras work well. But now even local shuras are under pressure from the wali, and sometimes cannot give the answer they want”, explained an elder from Nangahar Province.²²¹ Thus, in some parts of the country, no indigenous fora for debate and self-determination remain.

The influence of local commanders in constitutional debates is highlighted by the case of Marya Sazabor, a Mazar-i Sharif-based poet who published an article entitled “The Role of Women in the Constitution” in the newspaper of the *Junbish-e Melli Islami*.²²² Due to a typographical error, one sentence that should have read “ignorance of Sharia causes women’s problems” was printed as “Sharia causes women’s problems”. A local paper affiliated with *Jamiat-i Islami-yi Afghanistan* subsequently intimated that she deserved death, calling her “Afghanistan’s Salman Rushdie”. After a correction by the original publisher and the intervention of UN staff, the threats were retracted.²²³

Other civil society efforts are difficult to disentangle from the machinations of the *mujahidin* and their allies. A petition launched by *Junbish* and reportedly signed by about one million people in the northern provinces of Balkh, Samangan and Jawzjan, is touted as the product of broad civil

²¹⁴Briefing by Special Representative of the Secretary General Lakhdar Brahimi to the Security Council, 6 May 2003.

²¹⁵Hence Special Representative Brahimi’s call for a renewed international security effort. Ibid.

²¹⁶ICG interviews in Kabul, Jalalabad, and Mazar-i Sharif with Afghan civil society leaders, students and journalists, March and April 2003.

²¹⁷ICG interview, Mazar-i Sharif, April 2003.

²¹⁸ICG interviews with Kuchi Ahmadzai elders, March 2003. Respondents also noted that militias with no link to the formal governmental structures also exist.

²¹⁹ICG interviews with tribal elders, Jalalabad, April 2003.

²²⁰ICG interviews, January and April 2003.

²²¹ICG interview with Mohmand elder, Nangahar Province, April 2003.

²²²This is a party affiliated with General Abdul Rashid Dostum and largely composed of Uzbeks. Maley, *Afghanistan Wars*, op. cit., p. 202.

²²³ICG interview with UNAMA staff, Mazar-i Sharif, April 2003.

society participation.²²⁴ But sources unconnected to *Junbish* report that the document is an internal party product, and most signatories had no idea what they had signed.²²⁵ Supposedly independent actors like university professors also take positions virtually identical to those of *Junbish*.²²⁶ The only press apparently free to comment on the constitution are connected with the *jihadi* parties and their allies.

Because “the warlords are too strong”, many Afghans do not hold high expectations for the Constitutional Loya Jirga, believing that any attempt at legitimate representation will be stifled.²²⁷ Scepticism is deepened by experiences of insecurity and coercion, un-addressed by the international community, during the Emergency Loya Jirga: “Now [the warlords] know that the UN and the government don’t have any support, and that coercion works, things will be worse”.²²⁸ Coercion during the proceedings is not the sole, or even most important, concern. People “can be targeted the next day or the next week”.²²⁹

President Karzai has unfortunately appeared paralysed by these concerns, ceasing, unlike Special Representative Brahimi, to call for ISAF expansion and not confronting either regional military leaders or the *Shura-yi Nazar* faction in Kabul. Nor has he promoted open debate by stressing the need for free media or helping in person to smooth the way for consultations by preparing provincial governors.

These security concerns, which have yet to be seriously analysed at an operational level within UNAMA,²³⁰ can be ameliorated in several ways.²³¹

²²⁴ ICG interviews with *Junbish* officials, April 2003. The petition contains a score of recommendations, the most detailed of which is a proposed federalist division of the country.

²²⁵ ICG interview with Mazar-i Sharif trader, April 2003.

²²⁶ ICG interview with Balkh University professor of history, April 2003; “Suggestions of some Balkh University Lecturers to the Constitutional Drafting Commission”, *Ulus*, 2 March 2003.

²²⁷ ICG interview with provincial government departmental director. April 2003.

²²⁸ ICG interview with Kabul teacher, February 2003.

²²⁹ ICG interview with tribal elders, Nangahar Province, April 2003.

²³⁰ ICG interview with UNAMA Constitutional Commission Support Unit staff, 14 May 2003.

²³¹ The concerns of the commission itself are relatively straightforward to address.

First, the geographic focus of consultations must be changed. The Emergency Loya Jirga showed how at least some uncoerced public discussion can be facilitated. Its first round was organised at a village level, hence at least in part circumventing local commanders’ power centres in provincial capitals.²³² Other decentralised forms of education and consultation to limit security problems are also feasible. A project, coordinated by the Afghan Civil Society Forum and involving ten Afghan NGOs with provincial field presences, aims to educate local notables like teachers and health care personnel, including women, to do low-key public education at district level.²³³ The field-based NGOs identify trusted local educators, who are best able to assess security and find safe venues. UNAMA’s Constitutional Commission Support Unit vigorously opposed attempts to include consultation in this process.²³⁴

Secondly, a coherent security strategy involving international personnel, linked with what trained Afghan forces exist, is needed. Afghanistan’s “nascent security institutions cannot be expected any time soon to provide the security that is desperately needed”, according to Special Representative Brahimi.²³⁵ As respondents in focus groups conducted by the Kandahar-based Afghans for Civil Society explained, “the [Emergency Loya Jirga] process could not have been as open and free as it was without the intense participation and monitoring of the international community, and the presence of Coalition forces in Afghanistan”.²³⁶ A UN staff member, who assisted in the Emergency Loya Jirga’s organisation, noted that in a limited number of locations in June 2002 small teams of Special Forces deployed by NATO countries were able to negotiate effectively with local commanders and discourage coercion and infiltration of meetings.²³⁷

²³² ICG Afghanistan Briefing Paper, *The Loya Jirga: One Small Step Forward?* (16 May, 2002), pp. 7-8.

²³³ ICG interviews with NGO personnel, March and April 2003.

²³⁴ *Ibid.*

²³⁵ Briefing by Special Representative of the Secretary General Lakhdar Brahimi to the Security Council, 6 May 2003.

²³⁶ Afghans for Civil Society, ‘Loya Jirga Focus Groups Kandahar and Helmand provinces, November 2002-January 2003, Final Report’, 2003, p. 4.

²³⁷ ICG interview with former UN staff member involved in Emergency Loya Jirga process, March 2003.

Moreover, these limited multinational forces could liaise with and lead a larger Afghan contingent. An advisor to the U.S. police training project noted that event-specific training related to police security obligations around political events like that provided in Bosnia by the Organisation for Security and Cooperation in Europe could be provided quickly because it requires only about 40 hours of training.²³⁸ A “cadre of special external forces could be monitors”, partnered with civilian monitors such as were used during the Emergency Loya Jirga in a handful of regional centres.²³⁹ Further, an analyst of the Afghan military noted that some army units of former professional soldiers exist that could play a constructive role in the constitutional process.²⁴⁰

Coercion outside the actual consultations is more difficult to address, although the aforementioned measures could minimise infiltration. Creation of an adequate protection program, something UNAMA woefully lacks,²⁴¹ in tandem with the limited extension of international security personnel,²⁴² could also ameliorate the situation.

Finally, effective consultation requires more time, not least because, as noted, the present schedule envisages it occurring at the same time as disarmament, demobilisation, and the ripening of the opium crop. The security situation lags considerably behind an ambitious political timetable: “There is a disequilibrium between the long-term security time-table of two to four years, and the political timetable”.²⁴³ The imbalance originated in the occupation of Kabul by the *Shura-yi Nazar* faction of the United Front prior to the December 2001 political settlement at Bonn.²⁴⁴ The Emergency Loya Jirga only consolidated its

position and led to the perception that other groups would have no place in government.²⁴⁵ A military victory has thus permitted one faction to tighten its hold on power.²⁴⁶ A constitutional process that seeks to redistribute power, even as the *Shura-yi Nazar* continues to dominate the security sector within the central government, risks repeating the mistake made in 1964: attempting to fashion an institutional consensus through a constitution, while ignoring the political and military tensions accelerating below the surface.

Measures to loosen this factional vice through institutional reform of the armed forces and administrative infrastructure are moving incrementally. Disarmament is scheduled to begin only in July 2003.²⁴⁷ The U.S. is only now starting to discern and deal with the political shortcomings of its military strategy of allying with local commanders.²⁴⁸ Afghans themselves are sceptical that disarmament without the creation of an economy to absorb demobilised soldiers will have any effect: “People will feed their family with guns” as long as other ways of income generation remain elusive.²⁴⁹ The Afghan National Army remains predominantly Tajik and associated with the *Shura-yi Nazar*.²⁵⁰

The gears of institutional transformation that could drag the security structures of central administration, particularly the Ministries of Defence and Interior, from a single-party lock-up operating along clientalist lines have yet to find purchase. As they begin to bring pressure on the administrative framework, some political space may open. No absolute purge of commanders is needed. A tipping from monopolised military force to a contested situation may, in some instances, suffice. For instance, an organiser of the Emergency Loya Jirga in the northern provinces explained that where neither the *Junbish* nor the

²³⁸ ICG interview with U.S. advisor on police training, March 2003.

²³⁹ Ibid.; ICG interview with police personnel in Mazar-i Sharif, April 2003.

²⁴⁰ ICG interview with security sector analyst, May 2003.

²⁴¹ This gap is painfully highlighted in a 28 March 2003 memorandum from the UN Office of the High Commissioner for Human Rights to UNAMA entitled “Witness Protection Report and Next Steps” that stressed the need for a coherent protection program in order to investigate human rights violations in northern Afghanistan.

²⁴² According to the human rights NGOs that work closely with UNAMA’s human rights unit, protection is simply not seen as one of UNAMA’s responsibilities now. ICG interview, April 2003.

²⁴³ ICG interview with Afghanistan commentator, December 2002.

²⁴⁴ Johnson et. al., op. cit., p. 3.

²⁴⁵ ICG interview with former minister in Interim Administration, March 2003. ICG Briefing, *The Afghan Transitional Administration*, op. cit., p. 3, n. 6; Johnson et al., op. cit., p. 6.

²⁴⁶ Afghans for Civil Society, op. cit. p. 19.

²⁴⁷ ICG interview with UNAMA security experts, April 2003.

²⁴⁸ ICG interview with U.S. diplomatic personnel, April 2003.

²⁴⁹ ICG interview with Mazar-i Sharif journalist, April 2003.

²⁵⁰ ICG interview with NGO community organiser, Kabul, February 2003.

Jamiat parties were able to exercise unfettered domain, a freer election occurred.²⁵¹

More time for constitution-making would thus allow a considerably better process. The particular and partial security solutions outlined above could also be more effectively implemented within an extended timeframe. Yet none of these ideas have been explored, and the present concept – cooperation between UNAMA field offices and provincial administrations – is woefully inadequate.

B. THE RISK OF EXTREMIST HIJACK

The very real fear of extremist hijack is compounded rather than allayed by present drafting procedures. Factions within *Jamiat*, *Ittehad* and other *jihadi* groups, which endorse an astringent and oppressive form of Islam, have ample psychological basis for striving against more liberal social values in the constitution. According to a deputy of *Ittehad-e Islami Afghanistan*, if Afghans reduced the presence of Islam in the constitution, “by our hand, we would become *kafirs* [unbelievers]. . . . After 23 years of struggle, Islam must be applied as much as possible”.²⁵² A former *Jamiat* commander criticised the “basic principles” language of the 1964 Constitution for its lack of clarity and emphasised that the new constitution needed to be “clear” on Islam.²⁵³ This strongly felt commitment to a variant of Islamic ideals held by important political actors and experienced through two decades of conflict is likely to be deployed to consolidate political advantage during drafting of a new constitution, echoing the Islamic claims used by religious and tribal elites in the 1920s.

Jihadi groups are already well organised and funded.²⁵⁴ They have sufficient resources to mobilise public opinion and delegitimise opponents whenever they wish. The attack on Marya Sazabor, the Mazar-based poet, illustrates this power: Their print media has always played a crucial role in the

mobilisation of extremist groups in Afghanistan.²⁵⁵ Nor is Mazar-i Sharif unique in being home to *jihadi* newspapers. In Kabul, several like *Payam-i Mujahid* and *Mujahid Weekly*, expound the views of *Jamiat's* Burhanuddin Rabbani, and *Ittihad's* ‘Abd al-Rab al-Rasul Sayyaf.

The elimination of public debate and consultation on the constitution is unlikely to silence or marginalise these groups. Religious leaders have already mobilised, with the aid of the conservative Supreme Court, to advocate the inclusion of a strict and narrow version of Sharia in the new constitution.²⁵⁶ Confidantes of Sayyaf are to be found in the full Constitutional Commission. Because such groups already have the means to exert a powerful influence on the constitution's final form, the absence of a public process is unlikely to impact them greatly.

The lack of transparency in the drafting process also empowers such groups in several ways. First, the absence of public debate and consultation provides a ready-made issue to mobilise broader support within the Loya Jirga against a draft that is not to their liking. If their agents on the commission are not successful, these groups could discredit the Constitutional Loya Jirga because of the lack of transparency, and the resultant impression that the constitution-making process has been stage-managed by foreign powers, particularly the U.S. The religious issue would provide a foundation for a broader temporary alliance of convenience between disparate political and military factions around the country dissatisfied with the Karzai regime, or simply looking for ad hoc territorial and political gains.²⁵⁷

Further, permitting a rehearsal of extremist arguments about the role of religion may in fact diminish their potency. In part, airing extremist arguments in a full public debate, rather than within the cloistered discussions of the commission, deprives the bearers of these ideas of the air of the unjustly marginalised. Also, “allowing [extremists] to vent their anger, rather than excluding them from

²⁵¹ ICG interview with Emergency Loya Jirga organiser, March 2003.

²⁵² ICG interview with Ahmad Shah Ahmadzai, deputy of *Ittehad-e Islami Afghanistan*, Kabul, 3 March 2003.

²⁵³ ICG interview with former mujahidin fighter, Kabul, March 2003.

²⁵⁴ Ahmed Rashid, “A Desire to be left alone”, *Far Eastern Economic Review* (2 January 2003).

²⁵⁵ For a charting of uses of printed religious propaganda in the 1970s, see David B. Edwards, “Print Islam: Religion, Revolution, and the Media in Afghanistan”, *Anthropological Quarterly*, No. 3, Vol. 68, July 1995.

²⁵⁶ “Islam only source of law in Afghanistan”, *The Independent Bangladesh*, 4 May 2003.

²⁵⁷ ICG interview with Afghanistan scholar, February 2003.

the process, will make them less likely to reject the final product".²⁵⁸ If these groups feel that their arguments have been part of the process of shaping the text and have publicly committed themselves within the context of a debate to being part of that process, they will be under more pressure to accept eventual compromises.²⁵⁹ Moreover, extremists may overplay their hand, undermining their own case. In the Marya Sazabar affair, UNAMA officials reported that more liberal members of *Jamiat* felt they had been embarrassed by the threats against the poet sponsored by more radical elements within the party.²⁶⁰

Thus, the current approach to constitution-making makes extremist hijack more likely to be a self-fulfilling prophecy because it gives such groups more leverage in the Constitutional Loya Jirga.

C. PUBLIC CONFUSION

The fear of public confusion, when raised by the Transitional Administration or UNAMA, is a disingenuous concern that trades on an inaccurate and demeaning stereotype of rural Afghans who lack formal education. An overwhelming majority of ordinary members of civil society, including village elders, university students, and traders, who were interviewed by ICG evinced a basic understanding of what they valued in government. NGO workers engaged in community building and development concur.²⁶¹ "Afghans are dying to talk, especially to the government", noted a respected commentator.²⁶²

What confusion exists comes from the opacity of the overall process. Most Afghans interviewed by ICG were unaware of its three-stage nature or current state. Indeed, the only Afghans who displayed a clear understanding of the exercise belonged to political parties connected to the

central government.²⁶³ Others expressed a desire for a central government that could rein in regional commanders, and a government dominated not by factional interests, but by individuals with a "national" perspective.²⁶⁴ Generally, comments evinced frustration at a closed, secretive process. In particular, Afghans, ranging from *jihadi* party officials to Kuchi (nomadic Pashtun) tribal elders, expressed frustration that the draft had not been publicised²⁶⁵ and argued that this would make consultation a sham. This confusion will only be sharpened by the emergence and discussion of the various drafts.²⁶⁶ In other words, the lack of a transparent constitution-making process, and not some basic inability to understand politics, stands between Afghans and meaningful participation.

Obviously, effective dissemination of information, both about the process and substantive choices, requires a careful strategy deploying a variety of media, like the one conducted in 1964.²⁶⁷ Yet UNAMA and the Transitional Administration have frittered away seven months since the drafting commission's inauguration. No credible strategy yet exists. Certainly, a campaign encompassing Afghanistan's regional television and radio stations, in addition to the very popular BBC Dari and Pashto services, and Voice of Liberty radio, could overcome this. Many effective and low-cost methods of transmitting information exist. During the public campaign about the replacement of the currency, for example, scripts for radio shows explaining the issue were drafted in Kabul and distributed to provincial stations, which performed them.²⁶⁸ But even more useful would be additional time, permitting an effectively orchestrated campaign that marshals public awareness.

²⁵⁸ ICG interview with Afghanistan analyst, December 2002.

²⁵⁹ A similar dynamic emerged in South Africa, where both the African National Congress and the National Party had to take public responsibility for eventual compromises. Nicholas Haysom, "Negotiating the Political Settlement in South Africa. Are there lessons for other countries?", *Track Two*, No.3, Vol. 11, May 2002, p. 35.

²⁶⁰ ICG interview with UNAMA staff, Mazar-i Sharif, April 2003.

²⁶¹ ICG interview with Mazar-i Sharif NGO staff, December 2002.

²⁶² ICG interview, December 2002.

²⁶³ ICG interviews with deputies of *Ittihad-i Islami*, *Jumbish*, *Jamiat*, and *Hizb Wahdat (Khalili)*, Kabul and Mazar-i Sharif, March and April 2003.

²⁶⁴ ICG interviews, Jalalabad, Kabul, and Mazar-i Sharif, March and April 2003.

²⁶⁵ ICG interviews with *jihadi* party officials and tribal elders, March 2003.

²⁶⁶ At minimum, there are five drafts potentially in circulation – one by Shahrani, one by Marufi, and three by Carassone.

²⁶⁷ Dupree, *Afghanistan*, op. cit., p. 567.

²⁶⁸ ICG interview with electoral consultant, May 2003.

D. THE VALUE OF PUBLIC PROCESS I: LEGITIMACY

Exaggeration of risks related to public debate obscures the value of that debate to Afghan political culture. But there is a clear case for a public, transparent process, not least because of the pressing need for legitimate government.

The fates of the 1923 and the 1964 constitutions demonstrate that governments founded on constitutions with little legitimacy are vulnerable to insurrection. Although potential insurrectionary movements in contemporary Afghanistan would rely less on mass mobilisation than in the past,²⁶⁹ generally accepted and legitimate democratic institutions that distribute power, constrain overreaching, and allow for electoral cycling of key posts reduce incentives for such movements and strengthen the state. Yet such institutions demand a “deep unquestioned routinised commitment to democracy and its procedures at the elite and mass levels”, formed across generations.²⁷⁰ Such notions of legitimacy are not alien to the Afghan context. Afghans have a strong sense of which authorities warrant allegiance. Those interviewed by ICG often evinced strong feelings about the legitimacy, or more often lack thereof, of the Karzai administration.²⁷¹ In the words of one Shinwari Pashtun elder, “if this government cannot follow through on the people’s suggestions [about security and reconstruction], eventually the people will be against the government and will find another way”.²⁷² Long-term stability is best guaranteed by nurturing a legitimate democratic culture.

Legitimacy for the constitution is not solely a consequence of substantive outcomes embodied in text. On many constitutional issues, from governmental structure to rights to the role of religion, wide margins of disagreements exist and are unlikely to abate. Many are reasonable. No constitution will be entirely amenable to every person. Of necessity then, a draft will seek compromise on some issues. The aim of a drafting process must be to establish sufficient compromise,

and hence endorsement, on sufficient issues so that a majority accepts the final document. But it is not enough simply to write a constitution that contains compromises on the key contentious issues. Without a *process* of negotiation and debate, textual compromises are likely to be seen by different groups as repudiations of their position. Without discussion, a constitution of compromises, drafted with the best of intentions, will be seen as a betrayal and evasion. Without the gauntlet of public debate, even the best possible constitution will lack a consensus, and thus legitimacy.

A flawed and opaque constitutional process that leaves most Afghans feeling excluded cannot be a sound foundation for the growth of accountable and respected political institutions capable of containing and channelling political conflict. Without such institutions, the violent factional conflict that has marred Afghanistan for decades will probably continue. Political groups that do not gain power in the first elections will have no incentive to accept the result if they cannot trust in state institutions to contain and cycle power.²⁷³ The 2003 Loya Jirga threatens to repeat Zahir Shah’s erroneous decision in 1964 to paper over grave fault lines between political forces with a legal instrument that had no way of containing or taming those forces.

Finally, and perhaps critically, it should not be forgotten that practices like self-determination, free expression, and political autonomy are all worth pursuing as ends in and of themselves.

E. THE VALUE OF PUBLIC PROCESS II: REFORM OF POLITICAL PARTY CULTURE

A public process is also a unique opportunity to reconstitute political parties, the bodies that mediate between the population and government. Political parties remain illegal because of the absence of a governing law,²⁷⁴ stifling nascent democratic groups’

²⁶⁹ Such groups have external sources of funding. Ahmed Rashid, “The Other Front”, *The Wall Street Journal*, 1 February 2003; Goodson, op. cit., p. 88.

²⁷⁰ Diamond, op. cit., p. 65.

²⁷¹ ICG interviews in Jalalabad, Kabul and Mazar-i Sharif, March and April 2003.

²⁷² ICG interview, April 2003.

²⁷³ Minimally, democracy must allow “contestation for political power within a framework of rights and institutions”, Samuel H. Barnes, “The Contribution of Democracy to Rebuilding Postconflict Societies”, *The American Journal of International Law*, Vol. 95, 2001, p. 88.

²⁷⁴ ICG interviews with Ministry of Justice officials, November 2002.

activities.²⁷⁵ In contrast, *mujahidin* parties function with immunity because of their entrenchment in the Kabul and provincial governments after their alliance with Coalition forces in Operation Enduring Freedom. The constitutional moment is both an opportunity to bolster new democratic political parties and a chance to entice dominant factions toward a political centre.

At the threshold, a public debate on the constitution is crucial for development of a counterweight to extremist groups. It is nearly inevitable that Islam will be rhetorically invoked in the Constitutional Loya Jirga, particularly to discredit those advocating increased protection for minorities, human rights, women's rights, and civil liberties generally. In the 1964 Constitution debate, liberal ulema had been organised to counter such rhetoric.²⁷⁶ In contrast, there is no effectively organised constituency today to oppose fundamentalist demands: "Someone will stand up and say that the [constitution] has to be based on Sharia, and that is the end of that".²⁷⁷

Such new democratic formations, which include Emergency Loya Jirga delegates who still want to be politically active, feel "small and weak"²⁷⁸ and operate only in urban centres in a limited number of provinces.²⁷⁹ A public debate on the constitution is a chance for these groups, supported and sheltered by the international community, to expand their networks, perhaps even to connect with established political actors. The development of such constituencies could create an effective voice to counter extremist arguments.

A legal framework for political parties must, therefore, be created before the constitutional debate is held. But the draft of the political parties law that has been proffered by the Transitional Administration is deeply flawed because it legitimises the *jihadi* parties and their allies but excludes new parties.²⁸⁰

²⁷⁵ ICG interviews with new democratic political party leaders, November 2002 and March 2003.

²⁷⁶ Olesen, op. cit., p. 208.

²⁷⁷ ICG interview with Afghanistan scholar, February 2003.

²⁷⁸ ICG interview with leader of democratic group, Kabul, March 2003.

²⁷⁹ ICG interview with leader of democratic group, Kabul, November 2002.

²⁸⁰ Article 12 of the draft law states that parties must have a minimum of 10,000 members. Draft Law on Political

Further, it is worth looking at the constitution-making exercise as an opportunity to empower moderates within the established parties, and to marginalise hard-liners set on rejecting democratic values and modernisation, particularly in regard to the position of women and minorities. This appears particularly true for the Panjshiri Tajik *Shura-i Nazar* faction, currently dominant within the central administration. This faction evolved out of *Jamiat-i Islami-yi Afghanistan*, "a relatively moderate, predominantly Tajik Islamist party" with diverse origins.²⁸¹ *Jamiat's* early members typically had an Islamic education, and the party attracted ulema that had passed through government madrassas; its leader, Burhanuddin Rabbani, combined "classical culture, spiritual (almost mystical) orthodoxy and political Islamism".²⁸² *Jamiat* commanders, who included both Persian-speakers and Ghilzai Pashtuns, were, however, permitted considerable autonomy from the political leadership, and thus developed a "more political and pragmatic approach" than this leadership.²⁸³ More loosely structured than parties like Gulbuddin Hekmatyar's "homogenous and disciplined" *Hizb-i Islami*,²⁸⁴ *Jamiat* had by the early 1990s devolved into "a fragile coalition of regionally based and mutually fighting client groupings focused on individual personalities".²⁸⁵

Today, in the north, *Jamiat* is little more than a heterogeneous collection of local commanders, with only a limited number of educated personnel among its ranks.²⁸⁶ In contrast, the faction now dominating Kabul comprises "a generation of 30-something university educated Tajiks, who are highly motivated, and able to wield the levers of power".²⁸⁷ Yet even within this grouping, "there is

Parties, Art. 12. The effect of this provision would be to legitimise the *jihadi* parties and their allies but block new parties from developing.

²⁸¹ Rubin, op. cit., p. 218; see also Olivier Roy, *Afghanistan: From Holy War to Civil War* (Princeton, 1995), pp. 57-58.

²⁸² Dorronsoro, op. cit., p. 182; Roy, *Islam and Resistance*, op. cit., p. 77; Rubin, op. cit., p. 98.

²⁸³ Rubin, op. cit., pp. 218-20.

²⁸⁴ Roy, *Islam and Resistance*, op. cit., p. 78; Rubin, op. cit., pp. 213-15.

²⁸⁵ Andreas Wimmer, "State-Formation First. Recommendations for Reconstruction and Peace-Making in Afghanistan", Zentrum für Entwicklungsforschung, Universität Bonn, April 2002, p. 11.

²⁸⁶ ICG interview with international observer, Mazar-i Sharif, April 2003.

²⁸⁷ ICG interview with Afghanistan commentator, Kabul, December 2003.

an internal crisis now” in which the orientation of the party is under review, and new factions are emerging such as the *Nizat-i Milli*, led by Marshal Fahim and Wali Massoud.²⁸⁸ While its amenability to modernisation and change remains somewhat undecided,²⁸⁹ an intellectual of the *Nizat* noted that the faction is amenable to coalitions, even with members of the former Communist parties.²⁹⁰

Panjshiri Tajik domination of the central government is not going to change rapidly. But international encouragement, through diplomacy, of more progressive factions within the *Shura-yi Nazar*, who are more willing to compromise, collaborate and engage in ordinary politics, could promote the emergence of a more politically flexible entity. The constitutional debate is an ideal opportunity to engage with and empower such factions. The alternative is a “strong-man model” that while “cheap”, “effective” and demanding of “little effort on the part of the international community”²⁹¹ will lack stability or inherent respect for civil rights and Afghans’ wellbeing generally.

In summary then, both short and long-term considerations favour a more open process. Only such a process can fulfil the expectations of Afghans that were fostered when the international community promised liberation from anarchy as well as from the Taliban.

F. THE BONN AGREEMENT’S TIMING

The barriers to a more effective public process can only be corroded with more time. The Bonn Agreement contains a degree of flexibility that permits a more expansive period of public education and consultation. This extension would indeed be more in harmony with the goals of that document, which include “democracy, pluralism and social justice”,²⁹² than a truncated process with little

legitimacy or public buy-in. Further, pragmatic arguments ranged against a lengthening of the Bonn timeframe have less weight than they seem.

At the threshold, it would be irresponsible to hold the Constitutional Loya Jirga in 2003 given prevailing conditions. The key to transcending the current situation is the realisation that the Constitutional Loya Jirga and a national assembly can be one and the same entity. A democratically elected legislature, chosen in “free and fair” elections as stipulated in the Bonn Agreement,²⁹³ could, when sitting as a Constitutional Loya Jirga, organise public debate, discuss and refine the draft, and finally adopt and ratify the constitution.

A Loya Jirga composed of members of an elected national legislature has precedent in the Loya Jirga created in the 1964 Constitution.²⁹⁴ That democratically elected body was responsible, among other tasks, for passing amendments to the constitution.²⁹⁵ Thus, Afghan law already recognizes the validity (and importance) of giving elected representatives a key role in constitutional change. The Bonn Agreement’s requirement that a Constitutional Loya Jirga be convened not later than the beginning of 2004 could be satisfied, therefore, by the inception of an electoral process early in that year.²⁹⁶ Those elections would then result in a national assembly that could act as a Constitutional Loya Jirga in 2004 and 2005.

Creation of a national assembly, or *Shura-yi Milli*, was proposed during the Emergency Loya Jirga, but rejected at the time by President Karzai’s advisors.²⁹⁷ Elections for this assembly should be

²⁸⁸ ICG interviews with *Jamiat* and *Nizat-i Milli* officials, March 2003.

²⁸⁹ ICG interview with *Jamiat-i Islami* official, Kabul, March 2003.

²⁹⁰ ICG interviews with *Nizat-i Milli* officials, Kabul, March 2003.

²⁹¹ Marina Ottaway and Anatol Lieven, “Rebuilding Afghanistan: Fantasy versus Reality”, Carnegie Endowment for International Peace, January 2002, p. 4.

²⁹² Preamble of the Agreement on Provisional Arrangements in Afghanistan, Pending the Re-establishment of Permanent Government Institutions, op. cit.

²⁹³ The Bonn Agreement references only “free and fair elections” for a “fully representative government” without explaining what offices must be elected. Ibid. Section 1, Art. 4.

²⁹⁴ Constitution of 1964, Art, 78. This Loya Jirga also included chairmen of provincial councils.

²⁹⁵ Ibid. Art. 122.

²⁹⁶ Although the convening of the Loya Jirga is set for January 2004, it could be argued that the previous delays in the process, including the three month delay in the creation of the drafting commission, warrant setting the date for convening the Loya Jirga for at minimum April 2004. Thus, the process of democratisation would not suffer as a consequence of the Transitional Administration’s delay.

²⁹⁷ ICG Briefing, *The Afghan Transitional Administration*, op. cit., p. 5. The problems associated with the *Shura-yi Milli* in July 2002, the danger of it acting as a brake on reconstruction, and the danger of it flaring into factional conflict do still apply, albeit in an attenuated form, and could be addressed. Reconstruction is driven by key

staggered on a province-by-province basis so that a limited international security contingent could be effectively deployed in problem areas, rather than stretched by a simultaneous nation-wide election. A staggered process would provide some opportunity to address logistical difficulties regarding registration.²⁹⁸ It would further build confidence and provide a window of opportunity in which to implement police reform, justice sector redevelopment, and economic redevelopment projects, all of which would strengthen the authority and legitimacy of the central government.

The national assembly thus formed would be tasked with debating and finally adopting a constitution after broad public involvement. It could consider broadly constitutional issues including those related to process and timing, and refine the draft text through committees, creating a structure that could be adapted for future legislative tasks. Members of key government institutions, like the Supreme Court and the Ministry of Justice, could play a role through the committees. The resulting document, ratified by the elected assembly sometime in 2005, would have considerably more weight than one endorsed quickly by an ad hoc and imperfect Loya Jirga in late 2003 or early 2004.²⁹⁹

A fresh interpretation of the constitutional timetable cannot rest on legalistic arguments about the precise phraseology of the Bonn Agreement alone. Already, Afghans harbour considerable distrust about the motives of the Transitional Administration. Although the present process will not yield a document invested with popular respect, a change in timing could also exacerbate distrust. If it extends the timetable, the Transitional Administration must offer a lucid and frank public explanation of the logistical difficulties of education and consultation, the need for greater dialogue, and the manner in which the new schedule

would address these needs.³⁰⁰ An international conference, perhaps again at Bonn, called by the UN and NATO, could provide a platform for announcing and justifying these changes.

Furthermore, such an international conference could serve to re-engage the United States and other members of NATO to address the security deficit.³⁰¹ No process of cementing legitimacy for new institutions can be successful without real commitment, especially in regard to security, from both the UN and these nations. Both the constitution and disarmament and demobilisation require renewed coordination of security efforts by NATO.

Other practical arguments are cited against a chronological extension of the current constitutional plans but they lack substance. Diplomatic sources in Kabul note that dispensing with the Bonn Agreement “would be a loss of a touchstone”, and would allow other parts of the arrangement to unravel.³⁰² According to the U.S. Embassy, “a major postponement will be counter-productive because people would lose the incentive to keep moving forward”.³⁰³ For donors, these concerns are linked to a need to see Afghanistan as a successful transition³⁰⁴ and the desire to limit military and financial commitments when other crises, like Iraq, demand attention.

But there is less than meets the eye to this momentum argument. As noted above, disarmament and demobilisation have yet to commence. The Afghan National Army is still in its infancy and seems to duplicate the pattern of ethnic segregation within the cabinet. No effective national police force exists, and local police are typically corrupt and abusive.³⁰⁵ It is difficult to discern what momentum there is to be lost.

Nor is rigidity over timing of the process required by fidelity to the agreement. When asked about justifications for a tight timeframe, a participant in the Bonn negotiations conceded, “I don’t know

ministries, which initially could be delinked from the *Shura-yi Milli*'s control. In regard to actual conflict, the *Shura-yi Milli* could be given only those tasks like the development of new constitutional principles that would not embroil it in ongoing administrative problems, hence reducing the possibility of its divisiveness becoming untenable.

²⁹⁸ ICG interview with UNAMA elections team, May 2003.

²⁹⁹ Alternatively, although less effective, would be a March 2004 Constitutional Loya Jirga followed six months later by September elections.

³⁰⁰ Constitution-making can involve false starts. In South Africa, initial negotiations toward a constitution collapsed and had to be restarted. Haysom, *op. cit.*, p.21.

³⁰¹ See also Goodson, *op. cit.*, p. 83.

³⁰² ICG interview with Kabul diplomat, 12 April 2003.

³⁰³ ICG interview with U.S. diplomat, 16 February 2003.

³⁰⁴ Wimmer, *op. cit.*, p. 5.

³⁰⁵ See generally Amnesty International, “Afghanistan: Police reconstruction essential for the protection of human rights”, London, 12 March 2003.

what we were doing”.³⁰⁶ Many Afghans concur: “the biggest mistake in Bonn was to give a short time for [the drafting of the constitution and elections]”.³⁰⁷ Now that the security and political context has come into focus, a refusal to permit a broader process would constitute a denial of the promise of democratisation and openness implicit in Operation Enduring Freedom and the subsequent commitment to reconstruction. Certainly, such a refusal cannot be justified by the international community’s own limited attention span.

In conclusion, there are pressing practical and logistical reasons to expand the timeframe for constitutional debate within the parameters of the Bonn Agreement, and numerous ways of doing so. Such an expansion would make it possible to undo some of the problems in the process caused by the lack of transparency.

VII. CONCLUSION

“The task of constitution-making generally emerges in conditions that are likely to work against good constitution-making”.³⁰⁸ The argument for more public debate and in particular an expanded timeframe, does not hinge on the existence of some ideal moment for which Afghans and the international community must wait. Rather, it rests on the obligation incumbent on UNAMA and Afghan authorities to administer a transparent process designed to create real compromise, open political space, and enhance the legitimacy of the final document.

A constitutional moment should give a nation the opportunity to reflect deeply and publicly on its values and direction. For nations like Afghanistan emerging from conflict, it should allow the crafting of new political institutions to resolve political conflict without arms. The engagement of civilian constituencies, alienated by prior conflict, should deepen and democratise political space and forge new bonds of accountability between government and people.

The process of constitution-making so far falls down on every count. Its legality is poor, having shallow roots in the Bonn Agreement and in President Karzai’s failure to issue a governing decree until April 2003. The process has also lacked transparency, from the manner in which the draft has been treated to the way commission members were selected. Without transparency, dominant political elites have been able to flex their muscles and consolidate their power. The broad Afghan public remains confused by the lack of information, and excluded by the secretive and opaque political process. Nor will the public education and consultation efforts sketched by the UN remedy this. These began far too late, with far too little funding, and virtually no planning. Under the present schedule, Afghans will have scant chance to learn what issues are being decided in the constitution, let alone articulate views on them.

The present process, although convenient for the UN and advantageous to the dominant powers in Kabul, ill serves the Afghan people. The short-term risks of debate are far outweighed by the long-term gains in stability from institutions accepted by most

³⁰⁶ ICG interview, February 2003.

³⁰⁷ ICG interview with journalist, Mazar-i Sharif, April 2003.

³⁰⁸ Elster, *op. cit.*, p. 394.

Afghans as the product of a transparent and popular process. Serious trouble is most likely to materialise either after the first election or before the second election, when those excluded from power find little cause to remain within a peaceful political culture. Political groups dissatisfied with the status quo will mobilise around issues like federalism or the role of religion in the constitution in order to establish their legitimacy and build broad coalitions. Afghanistan's past decades, or a brief excursion through the shattered houses and desolate ruins of Kabul's suburbs, make abundantly clear the alternative to peaceful opposition.

Even within the brief span of the constitution-making process itself, suppression of debate before the Loya Jirga empowers extremist groups and makes destabilisation of that assembly more likely. An expanded time frame at least would raise the possibility of synchronising political developments with military steps related to disarmament, demobilisation and the development of a professional, broadly accepted Afghan National Army. Only myopic notions of stability, concentrated on the present moment and blind to the medium and longer term, justify the present course. That course is likely to end in a shallow democracy, dominated by a cadre of strong men, with little economic development, an incapacity to deal with narcotics or terrorism concerns, and scant respect for human rights.

While a public debate on the constitution requires effort and energy to manage now, the UN has ample resources at its disposal, and donor governments have repeatedly expressed a willingness to underwrite a real public process. The United States and other members of NATO have a particular obligation to address the serious ongoing security deficit. If Afghanistan is not to veer back into the mire of internecine factional conflict, these resources and this goodwill must be put to work as soon as possible.

Kabul/Brussels, 12 June 2003

APPENDIX B –

KEY DATES FOR POLITICAL AND CONSTITUTIONAL DEVELOPMENTS

5 December 2001	Signature of Bonn Agreement (“Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions”)
15-22 June 2002	The Emergency Loya Jirga is held and Afghanistan’s Transitional Administration is formed
August 2002	Latest date, as specified by the Bonn Agreement, for the formation of the ` Constitutional Commission
7 November 2002	The Transitional Administration establishes the Constitutional Drafting Commission
26 April 2003	The Transitional Administration inaugurates the Constitutional Commission
4 June 2003	The public consultation process on a new constitution is to commence
October 2003	Planned date for the opening of the Constitutional Loya Jirga
January 2004	Latest date, as specified by the Bonn Agreement, for the convening of the Constitutional Loya Jirga
June 2004	Latest date, as specified by the Bonn Agreement, for the holding of “free and fair elections”