
AFGHANISTAN: THE CONSTITUTIONAL LOYA JIRGA

I. OVERVIEW

When delegates to Afghanistan's Constitutional Loya Jirga assemble in Kabul on 13 December 2003, they will begin debating and ultimately deciding upon a draft document that is intended to establish a strong presidency while accommodating the other dominant figures at the country's centre. It is a constitution, however, that for the most part would fail to provide meaningful democratic governance, including power-sharing, a system of checks and balances, or mechanisms for increasing the representation of ethnic, regional and other minority groups. The manner in which the draft has been prepared and publicised, as well as its content, raise serious questions about whether it can become the first constitution in Afghanistan's history to command genuinely deep popular support and, therefore, contribute to national stability.

Delays in release of the draft, made public only on 3 November 2003, meant that the distribution of printed copies and public education efforts started in earnest less than a month before the convening of the national conference that is meant to adopt it as the country's new fundamental law. It is believed that the document reflects the wishes of President Karzai and that its concentration of powers in the president's hands is strongly supported by the U.S. Nevertheless, many Afghans who have studied the draft, including political figures, lawyers and participants in the drafting process from varied ethnic and regional backgrounds with whom ICG has discussed the text, concur on the need for substantive revisions that would reduce presidential powers, invigorate an anaemic parliament and provincial councils, and establish a constitutional court. Conservative Islamic groups are unhappy that the draft did not institutionalise Islamic law unambiguously.

Many Afghans and other observers believe that the major decisions have already been taken behind the scenes, and President Karzai has expressed the hope that the Constitutional Loya Jirga will

conclude its business within a week to ten days. There are indications, however, that delegates may wish to make use of their prerogative to change the document, and UN Special Representative Lakhdar Brahimi has predicted a "difficult" debate.¹

ICG's June 2003 report on *Afghanistan's Flawed Constitutional Process*² covered the period between the convening of the Constitutional Drafting Commission in November 2002 and the start of the public consultation process under the auspices of the larger Constitutional Review Commission. This paper examines the structures proposed in the final draft presented to the Constitutional Loya Jirga by the Review Commission and analyses the differences between that document and what originally emerged from the Drafting Commission. It pays particular attention to the capacity of the proposed constitution to ensure inclusive, democratic governance and protect human rights – issues that will be central to its public acceptance.

II. THE CONSULTATION PROCESS

The Constitutional Commission secretariat began public consultations at the beginning of June, before a published draft was available, and continued the process through July. The consultation process worked through focus groups, including elders, *ulema* (Islamic scholars), women, business groups, youth groups, Afghan employees of NGOs and international organisations, and former Emergency Loya Jirga delegates.³ Planning, however, was done extremely late; as recently as March 2003, no public education staff had been

¹ "Karzai Seeks Quick Accord on Afghan Constitution", *The New York Times* (Reuters), 10 December 2003.

² See ICG Asia Report N°56, *Afghanistan's Flawed Constitutional Process*, 12 June 2003.

³ United Nations Assistance Mission in Afghanistan (UNAMA) Press Briefing by Manoel de Almeida e Silva, 15 June 2003, p. 5.

hired, no plans drafted, and no public education material prepared. The focus groups themselves were imprecise, identified without the benefit of extensive demographic data and, in practice, included people outside the target groups. The consultations, therefore, were conducted neither with a scientific sample of the population nor fully publicly. Despite these flaws, they offered some insights into specific regional concerns and the prospects for the Constitutional Loya Jirga.⁴

The results indicated obvious regional disparities, with the number of participants higher in the northeast than in the north and the central highlands combined. Public participation in the southeast was even more limited. Such disparities are significant in gauging support for critical constitutional issues, including federalism (favoured in parts of the north) and a constitutional monarchy (strongly supported by consultation participants in the Pashtun southeast). The results also brought out the risk of cooption in areas where the former mujahidin parties are well organised and enjoy a monopoly of local authority. Large numbers of participants at the consultations in Kabul and Herat advanced evidently rehearsed demands for constitutional recognition of the “rights” of the mujahidin and made statements critical of civil liberties and women’s rights.⁵

Although overt evidence of political interference was limited to specific areas, these experiences increase concern about the security environment in which the Constitutional Loya Jirga is taking place. Prior to the formal consultations, ICG interviewed civil society figures from Faizabad, Gardez, Herat, Jalalabad, Kabul, and Mazar-i Sharif. All stressed that provincial government was itself an important source of insecurity.⁶ Free expression of views, they said, would be limited by the involvement of provincial officials.⁷ A member of the Constitutional Commission secretariat who observed the consultations in the southwest provinces echoed the point:

One of the main issues raised in the consultations was that until warlordism was ended, the process of drafting a constitution wouldn’t matter. It’s like building a house without a ceiling. People were concerned about the capacity to enforce it.⁸

The withholding of the draft constitution from those being consulted also created the impression that the key debates had already been concluded. Indeed, participants in the focus groups held at Kabul University loudly decried the continued unavailability of the draft to the public.⁹

III. THE DRAFT CONSTITUTION

Nearly three months elapsed between the conclusion of the consultation process in late July 2003 and the release of the draft constitution in early November, during which input from the centre appears to have taken precedence over the results of the public consultation process. A comparison of the draft as it

⁴ The UN has reported that, despite considerable insecurity in large parts of the country and explicit death threats in many instances from the forces who oppose normalisation in Afghanistan, some 178,000 Afghans participated in the consultations, 19 per cent of whom were women. A total of 556 meetings were held to discuss the draft, and 50,000 written comments were received. The UN report concluded that: “Reactions to the draft have been mixed. No precise polls are available, but there are indications that a significant number of Afghans believe that the draft will promote the peace process and strengthen the rule of law. Many Afghans, on the other hand, continue to favour a constitutional monarchy. This view is especially strong among Pashtuns. The status of national languages is also contentious; Pashtu and Dari are to be the national languages, but minority languages are given no official status. Contention also exists on the role of Islam, the protection of human rights (which some see as insufficient in the draft) and the devolution of power to the regions”. Report of the Secretary General to the General Assembly, “The Situation in Afghanistan and its implications for international peace and security”, United Nations General Assembly, A/58/616, 3 December 2003, p. 4.

⁵ United Nations Assistance Mission in Afghanistan (UNAMA) Press Briefing by Manoel de Almeida e Silva, 15 June 2003.

⁶ ICG interviews in Kabul, Jalalabad and Mazar-i Sharif with Afghan civil society leaders, students and journalists, March and April 2003.

⁷ ICG interviews with civil society leaders and provincial government officials in Kabul, Jalalabad, and Mazar-i Sharif, April 2003. Many of those interviewed noted that there would probably be little overt violence because most people are aware of local commanders’ power and do not need physical reminders.

⁸ ICG interview, September 2003. The UN itself has acknowledged this situation, noting that, “unchecked criminality, outbreaks of factional fighting and activities surrounding the illegal narcotics trade have all had a negative impact on the Bonn process”. Report of the Secretary General, op. cit., p. 1.

⁹ ICG interviews with independent observers of the constitutional process, Kabul, July 2003.

stood at the end of September 2003, when the Constitutional Review Commission had completed its work, and it was submitted by Vice President Niamatullah Shahrani, the chairperson of that body, to President Hamid Karzai and the draft released to the public on 3 November, reveals extensive textual revisions, with the most striking being the greater concentration of power in the presidency.¹⁰

A. CHECKS AND BALANCES

Presidential Power. The government structure provided for in the Review Commission's draft included a directly elected president; a prime minister; a two-chamber parliament, known as the National Assembly; and a constitutional court. The president was to be the highest official of the government, with extensive executive powers that included appointing the prime minister, the justices of both the supreme and constitutional courts, and one third of the members of the upper house of parliament. The executive arm of the government, headed by the prime minister, was to have responsibility for enforcing laws, protecting the national interests and sovereignty of Afghanistan, managing financial affairs and reporting to the National Assembly at the end of every fiscal year.¹¹

Apart from dividing executive authority between the president and the prime minister, the draft also vested considerable authority in the constitutional court, whose nine members were tasked with considering conformity of laws, legislative decrees and international treaties with the constitution; interpreting the constitution, laws and legislative decrees; investigating reports of offences during elections; and providing legal and judicial advice on issues related to the constitution to the president.¹²

¹⁰ The draft submitted to President Karzai at the end of September 2003 was resubmitted to the president on 15 October with changes made at his request by a subcommittee of the Review Commission and two external advisers, Professor Barnett Rubin, an American, and Professor Yash Ghai, a constitutional expert from Kenya. This draft was then reworked substantially within the Afghan National Security Council over an eighteen-day period before its release to the public.

¹¹ Information based upon a copy of the final draft produced by the Constitutional Review Commission and ICG interviews with a member of the Constitutional Review Commission, 1-2 September 2003.

¹² Ibid.

The published draft reflects a radical shift from the system proposed by the Review Commission. It dispenses with both the post of prime minister and the constitutional court. Most of the latter's powers are assigned instead to the Supreme Court. It proposes a new post, that of vice president, who, however, would have executive power only in the event of the death or incapacity of the president.

The reasons for these changes have been the source of considerable speculation in Kabul but a crucial one apparently was the strong desire of President Karzai and his allies within the National Security Council for a purely presidential system. A second, in the perception of many Afghans, was the U.S. desire to ensure that Karzai is in firm control, or at least unchallenged by a legislature or judiciary while he struggles to assert his authority over other powerful players such as the two key Panjshiri Tajik ministers in the cabinet, Vice President and Defence Minister Mohammad Qasim Fahim and Education Minister Younus Qanooni.¹³ On the eve of the Constitutional Loya Jirga, Karzai said he would not stand for re-election if the constitution established a prime ministerial system.¹⁴

The published draft vests virtually plenary power in the president for a five-year term of office (renewable by one re-election), while the legislative and judicial branches have only limited constraining roles. Article 76 authorises the government to "devise and approve regulations" that are "not contrary to the text and spirit of any law". Many democratic constitutions provide the opportunity for

¹³ Fahim and Qanooni are members of the Shura-yi Nazar ("Supervisory Council"), a military coordination body formed by the late Ahmad Shah Massoud and composed mainly of Tajiks from the Panjshir Valley and other parts of northeastern Afghanistan. Shura-yi Nazar held three key ministries (defence, interior, and foreign affairs) during the six-month Interim Administration established under the December 2001 Bonn Agreement. Apart from the interior ministry, now headed by Ali Ahmed Jalali, Shura-yi Nazar members continue to hold these posts and the intelligence agency or National Security Directorate. For how power relationships, including the divisions between Fahim and Qanooni, played out at the Emergency Loya Jirga in 2002, see ICG Afghanistan Briefing, *The Loya Jirga: One Small Step Forward?*, 16 May 2002, and ICG Afghanistan Briefing, *The Afghan Transitional Administration: Prospects and Perils*, 30 July 2002.

¹⁴ "In countries where there are no strong institutions, where the remnants of conflict are still there, we need a system with one centrality, not many centres of power", Karzai told an interviewer. See "Karzai Seeks Quick Accord", op. cit.

the executive to issue implementing rules and regulations or orders based on laws, of course, but in the Afghan context and given the country's history of rule by executive decree, this provision arguably creates the prospect of rule by presidential act, subject only to possible court review, especially in the immediate period after adoption of the constitution and before the National Assembly is up and running. Indeed, given Afghanistan's history of rule by executive decree, and the probability that at least in its first years the National Assembly will be less functional and effective, it is likely this decree power would continue for an important period of time to be the central mechanism of legislation.¹⁵

It is also proposed that the president have a range of other critical powers, including to declare war and a state of emergency; to appoint ministers, the attorney general, and one third of the upper house of the National Assembly; to appoint and dismiss judges; and to call a referendum "on important national, political, social or economic issues", which would be another means, albeit logistically cumbersome, of circumventing the National Assembly.¹⁶ Article 122 allows the establishment of "military courts", whose jurisdiction is otherwise unspecified and, therefore, possibly open to misuse.

The president, through his decree and appointment powers, could override or simply ignore legislative protest.¹⁷ The National Assembly lacks effective means to constrain executive power. Virtually its only method of calling the president to account would be through the impeachment of a minister and then a vote of no confidence in that minister if the responses to interrogatories was found to be

inadequate.¹⁸ Impeachment of the president would be possible but only through a cumbersome process requiring successive action by the National Assembly, a Loya Jirga, and a special court.¹⁹ Legislative control of finances would be limited by the executive's plenary power to initiate the budget, and the proviso that if the National Assembly failed to act on it in a prompt and coordinated fashion, the president's budget would be considered approved.²⁰

The draft's virtually unchecked concentration of power in the presidency has prompted nearly universal criticism in Afghanistan from across the political spectrum: among the dominant armed parties in the north – the mainly Tajik Jamiat-i Islami and the predominantly Uzbek Junbish-i Milli – as well as among non-militarised parties such as the United National Party, led by former members of the Parcham faction of the Communist Party and with significant support in Kabul, and the royalist National Unity Movement, which is particularly influential in the Pashtun south and southeast. The same concern is also voiced by an alliance of Kabul-based pro-democracy parties and groups, the National Front for Democracy in Afghanistan.

Hakim Nurzai, the deputy head of the National Unity Movement, expressed concerns to ICG about the personalisation of power and the durability of the proposed structure:

It is the current power holders that are trying to constitutionalise their current powers. It is not in the interest of stability in the country. This way we are not going to have a durable and reliable national document. What the international community – the United States and the European Union – should do is to invest in the Afghan nation not in individuals. They should work with the people not with individuals. What will [they] do if an individual dies?²¹

Given the level of political fragmentation in Afghanistan, and the very limited prospect that any party will emerge from parliamentary elections with a strong majority, a near complete absence of mechanisms through which to share power and the

¹⁵ Draft Article 121 creates the possibility of review by the Supreme Court, on request of the government or the lower courts, of "laws, legislative decrees, international treaties, and international conventions" by the Supreme Court. There is some question, however, given the uncertainties surrounding that young body that are discussed below, whether, and on what issues, it will be prepared to stand up to a strong executive. The judicial review provision leaves open the possibility for review of compatibility with Islamic law, which could lead to difficulties with some of the human rights guarantees in the constitution. Moreover, there are apparently contradictory provisions within Article 121. Although a mature system could work out the ambiguities, they are likely to add to early uncertainty and instability. On the Supreme Court, see also ICG Asia Report N°45, *Afghanistan: Judicial Reform and Transitional Justice*, 28 January 2003.

¹⁶ Draft constitution, Articles 64, 65.

¹⁷ Again, subject to the possible limitation of court review discussed above.

¹⁸ Draft constitution, Article 92.

¹⁹ Draft constitution, Article 69.

²⁰ Draft constitution, Articles 96, 98.

²¹ ICG interview with Hakim Nurzai, Deputy Head of the National Unity Movement, 4 December 2003.

lack of checks on the executive are likely to promote alienation, with potentially destabilising effects. “The 24 years of war in Afghanistan were over the distribution of power, so that everyone felt represented and had a share of power”, said Amanuddin Timuri, head of the Junbish provincial council in Kabul and editor of the Junbish party organ *Rowzana-e Omid*. “If people feel represented in parliament, and parliament has significant powers, they will support it”.²² These sentiments were echoed by Dr. Mohiuddin Mahdi, a delegate to the Constitutional Loya Jirga associated with *Nezhat-i Milli*, a party founded by non-clerical members of *Jamiat-i Islami* and supported by some individuals in *Shura-yi Nazar*:

The writers of the draft didn’t consider the history of Afghanistan and the significance of the last decade of ethnic conflict. Afghanistan needs a representative parliamentary republic to allow different ethnic groups to participate in governance....[the drafters] failed to distinguish between a despotic central government and a strong central government. In a strong central government people will have involvement in the government through a parliament.²³

Although questions of ethnic representation and power-sharing underscore both Timuri’s and Amanuddin’s comments, ethnicity itself is treated by the draft as an impermissible political factor. Article 35, for example, prohibits political parties from acting even partly on the basis of ethnicity.²⁴ But as a practical matter, ethnic identification is central to contemporary Afghan politics and there is little chance that this will change in the short term. Attempting to exclude ethnicity from politics by law would likely benefit those in power at the centre, who wish to exclude regional leaders who legitimately represent minority groups, such as Uzbeks or Hazaras. It is unlikely, however, to constrain those who at some level represent larger or more powerful groups, such as Pashtuns or Panjshiri Tajiks. It would be far better to acknowledge and incorporate ethnic identity as a legitimate part of personal identity and political formations, rather than allowing it to be used as a tool of exclusion.

Centre vs. Provinces. The draft devolves little authority from the centre to the provinces. There is scant reference to the respective powers of the centre and the provincial administrations, particularly on the crucial issue of revenue collection, but also on such key concerns as security institutions and resource-sharing. The text provides for the election of provincial councils to advise the provincial administrations – headed by presidential appointees – “on important issues falling within the domain of the province”,²⁵ but is silent on how the provincial administrations themselves are to be selected.

The draft’s failure to address centre-province relations squarely is driven in part by the Karzai administration’s reluctance to formalise a situation in which regional administrations with significant, or potentially significant, sources of revenue, such as those headed by Ismail Khan in Herat and Abdul Rashid Dostum in Shibergan, retain considerable independence. The central government has so far secured only relatively limited transfers of revenue from those areas and to seek a constitutional settlement at this time would mean Karzai would likely have to give up one of his few bargaining chips in dealings with the regional strongmen – withdrawal of recognition of posts they assumed following the collapse of the Taliban – and negotiate from a position of relative weakness.

Substantive discussion about devolution has also been discouraged by the international community, which has committed itself to a centrist approach to development assistance drafted by the finance ministry and implemented through the Afghanistan Assistance Coordination Authority (AACA). The Ministry of Rural Rehabilitation and Development has attempted to channel some of this assistance to local communities, but in a manner that concentrates implementation responsibilities in national and international NGOs and local development councils, rather than in provincial administrations.

Proponents of devolution have themselves failed to delineate central and provincial government responsibilities with precision, and their commitment to the issue has tended to turn on their representation in the central government. Of the principal political parties in Afghanistan, only Junbish, with a power base limited to the north, has unambiguously committed itself to federalism. Other

²² ICG interview with Amanuddin Timuri, head of the Junbish provincial council in Kabul and editor of *Rowzana-e Omid*, 1 December 2003.

²³ ICG interview with Dr. Mohiuddin Mahdi, 2 December 2003.

²⁴ Draft constitution, Article 35.

²⁵ Draft constitution, Articles 138-139.

regional parties, such as Hizb-i Wahdat (Khalili) in the central highlands, have moved away from pro-federalism positions following the appointment of their leaders to the cabinet during the Bonn conference and the Emergency Loya Jirga.²⁶

More recently, however, there has been a shift in the strategies of the Karzai administration, UNAMA, and the U.S. One component, the establishment of regional police training centres, stems from the failure of national army and police training in Kabul to produce a measurable impact on security in most of the country. The second component involves instituting a package of administrative reforms. Kandahar – where President Karzai and Interior Minister Ali Ahmad Jalali recently removed the provincial governor and police chief and plan more far reaching changes – is meant to be a test case. This process is intended ultimately to strengthen the capacity of provincial governments while binding them more closely to the centre, but the short term precondition is that the president and the minister of interior have sufficient authority to carry out wholesale reforms.

The experience in Kandahar to date, however, suggests the approach has clear limitations. In cases where authority over provincial government institutions is divided along ethnic or sub-ethnic lines, reforms that do not simultaneously ensure the representation of all components of the local population are potentially destabilising. In Kandahar, the recent administrative changes have come at the expense of the Alikozai tribe, whose members formerly dominated the police force, while maintaining the power base of the rival Barakzais, the major Pashtun tribe in the governor's office and in military and police units linked directly to that office.²⁷

These two imperatives – maintaining or increasing stability within provinces while promoting accountability of the provinces to the centre – can better be guaranteed by grounding representative provincial government in the constitution, with built-in mechanisms to ensure that Afghanistan's regional, ethnic, and religious pluralism is reflected in power structures. The devolution of political and economic

authority would promote democratic governance. On the contrary, any attempt to impose central rule over a multi-ethnic, multi-regional, and multi-religious population would only exacerbate internal divisions even as it failed to extend the centre's control over the periphery.

This would involve replicating a parliamentary model in the provinces, with provincial councils electing provincial governors and allowance made for positive discrimination to ensure minority representation. Transferring real rather than advisory powers to the elected provincial councils – such as revenue collection, and development planning and implementation, in all cases with reporting obligations to the central government – would arguably also provide a greater incentive for accountability than would concentrating those powers in appointed officials politically dependant upon the centre.

To address cases in which provincial governors refuse to cede power to elected councils or where impartial investigations reveal pervasive interference,²⁸ the president may need to have constitutional power to remove the officials or to call new elections, and the legislature the balancing authority in turn to exercise curbs on the misuse of such executive power.

B. HUMAN RIGHTS PROTECTIONS

By explicitly committing Afghanistan to abide by the UN Charter, the Universal Declaration of Human Rights, and international treaties and conventions to which it is a party,²⁹ the published draft corrects one of the major defects in the Review Commission's draft. However, it provides no clarity on resolving conflicts between international human rights law and Islamic law, for example, on disparities between men and women under *sharia* with regard to inheritance rights and court testimony. The director of one of the country's regional constitutional commission offices stated clearly that there was a basic contradiction that he was doubtful would be resolved by the Loya Jirga.³⁰

²⁶ Hizb-i Wahdat leader Karim Khalili was appointed as a vice president during the Emergency Loya Jirga, while Mohammad Mohaqqueq, the other key figure within the party, was named as planning minister.

²⁷ See ICG Asia Report N°65, *Disarmament and Reintegration in Afghanistan*, 30 September 2003.

²⁸ Such investigations could be carried out, for example, by the Afghan Independent Human Rights Commission acting jointly with the ministry of interior, as has been the practice with reports of intimidation and bribery relating to the elections to the Constitutional Loya Jirga.

²⁹ Draft constitution, Article 7.

³⁰ ICG interview 8 November 2003 with official in southeast regional constitution commission office.

The draft similarly would give the Afghan Independent Human Rights Commission constitutional status but not standing to bring cases before a court. There is no provision for petitioners to obtain a writ of *habeas corpus*, which could be one of the few effective remedies against the widespread practice of arbitrary detention by law enforcement authorities and the private jails of local commanders. Most critically, many of the rights set forth in the draft, including the right to life, contain the caveat that they can be curtailed by law.³¹

Although the draft at several points excludes persons who have committed “crimes against humanity” from holding public office, as a practical matter, this exclusion will be difficult to enforce because it requires a conviction “by a court” as a precondition.³² Apart from the formidable political obstacles to obtaining such a conviction in an Afghan court, Afghan law provides no definition of a crime against humanity, despite Afghanistan’s ratification of the International Criminal Court statute.³³ The bar to public office should, therefore, be reset, for example by providing that an individual whom the Afghan Independent Human Rights Commission, after thorough investigation and rigorous administrative hearing, has determined committed or ordered war crimes, and who has exhausted such judicial appeals as may be available against that ruling, shall be barred from public office.

Women and Minorities. The draft provides for the representation of women in both the lower and upper houses of the National Assembly. Article 83 would reserve at least one seat per province for women – under the current provincial structure, at least 32 seats in the lower house (Wolesi Jirga) out of a projected total of 220 to 250.³⁴ The very limited prospects for women to be elected to non-reserved seats in the foreseeable future suggests that this provision will be inadequate to ensure their effective representation in the lower house.

Article 84 states that 50 per cent of the one-third of members of the upper house (Meshrano Jirga) appointed by the president must be women. Appointment by and in the interests of those in power, as borne out by the experience of women’s participation in the Constitutional Drafting and

Review Commissions, tends to militate against effective representation. Reserving this percentage for women, but leaving those seats open to electoral contest, would help guarantee that they do not merely serve as a bloc supporting the president. The draft makes no special provision for the representation of women in loya jirgas, which are to include (presumably male) chairpersons of the provincial and district councils as well as members of the National Assembly.³⁵

While the draft’s list of fundamental rights includes a clause prohibiting discrimination between citizens, the Review Commission rejected proposals – advanced by international advisors and some of its own members – explicitly to allow positive discrimination, or affirmative action, as a means of remedying the effects of past discrimination against women and ethnic or religious minorities, for example in access to public services, health and legal remedies.³⁶ The commitment expressed in the preamble to a state based on social justice, provides an opening for such measures, and indeed would be viewed by members of many minority ethnic groups as implying them. Civil service reforms that professionalise ministries without factoring in the comparatively limited access that some ethnic groups have had to professional training and opportunities are likely otherwise to be seen by members of these groups as pretexts for the Tajiks to retain their existing, or the Pashtuns to restore their historical dominance.³⁷

As a member of the Review Commission pointed out to ICG:

The draft provides equal rights and opportunities for all citizens of the country. But this will not necessarily lead to social justice because many ethnic communities have been historically kept deprived, and they cannot develop as the privileged communities may. The history of pre-1960s United States shows that the provision of equal rights and opportunities alone was not enough to ensure social justice for the historically disadvantaged

³¹ Draft constitution, Articles 2, 10, 27, 33.

³² Draft constitution, Articles 62, 72, 85, 118.

³³ ICG interview with an Afghan lawyer, 1 December 2003.

³⁴ Draft constitution, Article 83.

³⁵ Draft constitution, Article 110.

³⁶ The draft provides, in its preamble, for a society based, *inter alia*, on “social justice.”

³⁷ Having lost representation in the bureaucracy during the Taliban years, Tajiks, particularly those from the Panjshir, have secured patronage appointments in several key ministries since the Shura-yi Nazar forces entered Kabul in 2001.

blacks. It was the civil rights movement and affirmative action that helped blacks to gain equal status with whites.³⁸

The same principle could also be applied to ensure representation of regional minorities, such as Pashtuns in the north, in provincial administrations. Given the targeted violence against and displacement of Pashtuns across much of northern Afghanistan following the collapse of the Taliban – and the domination of northern administrations by factions implicated in much of this violence – positive discrimination may in fact be necessary to ensure Pashtun political representation in the north and create conditions conducive to the return of displaced Pashtuns.³⁹

Religion. The draft's characterisation of Afghanistan as an Islamic Republic was widely anticipated, in view of the tilting of the Constitutional Drafting and Review Commissions toward members with training in *sharia* rather than civil law and, more critically, the domination of the political landscape by mujahidin parties.

By freezing the current arrangement whereby the president appoints the justices of the Supreme Court, which is dominated by fundamentalist clerics, and investing that court with the power to interpret the "Constitution, laws, and legislative decrees",⁴⁰ the draft sanctions the interpretation of laws by an institution that, as presently constituted, is likely to curtail political freedoms selectively. The draft allows Islam to be invoked to limit political organisation, by requiring that the charter of a political party be consistent with Islamic principles. A vivid illustration of this danger was the response of

the supreme council of the Supreme Court to announcement of the formation of the United National Party by several former Parchamis. The council, chaired by Chief Justice Fazl Hadi Shinwari, declared that any party that had been hostile to Islam and the people of Afghanistan should be deprived of the right to engage in political activities. The head of the United National Party, General Nurulhaq Ulumi, maintained that his party was respectful of Islam and what he termed "good" Afghan traditions.⁴¹

Unfortunately, the draft provides little opportunity to diversify the Supreme Court. Unlike the 1964 Constitution, which simply states that Supreme Court justices should be versed in the laws of Afghanistan (a provision that has been interpreted by many Afghan lawyers as requiring familiarity with both Islamic and non-Islamic sources of law),⁴² the present draft permits the appointment of individuals to the Supreme Court who have higher education in either non-Islamic or Islamic jurisprudence.⁴³ And as a practical matter, limiting the application of Jafaari Shia jurisprudence to "personal matters involving the followers of [the] Shia Sect in accordance with the provisions of law", as the draft does (Article 131), creates a presumption that the Islamic jurisprudence will be Hanafi Sunni and is, in turn, an obstacle to increased representation on the court of justices trained in the Jafaari school.⁴⁴

The liabilities of the Supreme Court, along with concentration of power in the presidency, explain why several Afghan lawyers and members of the Review Commission have argued that a constitutional court is necessary. According to one liberal Review Commission member:

It is essential to ensure proper implementation of the constitution and to ensure that the constitution is not misused in the interest of traditionalists and reactionary elements that often dominate the judiciary in Afghanistan. Leaving the constitution's interpretation to the Supreme Court will be a very negative point for the draft. If the constitutional court is not going to be established, at least there should be

³⁸ ICG interview with a member of the Constitutional Review Commission, 4 December 2003. Writing of the marginalisation of Hazarajat, in the central highlands, between 1929 and 1978, one Afghan specialist on the region noted: "Perhaps the most adverse effect of this isolation culturally was in the education sphere. Although conditions improved slightly during the first Republic (1973-1978), when a few more schools were built in the Hazarajat (previous to this period only a handful of schools had existed), the general situation remained discriminatory". S.A. Mousavi, *The Hazaras of Afghanistan: An Historical, Cultural, Economic and Political Study* (Curzon, 1998).

³⁹ See ICG Asia Report N°62, *Afghanistan: the Problem of Pashtun Alienation*, 5 August 2003, pp. 12-14, and Human Rights Watch, "Paying for the Crimes of the Taliban: Abuses Against Ethnic Pashtuns in Northern Afghanistan", April 2002.

⁴⁰ Draft constitution, Article 121.

⁴¹ *Eradah* (Kabul), 27 August 2003, and BBC Persian Service, August 2003.

⁴² ICG Asia Report N°45, *Afghanistan: Judicial Reform and Transitional Justice*, 28 January 2003, p. 10, citing Constitution of Afghanistan (1964), Article 99.

⁴³ Draft constitution, Article 118.

⁴⁴ Draft constitution, Article 131.

an independent institution, within the Supreme Court, to monitor implementation of the constitution and interpret the constitution.⁴⁵

Two other key provisions would compound the power of those factions best able to mobilise religious support. The draft gives religious authorities implicit control over the content of education generally⁴⁶ while suggesting that state resources will be used to maintain religious schools (madrasas).⁴⁷ Pakistan's experience demonstrates the dangers in allowing the religious sector control over educational content and allocations.⁴⁸ Indeed, by providing fundamentalists critical leverage in several provisions, the constitution could harm groups committed to the democratic process, even as it would vest increasing authority in groups willing to use Islam as a pretext to exclude others from political life.

IV. THE CONSTITUTIONAL LOYA JIRGA

Opting to use the district level representatives as an electorate, rather than the members of the 2002 Emergency Loya Jirga, promises to enhance the legitimacy of the Constitutional Loya Jirga.⁴⁹ Unfortunately, the absence of a computerised database of district level representatives forced staff of the United Nations Assistance Mission in Afghanistan (UNAMA) and members of the Constitutional Commission secretariat painstakingly to review and input data from paper records and delayed the availability of a definitive list until the beginning of September 2003.⁵⁰ In addition, elections had to be rescheduled in those districts where, for

reasons of security or political interference, it had not been possible to hold elections during 2002.

Public outreach by the Constitutional Commission secretariat was hampered by what its staff described as a lack of professional officers. One member of the secretariat contrasted the number of educated and experienced staff available to the Emergency Loya Jirga commission unfavourably with the number hired for the constitutional process. "There is an absolute lack of such [qualified] people", he said.⁵¹ This meant that the secretariat was forced into greater reliance on existing authorities to carry out education efforts in the provinces. In the southwestern region, for example, the provincial Constitutional Commission officers requested the *ulema* council in each province to do advocacy for the Constitutional Loya Jirga and "tell people that it is their national duty to participate". While that approach may have been useful as a means of defusing opposition to the process, it also increased the likelihood of its cooption.

The secretariat's public education efforts, which included public meetings, the distribution of posters, newspapers, and radio and television programs, were targeted at three categories: ordinary citizens, electors for the Constitutional Loya Jirga, and elected delegates to the Constitutional Loya Jirga.⁵² The bulk of the educational materials were designed to pose, and answer, elementary questions about the process, including the function and significance of the constitution, the reasons for adopting a new constitution, and the types of individuals who should participate in the Constitutional Loya Jirga. According to members of the Constitutional Commission's secretariat, the educational materials targeted at electors differed chiefly in placing a greater emphasis on the rules and procedures of the Constitutional Loya Jirga and the criteria for participation in it.

Despite the obstacles, the registration process was remarkably successful. Very high registration rates of Loya Jirga electors were recorded in most areas (notably Samangan in the north and Khost in the southeast, which reached about 96 per cent). As expected, there were much lower figures from the

⁴⁵ ICG interview with a member of the Constitutional Review Commission, 4 December 2003.

⁴⁶ "The state shall devise and implement a unified education curriculum based on the provisions of the sacred religion of Islam....", draft constitution, Article 45.

⁴⁷ "The state shall adopt necessary measures for the promotion of education in all levels, development of religious education, organising and improving the conditions of mosques, madrasas and religious centres", draft constitution, Article 17.

⁴⁸ See ICG Asia Report N°36, *Pakistan: Madrasas, Extremism and the Military*, 29 July 2002.

⁴⁹ Many of the appointed delegates to the Emergency Loya Jirga in 2002 were seen as unrepresentative in their home areas, and interference in the election process by provincial and regional authorities further discredited the composition of that gathering.

⁵⁰ ICG interview with a UNAMA official, 3 September 2003.

⁵¹ ICG interview with a Constitutional Commission secretariat member, Kandahar, 10 September 2003.

⁵² ICG interviews with Constitutional Commission secretariat members in Kabul, 4 September 2003, and Kandahar, 10 September 2003.

insurgency-affected southern provinces of Kandahar, Zabul, and Uruzgan, where registration rates ranged from 59 per cent to 65 per cent. Most striking, though, were the results in Kabul, where registration was just 69.43 per cent of the potential electorate by the municipal election on 8 December 2003.⁵³ This relative apparent apathy may reflect some disillusionment with the process but may also be a consequence of the widespread and frequent threats of violence that dogged it, in particular from the Taliban and others who oppose the country's new order.

However, the elections themselves – marred in some areas by compelling evidence of intimidation and vote-buying, subject to joint investigation by UNAMA, the Afghan Independent Human Rights Commission, and the ministry of interior – tended to reflect the balance of power in most regions. In Herat and rural Kabul, most elected delegates were linked respectively to Herat governor Ismail Khan and Paghman-based Ittihad-i Islami leader Abd al-Rabb al-Rasul Sayyaf. In Badakhshan, the northeastern home province of former president and Jamiat-i Islami leader Burhanuddin Rabanni, and in the western province of Ghor, bordering Herat, successful Jamiat candidates predominated (although their alignments within Jamiat varied).

Apart from Badakhshan, Junbish-i Milli delegates were strongly represented across the north, not only in the party's northwestern stronghold, but also in the northeastern provinces of Kunduz and Takhar, suggesting a payoff in the party's investment in a provincial office in Takhar as well as the likely support of local Uzbek commanders previously aligned with Shura-yi Nazar.⁵⁴ In the south early reports indicate both fundamentalist and royalist delegates have won significant representation, and that some delegates associated directly with President Karzai, including his brother, Popalzai tribal leader Ahmad Wali Karzai, were also successful. In the traditional, rural communities of the tribal areas, the successful delegates appeared to represent the elders. Nationally, the number of women was expected to top 100 (of some 500).

ICG conversations with political party leaders in Kabul and Kandahar and with senior UNAMA

officials suggested a strong possibility that delegates would form blocs during the Loya Jirga around a few core issues, including presidential powers, the status of the former king, and the constitutional role of *sharia*. Amanuddin Timuri of the essentially secular Junbish drew particular attention to the latter issue: "The draft gives a major role for religion; we are concerned that it may increase during the Loya Jirga". Timuri said Junbish was looking to forge an alliance with other socially liberal parties: "During the Emergency Loya Jirga, we had many liberal people [participating], but they were not working together. The other side was".⁵⁵ Experienced diplomats in Kabul held out the possibility that broader alignments would emerge during the Constitutional Loya Jirga of fundamentalist leaders, including those who had less invested in the present central government, such as Ismail Khan and Sayyaf.

V. CONCLUSION

Afghanistan's nine previous constitutions failed to take hold. They either were not enforced by the state or they lacked domestic legitimacy – or both. Among the specific reasons were the limited capacity of the central government during any of its previous incarnations to exercise authority over large parts of the country, the de facto and sometimes de jure yielding of authority by the state to traditional leaders, and the failure to draw the people into the constitution-making process. Consequently, there is a somewhat cynical tendency among even educated Afghans to associate constitutions with regime change. The present draft is widely viewed as aimed deliberately at protecting the decision-making power of President Karzai in Afghanistan's post-Taliban era.⁵⁶

What separates the current attempt at constitution-making from previous ones is not only the supervision and financial assistance of the

⁵³ Registration figures provided by UNAMA, 8 December 2003.

⁵⁴ See ICG Asia Report N°65, *Disarmament and Reintegration in Afghanistan*, 30 September 2003.

⁵⁵ ICG interview with Amanuddin Timuri, Kabul, 1 December 2003.

⁵⁶ In the early stages of the process, an Afghan law professor commented that "every regime in Afghanistan has had its constitution; this will be the Americans' constitution". ICG interview, Kabul, 16 April 2003. While U.S. officials question aspects of the draft that has emerged, notably its Islamic cast, the U.S. is widely perceived by Afghans to be strongly supportive of the provisions that would strengthen the present political status quo in Kabul and especially President Karzai.

international community, but also the range of political actors involved. Unlike the constitution-making exercises of Amir Amanullah Khan, the reform-minded monarch of the 1920s, or those under the republican governments of Presidents Daud Khan and Mohammad Najibullah, the process in 2003 has been largely dictated by the perceived need to accommodate competing political actors with autonomous power bases – a situation that was apparent both in the composition and work of the Constitutional Review Commission, as well as in the subsequent deliberations over its draft within President Karzai's cabinet.

The draft now before the Constitutional Loya Jirga would create conditions in which religious and central government power holders could leverage their positions to accumulate more authority. No meaningful power-sharing is envisaged, either within the national government or between central and provincial governments. Opportunities to address past ethnic and social inequalities and thereby build new bases of popular support for the constitution have been overlooked or ignored. In the end, institutions that strengthen checks and balances in government and increase the channels for representation of different ethnic and regional groups would likely be better guarantors of stability and broad public support for the central government than the kind of measures reflected in the draft constitution, which is aimed at securing the status quo in Kabul.

Kabul/Brussels, 12 December 2003