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The making of a constitution in Afghanistan

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State Reconstruction and International Engagement in Afghanistan
Panel IV: Re-Establishing a Legal System

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“The Making of a Constitution in Afghanistan”

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I. Introduction

The Bonn Agreement and the Adoption of a New Constitution

The “Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions,” otherwise known as the Bonn Agreement, was signed on December 5, 2001. The Bonn Agreement is a framework for transformation and stabilization of the Afghan political system. The Afghan representatives agreed to several fundamental things at Bonn. First, it was decided that the Afghan system of government would temporarily be based on the Constitution of 1964, without a King or legislature. Second, they choose an interim government which would function for six months and which would organize an Emergency Loya Jirga to choose a transitional government. Third, the transitional government would be responsible for creating a commission to draft a new constitution and to organize a second loya jirga, after 18 months, to approve a new constitution. Fourth, the transitional government would be responsible for organizing elections, after 24 months, to elect a new government according to the requirements of the new constitution.

On October 5, 2002, the Transitional Government of Chairman Karzai appointed a nine-member drafting committee of the Constitutional Commission to begin its work. Headed by Vice Chairman Shahrani, the drafting committee developed a plan for the constitution-making process and a draft constitution. On March 10, 2003 the secretariat of the Constitution Commission released a document, “The Constitution-Making Process in Afghanistan,” outlining the proposed activities and timeline of the Constitutional Commission. The drafting committee submitted a draft constitution to Chairman Karzai in early April, which is intended to serve, “as a set of recommendations ... on constitutional arrangements” to the full Constitutional Commission. On April 24, Chairman Karzai issued a decree appointing 35 members to the full constitutional commission (including six from the drafting committee), outlining a public consultation process, and deciding that the Constitutional Loya Jirga would be held in October of 2003.

The constitution will decide many important issues for Afghanistan’s future: the structure of the government, the role of Islam in Afghanistan’s legal system, the rights of the

citizens of Afghanistan, and an election system that will allow the people of Afghanistan, for the first time in its history, to elect the head of state and the legislature in free, universal elections. The electoral system itself will need to allow for representation of Afghanistan's diversity, and give all contenders for power enough of a stake in the system that they remain bound to democratic politics.

II. The History

Overcoming Decades of Political Turmoil in Afghanistan

If Afghanistan is to be once again prosperous and free of war and terrorism, it must overcome the deep divisions that have led to three decades of war and political turmoil. There are numerous cleavages in Afghan society, including; urban-rural, modern-traditional, the role of Islam and politics, and ethnicity. These cleavages have fueled and have been consequently further exacerbated by recent conflicts. In the course of these thirty years, Afghanistan has gone from being a constitutional monarchy, to a republic, to a communist dictatorship under Soviet occupation, to a failed and fractured state engaged in devastating civil war, to the home of a fundamentalist and obscurantist theocracy which thrived, in part, upon the largess of the leadership of a global terrorist confederation and the world's largest opium crop. These cleavages continue to manifest themselves in the ongoing peace-process.

The attacks on the World Trade Center and the Pentagon on 11 September 2001 marked the start of a new political situation for Afghanistan. The US-led military campaign in the country led to the collapse of the Taliban regime, the entry of Northern Alliance forces into Kabul and the eventual signing of the Bonn Agreement in December 2001. The political transition process that is still underway presents a great challenge and opportunity to the people of Afghanistan. Through dialog, negotiations, reconciliation, and reconstruction, the Afghan people can make compromises that will allow the country to enjoy security, a stable political future, and increased prosperity. In order to succeed, all groups in Afghanistan must be willing to work out their differences through peaceful politics, and must build trust in each other by forswearing the gun and embracing the pen. At its best, the constitutional process can be the central focus of this process of building peace.

The Experience with Constitutions in Afghanistan

Afghanistan has had both too much and too little experience with constitutions in the past 80 years. On one hand, Afghanistan has had many constitutions, but on the other hand, the country has had little opportunity to actually implement some of the fundamental aspects of these constitutions. Since 1923, when Afghanistan's first constitution was promulgated by King Amanullah, Afghanistan has had eight constitutions. The first two constitutions, in 1923 (Padshah Amanullah) and 1931 (Nadir Shah) were established by the monarchy after periods of turmoil (after the final battle for independence from Great Britain and after the revolt of 1929 that deposed King Amanullah). These constitutions

were created without a great deal of public participation, and they kept almost all of the state power in the hands of the monarchy, with little room for popular participation. They did include political reforms – especially the 1923 constitution – but the lack of public participation in this reform process is a primary reason for the uprising in 1929.

In 1963, after over 30 years of relative stability and slow but steady economic and political progress, King Zahir (who had been on the throne for 30 years) called for the drafting of a new constitution. This constitution, which introduced a far greater degree of democratic participation, was drafted over an 18 month period after wide-ranging consultations with all sectors of society. The resulting constitution provided for a popularly elected parliament, elected city councils, provincial advisory councils, and an independent legislature. Once this constitution was ratified by a *loya jirga* in 1964, the era known as the “new democracy” period began. Two parliamentary elections were held, and the country had just begun to experience democratic government.

In 1973, this period came to an abrupt end, when Sardar Daoud, former Prime Minister and cousin of the King, took power by coup. The 1964 constitution was suspended, and Afghanistan was declared a republic. A new constitution was prepared, without wide consultation, and promulgated in 1977. By this time, however, the government was in turmoil and Daoud was overthrown in 1978 by Communist coup. The constitution was once again suspended, and a new constitution was put in place in 1980 by Babrak Karmal. By this time, the country was already occupied by Soviet troops, and engaged in a brutal war. In an attempt to gain legitimacy after years of conflict, the government of Najibullah introduced another constitution in 1987. This document was quickly replaced in 1990 after the Soviet withdrawal, and in 1992 the new interim mujahideen government proposed a new constitution. However, fighting broke out between the elements of the new government in 1992 and civil war destroyed the capital and the government. The Taliban government did not create a new constitution.

With so many constitutions, it is difficult to discuss Afghanistan’s experience with any one constitution. A constitution itself is but a piece of paper – reflecting decisions made by the political leadership. If that leadership does not have the power or the desire to implement the basic law, then the constitution has little meaning. At the same time, when important changes are introduced, they require both some popular support, and some time to take root. For instance, after the new legislature was elected in 1965, they had great trouble completing their work, and the legislative process became deadlocked. The representatives, still without political parties, played politics more like Buzkashi than chess, unable to act cohesively with allies, unwilling to make short-term sacrifices for long term gain. The political representatives may have been able to work out these problems through practice and new elections – but they were not given the opportunity.

The rights of citizens of Afghanistan is also a good example of a strong constitution on paper, but weak effect in reality. Afghans have been promised many freedoms – freedom of speech, freedom of assembly, freedom from torture, freedom from discrimination – but when those freedoms were violated, the courts and police did not enforce them, or punish the transgressors.

For most of Afghanistan's history, the country has been ruled by power, not by law. Although many of Afghanistan's governments did make an effort to improve life for the people, they did not do so by the rule of the constitution. The rule of the constitution means obeying and enforcing the law, equally, for everyone.

III. The Process

The Public Consultation Process

There have been competing views about whether the constitutional process should be opened to debate and wider participation within Afghan society. Some argue that the constitutional process must be broadened to incorporate diverse views and to allow for popular political participation. To that end, debate over fundamental constitutional issues should occur throughout Afghanistan. The process will be perceived as more legitimate when interested parties feel that they have had their say, even if there are tight controls on the outcome of the debate. Others argue that injecting confrontational issues into the political process could be destabilizing, or could undermine progress on sensitive issues. There is a perception that a few controversial issues could cause the forces of moderation to lose ground on a host of other matters. Therefore, the preference would be to keep debate on controversial issues out of the public sphere.

At present, an official two-month public consultation process is planned, starting in June, that will be controlled but unpredictable. Independent civil society networks have also been gearing up to play a role, holding training sessions, consultations, and working groups to try to contribute to the process from the outside. Both groups are disseminating information about the constitutional process. The consultation process, however, may be affected by the presence of the draft completed by the Drafting Commission. A draft will tend to focus debate on its terms, rather than having a more open, less combative discussion about the issues. Thus far, the Commission has not released the draft, but leaks and rumors abound. Ultimately, controversial issues will affect and infect the debate and its outcomes; how to deal with these issues is thus a key question.

The Constitutional Loya Jirga

The Constitutional Loya Jirga (CLJ) will have a significant impact on the way the constitution is perceived. The legitimacy of the constitution will rest not only on its substance, but also in the circumstances of its adoption. The experience of the Emergency Loya Jirga (ELJ), with its weak chairmanship; unruly, unordered debates; last minute delegate packing; and intimidation, left many to question the legitimacy of the exercise. Given the experience of the ELJ and the importance of the CLJ, three critical issues need to be addressed:

- 1) the number of delegates and the means for their election, or selection;
- 2) the rules of procedure;

3) the body responsible for deciding and implementing these issues.

1. Selection of delegates

There has been serious suggestion in Kabul that, instead of fresh elections for the CLJ, members will be chosen from among the delegates of the ELJ. It is not clear whether this has been decided, or exactly why. Certainly the prospect of another nationwide delegate-election process would be daunting and would entail significant effort and expense. There is also concern that a new election would in fact be less fair than the first, given the deteriorating security situation and the increased confidence of commanders in the wake of the ELJ. However, the UN itself declared the ELJ selection process flawed and subject to intensive intimidation, even before the additional, last-minute delegates were added.

If there is no new delegate election, how many delegates will be selected, and by what process? There will need to be some distribution criteria to ensure ethnic, regional and political diversity and gender equity. Overt ethnic quotas will be problematic, as there is a fundamental lack of agreement concerning the ethnic breakdown of the country. Geographic distribution can serve to some extent as a proxy for ethnic distribution, but not entirely; some parts of the country are very ethnically mixed, and there is already a struggle for control of some these areas. An analysis of the ethnic breakdown of the delegate pool may be necessary to ensure that some parity exists. Attention also needs to be paid to issues of competence, and a number of seats should be reserved for representatives with specific expertise on some of the issues to be addressed.

The overall number of delegates to the CLJ will need to be reduced to create the possibility for effective debate, but selecting a reduced number of delegates from the existing pool of 1,051, plus the 550 appointees, could be difficult. Given that one of the accusations against the ATA is that it is not representative, allowing it simply to select all the delegates would be problematic. It may be better to have some system of elections by delegates from within their own ranks, with some selections allowed by the ATA or the responsible body, such as the Constitutional Commission or an independent *loya jirga* commission.

In the event of voting among delegates, there should probably be a geographic division of the delegates for the election process. This could be either provincial or regional (based on the eight voting regions used for the ELJ selection process). In either case, each region or province would be assigned seats proportional to its total number in the overall pool. For example, if Herat province had 10% of all elected delegates at the ELJ (about 105), then it would be entitled to 10% of the elected delegates at the CLJ, whatever the size. According to this process, only those delegates who were elected at the district level for the ELJ – approximately 1,051 – would be eligible to be elected for the provincial/regional seats at the CLJ. The provincial governors, added to the delegate total at the last minute prior to the ELJ, could be added to the provincial election process or left to selection by the government, if it so chooses.

Holding elections from within each provincial delegation ensures that the delegates will know each other, and so their decision-making process will be very informed. It would also allow for regional/ethnic balancing within the province – thus utilizing inter-communal negotiation and balancing to arrive at a politically equitable or ‘accurate’ solution. However, experience at the ELJ shows that the process of electing delegates from within each overall provincial delegation may be problematic. Many of the district-based elections were tainted by political intimidation, and there were attempts to compel provincial delegations to take certain positions. It may not be realistic, therefore, to believe that independent candidates will be able to have themselves elected by their provincial delegations to the few seats available to them. Several *loya jirga* delegates stated emphatically in interviews that they and other independents would not get through a provincial voting process among the delegates. The majority of delegates, they assert, are already ‘government’ people (i.e., supported by local power-holders), and the likelihood of significant pressure by regional commanders would cause the remaining independents to drop out. If this were the outcome, would the ATA be willing to use its appointments to balance this?

Alternatively, the delegate election could be held on a regional basis, according to the nine electoral regions used for the ELJ. This could allow independent delegates to pool their votes to ensure that independents are elected. However, regionalizing the approach without distribution requirements risks cutting out certain groups or provinces. The outcome would be dependent on the method of voting used.

In either case, the remainder of the seats would be subject to selection by the ATA, the Constitutional Commission or a new Loya Jirga Commission. Given the substantially reduced number of appointments possible, it will be difficult for the selecting body to include key players and provide balance. As very few women were elected through the district polls, and so few would be likely to be elected for the CLJ, a substantial number (perhaps one-third) of the appointments would have to be women to at least maintain their minimal 11% representation from the ELJ. At the same time, the ATA will undoubtedly want its approximately 35 cabinet members, and the Constitutional Commission of perhaps another 35, present.

2. *Rules of procedure*

According to historical accounts, the constitutional *loya jirga* convened to approve the 1964 constitution was a very open forum that debated and reviewed each article before amendment and passage. This *loya jirga*, which had 452 delegates, discussed and voted on its rules of procedure before the start of the debate. Among those rules, dissenters were allowed to submit written opinions for posterity.

The 2003 CLJ will require effective rules of procedure to ensure that an orderly debate allows constitutional issues to be fully aired, amended and voted on. The chair and secretariat of the CLJ must be thoroughly versed in these rules so that they may be enforced effectively, and delegates must have sufficient command of the rules to use them to their advantage, and to prevent their abuse. The experience of the ELJ

demonstrates the importance of the enforcement of effective procedural rules. Ultimately, poor understanding and enforcement of the ELJ rules contributed to the exclusion of delegates from key decisions, and unbalanced representation on the dais.

3. *A Loya Jirga Commission?*

The previous sections raise fundamental questions about the organization and conduct of the CLJ, including the selection of delegates, the establishment of rules of procedure and delegate training. An independent Loya Jirga Commission was responsible for these tasks in preparation for the ELJ. It remains unclear what entity will be responsible for these issues for the CLJ.

The Constitutional Commission, which will have a significant responsibility in taking care of the constitutional drafting process, has not been given responsibility for the CLJ. To ensure that the critical preparatory work for the CLJ is done well in advance, either an independent *loya jirga* commission should be appointed, or a *loya jirga* committee with a substantial secretariat should be created within the Constitutional Commission.

IV. The Major Issues

There are three fundamental issues to be addressed in the constitution that seem to inspire the most excitement, concern, and debate throughout Afghanistan. Finding compromises on these issues that will satisfy short-term fears as well as the longer-term needs of the state and its people will be critical to the success of the constitution.¹ A description of how these issues were dealt with in the 1964 Constitution can be found in Annex I below. These issues are:

1. The Separation and Balance of Powers of Government
2. Local and/or Regional Power-Sharing
3. The Role of Islam

1. The Separation and Balance of Powers of Government

The fragile political situation in Afghanistan suggests that the design of the government should be such as to maximize representation and stability and reduce the tendency towards conflict and the risk of capture by illegitimate means. The attempt on Chairman Karzai's life in Qandahar in September 2002 all too clearly highlights how any structure must not only take into account Afghanistan's possible political evolution, but also the possibility of political violence. Safeguards to ensure that any acting head of state cannot automatically assume the presidency and collegiate systems of government which avoid vesting too much power in one person may be important in maintaining a degree of stability.

¹ I would like to acknowledge Chris Johnson, William Maley, and Ali Wardak, my co-authors on "Afghanistan's Political and Constitutional Development," (ODI, 2003) for their contributions to this section.

Power-sharing will be a critical aspect of the resolution of Afghanistan's conflicts and the consolidation of peace. Numerous mechanisms can be put in place to lock potential spoilers into the government. For instance, the executive can be made into a 'grand coalition', proportionally allocating cabinet posts and deputy ministerial posts based on election results. Other consultation mechanisms between representatives of major ethnic groups can be established (such systems ensure buy-in by all significant groups but run the risk of stalemates).

The 1964 constitution provided for a constitutional monarchy, whereby the king had ultimate executive authority (the power to declare war, sign treaties and dissolve parliament, for instance); the prime minister administered the executive authority; and the parliament had broad legislative and executive oversight powers for the budget, the ratification of treaties and the approval and dissolution of the executive.

Given that substantial authority was in the hands of the monarch, the election of the executive and the exercise of executive power will be substantially different in the 2003 constitution. The 1964 constitution granted the following powers to the king: command of the armed forces, declaration of war, convening of *loya jirga*, dissolution of parliament, absolute legislative veto, signature of treaties, appointment of the prime minister and cabinet, appointment of one-third of the upper house (the Meshrano Jirga) and its president, appointment of the chief justice and justices of the Supreme Court, appointment of judges and high-ranking military officers, appointment of ambassadors and government representatives abroad, declaration of a state of emergency, and pardons. Some of this impressive catalogue of powers will undoubtedly have to be removed from the person of the chief executive, and altered or redistributed among the branches of government.

Many of the powers articulated in the 1964 constitution will probably be constrained to promote a balance between legislative and executive authority:

- the prime minister, if there is one, is likely to be chosen by the legislature;
- the cabinet of a president may be chosen by the president, possibly with the approval of the legislature (or part thereof), whereas the cabinet of a separate prime minister may be chosen by the prime minister or by the legislature;
- the veto power of the executive may be overridden by a legislative majority;
- the power to dissolve the legislature will be removed or constrained;
- the power to appoint members of any house of the legislature may be removed;
- the appointment of ambassadors and other representatives of the state may require legislative approval;
- the appointment of justices and judges may require legislative approval; and
- the signature of international treaties may require legislative approval.

Executive control over the military and the security forces, combined with the subordination of those forces to civilian rule, will be an essential element of Afghanistan's move towards peace and stability. Constitutional authority over the

security forces will not be sufficient. The relationship between the chief executive, the minister of defense and the chief(s) of the military services should be institutionalized within, or concomitantly to, the constitution. Key issues include command and control, powers of appointment, the power to declare martial law or states of emergency and succession. Critical issues to be addressed include mechanisms that can ensure that confrontations within the executive over security issues are resolved peacefully, and the procedures required to authorize the use of military force.

One of the key choices is whether there will be an independently elected head of state, a prime minister (selected by a majority/majority coalition of parliament), or both. Given that there is little patience in Afghanistan for unresponsive authoritarian rule and an inherent mistrust of a strong executive, power-sharing mechanisms will be needed to ensure broad participation, while not leaving the executive bereft of decision-making authority.

There are essentially three options for the executive:

- *A pure presidential system:* the head of state and head of government are one and the same. The president is elected directly by popular vote; the executive is not subject to a no-confidence vote by the legislature (barring impeachment) and is elected for a constitutionally prescribed period. The executive is represented and dominated by the powerful, unitary figure of the president.
- *A pure parliamentary system:* the head of state and head of government are the same. The prime minister can be selected by the majority party or coalition in the legislature, or in some cases can be elected directly. The executive is subject to removal by a no-confidence vote of the parliament. Depending on the structure and make-up of the legislature and the cabinet, this tends to be a consensus executive, and relatively weak or strong depending on the strength of the prime minister's party. This model may also incorporate a largely ceremonial president.
- *A semi-presidential system:* the head of state (the president) is directly elected by popular vote, while the head of government (the prime minister) is selected by the legislature. The head of state controls defense and foreign policy, while the head of government controls administration and most domestic policy issues. The strength of the president and prime minister will depend on the duties assigned to each, the relative strength of their respective parties and the political or party differences between them.

Trust in the electoral process is a fundamental feature underpinning a successful presidential system. The authority of the executive over the government is tempered not so much by immediate obstacles (like the need for legislative approval) but by the prospect of future losses at the polls. Bad policies or bad results elicit no immediate sanction, and so faith in future elections is essential to accountability. Given Afghans' limited experience with electoral politics and the fragility of the current situation, this faith is not likely to exist at the outset. Nor is it easy to see how a direct election for president could be a meaningful exercise of political choice in a country where national politics is as yet little developed and the means of communication is limited. The concentration of power in the hands of one person is also potentially dangerous in an

unstable political situation as it increases the rewards of illegitimate capture of the presidency, and thus increases the risk of this happening. A presidential system where the executive and the majority in the legislature are from different parties can also lead to paralysis, a particular problem if the legislature controls the budget. Using legislative control over the budget as a brake on the executive could also make impossible strategic thinking over financial decisions, as the budget would become subject to trade-offs between the various parties.

There may be a perception that a strong executive is needed to bring the military and various armed factions under control. This may be true if a majority of groups participate in a new government and executive independence is necessary to overcome factional pressures. However, because the executive may well be ‘another faction’ in the eyes of many Afghans, overly concentrated power and the ability to act unilaterally could undermine the entire process, or tilt dangerously towards despotism. Ultimately, government stability in Afghanistan will be the result of compromise, not electoral victory. It is difficult to see a presidential system making the necessary compromises in the short term. A semi-presidential system is similarly problematic, as it creates two power centers with the potential for destabilizing conflict between them.

The need to involve an array of groups and factions in the governing process suggests that a consensus-based approach may be necessary. Given the atomized nature of Afghan political organization, it seems likely that the legislature will be made up of multiple parties, with none gaining a clear majority. Thus, the executive in a parliamentary system is likely to be the result of a potentially fragile coalition, with the danger that this will lead to instability.

In discussions around the country, most people seemed to prefer a strong executive prime minister with a role for a ceremonial president who could serve as mediator, respected elder and – hopefully – a symbol of national unity. However, the presidential ambitions of certain faction leaders may push them to support a presidential system, even though they may be unwilling to deal with a rival victor.

2. Local and/or Regional Power-Sharing

A key element of Afghanistan’s political future concerns the extent to which governmental authority will be centralized or decentralized. This question is critical in both a formal sense, as it will have an impact on decisions in the institutional design process, and in a practical sense, as ideas of a strong central government confront the reality of strong regional autonomy created by the turmoil of the last 23 years. Ethnic groups that were relatively disenfranchised in the past now have autonomous military, and to a lesser extent political, structures. The party structures that grew up in the *jihad* have at times functioned as mini-state governments, carrying on foreign relations, issuing visas and even printing currency.

Throughout Afghanistan, most people interviewed for this study expressed a desire for a strong central state. The reason they gave was related to the level of interference from

Afghanistan's neighbors, who are seen as being responsible for much of the disintegration and destruction in the country. This wish was, however, always accompanied by demands that it be fair and not ethnically biased. Given the levels of dispute about the numbers of each ethnic group, it is highly unlikely that any central government will be able to satisfy all on this account. Defusing the tension thus created will in part rest on having alternative loci of power, where local and regional power-holders feel that they can exert a measure of control. Failure to create such loci risks causing those regions to seek alternative political arrangements through force.

The historical reality is that power in Afghanistan has almost always operated through a negotiation between the central authority and local power-holders – and tensions between these two levels have existed for as long as there has been a state. Even the Taliban, which exerted a greater measure of central control than its immediate predecessors, was forced to negotiate with local elites and accept a degree of local autonomy. Most of Afghanistan has always been remote from the center, and the infrastructure is insufficient to impose high levels of central control. Moreover, centralization has never been popular. This is due in part to strong local social organization and a tradition of independence, which means that decisions imposed from outside are usually resented locally. Distrust of central government is also based on the experience of authoritarianism and brutality.

The concept of a 'strong' central state, therefore, needs refining. What does strength mean? Systems that work through power-sharing and negotiation can be stronger than those that seek to impose by decree and force. What exactly needs to be centralized, and how? In interviews with Afghans around the country, there was virtual unanimity that national defense, foreign affairs and finance were all matters for the central state. Issues considered appropriate for the local level included police, health, education, the management of natural resources and cultural policy. The need to guarantee basic rights in the new constitution for each minority was often stressed.

Several of Afghanistan's minorities have argued for a federal-type system that would grant relative autonomy to various regions of the country. However, 'federal' options are seen by many as dangerous at the present time. Even advocates of federalism tend to argue that the state first needs to be consolidated, foreign interference brought to an end and fiscal control established; only then, they say, can one decentralize. Without an established center to relate to, there is a danger that decentralization will simply be a license for continuing fragmentation. The election or appointment of provincial governors, mayors and district administrators was also a frequent topic. Historically, provincial governors were appointed from the center and were often not from the area they governed. Central appointments often caused tensions with local leaders; indeed, some of the first armed clashes following the introduction of the AIA occurred over the appointment of a governor in Khost province. Interviews found opinion split on the issue of cross-province appointments. Many believed that it was necessary to have non-local governors and administrators to avoid corruption, especially in the current situation, while others felt that centrally-imposed governors tended to undermine local political dynamics. Yet others felt that, while in principle officials should be able to cross boundaries, in the current climate of uncertainty people not only needed 'their own

person' in power, but also that those from outside would not be allowed to govern. Appointing the administrative staff of central authorities, such as governmental ministries, in consultation with local authorities could also enhance local participation.

The years of war opened up a gap between the local and the central structures, with little connecting them. Central government ceased to have anything to offer provinces, let alone districts. Part of the political challenge will be re-establishing that connection, and doing so in a legitimate way.

3. The Role of Islam

Afghanistan is a firmly Islamic nation: some 99% of its inhabitants are Muslim; the legal system is heavily influenced by the Sharia; and the political identity of a significant portion of the political leadership is rooted in some identification with Islam. Thus Islam will likely play several roles in the constitution, as a state religion, as a basis for national unity, and as a basis or source for the legal system. How to incorporate these issues in a way that is meaningful to Afghan people and politicians without making the constitution discriminatory, or providing too much authority to the 'arbiters of Islam' is a crucial and highly political matter.

Islam has had a prominent place in the constitutions of Afghanistan. In the 1964 constitution, Islam is the state religion, and religious rites of the state were to be performed according to the Hanafi school. The King was also required to be a Muslim. The constitution also required that all laws passed by the parliament must not be contradictory to the basic principles of Islam. Therefore, because the legislature had the responsibility to pass the laws of the land, judges were required to base their judgments on the law of the state. Only in those cases where there is no law to cover a case before the judge, the basic principles of Hanafi jurisprudence, in accordance with the limitations of the constitution, are to be applied to secure justice. Therefore, the constitution also required that all judges must have competence in the laws and jurisprudence of the nation. This system required the laws of Afghanistan to be in accord with the principles of Islam, but allowed the elected representatives of the people to decide how to do that. As the parliament did its work and passed comprehensive legal codes, the need for judges to apply their own private Islamic legal interpretations became less necessary.

Given Afghanistan's substantial Shi'a population, a constitution making Sunni Hanafi jurisprudence and ritual the basis of state law and religion appears discriminatory. There has been discussion about how to incorporate other schools of Sharia, either by excising reference to a particular school, or by making reference and allowance for multiple schools.

The role that Islam plays in the formation and application of law is also a critical question. There are a range of options, from having the legislature consider Islamic principles, to requiring that the law not contradict Islam, to requiring that the Sharia be the source for all laws. In the past, Afghanistan had chosen the middle ground, but forces are pushing from both sides. Whatever path is chosen, the most significant long-term

question for Afghanistan's constitutional structure vis-à-vis the role of Islam will be: who has the power to decide whether a law is sufficiently "Islamic" according to the standard of the constitution? This power can rest with the legislature itself, with a Supreme or Constitutional Court, or with an Islamic council. The choice of body may make an enormous difference, depending on what forces are appointed to it, and how they wield this authority. For instance, if the body is seen out of the Islamic mainstream of Afghanistan, then it may lose legitimacy with the people and/or the Ulema. There is a risk that this enormous power could be concentrated into the hands of a small un-elected group, short-circuiting the political process through the use of an Islamic trump card.

Annex I

The 1964 Constitution

The 1964 (1343) constitution has many important aspects to consider. This constitution was intended to move Afghanistan into an era of greater citizen participation and more representative and accountable government. As aspects of this constitution are now in force according the Bonn Agreement, and because it serves as an important guide for the new constitution, we will examine five of its key principles here.

1. The Executive Power

The 1964 constitution provided for a constitutional monarchy, whereby the king had ultimate executive authority (the power to declare war, sign treaties and dissolve parliament, for instance); the prime minister administered the executive authority; and the parliament had broad legislative and executive oversight powers for the budget, the ratification of treaties and the approval and dissolution of the executive. Given that substantial authority was in the hands of the monarch, the election of the executive and the exercise of executive power will probably be different in the new constitution. The 1964 constitution granted the following powers to the king: command of the armed forces, declaration of war, convening of *loya jirga*, dissolution of parliament, absolute legislative veto, signature of treaties, appointment of the prime minister and cabinet, appointment of one-third of the upper house (the Meshrano Jirga) and its president, appointment of the chief justice and justices of the Supreme Court, appointment of judges and high-ranking military officers, appointment of ambassadors and government representatives abroad, declaration of a state of emergency, and pardons.

In practice, the Prime Minister was responsible for the daily operation of the government, and the King did not abuse his considerable constitutional powers. However, keeping this power in the hands of one un-elected official did not help to introduce a political culture in the country that respected peaceful, constitutional transition of power from one leader to another. When Sardar Daoud declared himself President after the coup in 1973, he gave himself strong and unaccountable powers. Although many were sorry to see the King leave, there was not a popular uprising against Daoud's seizure of absolute power. Some of the impressive catalogue of powers of the chief executive will undoubtedly have to be removed from the person of the chief executive, and altered or redistributed among the branches of government.

2. The Legislature

The role of the "Shura" or parliament of Afghanistan was strengthened in the 1964 constitution as the pre-eminent law making and representational body. The Shura was acknowledged in the constitution as manifesting the "will of the people." The 1964 Constitution envisioned a bicameral legislature with a directly elected lower house of 214 members, the *Wolesi Jirga* (House of the People), and a smaller upper house of 84 members, the *Meshrano Jirga* (House of Elders). Due to the extremely short trial period

of this model, the modalities of power-sharing between the two houses of the legislature or between the executive and the legislature were never fully explored. The lower house, whose members were directly elected from single-member districts, held the dominant legislative position. The upper house was comprised of a third directly elected one from each province, one-third elected by each provincial assembly and one-third appointed by the king. The two-house structure was a way of allowing people to vote for geographic representation, while providing for representation of Afghanistan's diversity. By requiring a more deliberative legislative process, a bicameral legislature can also act as a check against the legislature imposing unnecessary changes on a functioning executive.

Between 1965 and 1973, the Shura suffered from inaction and deadlock. Because political parties were not legal in Afghanistan, individual members of the Shura were elected independently in each district of the country. This lack of parties meant that there was no hierarchy of leadership in the Shura, no one to organize delegates and to bring party members in line. This lack of organization, combined with the newness of authority in the hands of elected representatives, meant that the Shura struggled to accomplish anything. The fragility of this system was not enough to contend with the political pressures of the age (the cold war and modernization) and it collapsed after a short experiment.

For the first time, the 1964 constitution also institutionalized the *loya jirga*. The *loya jirga*, well known in Afghan history as an ad hoc body that brings together the nation for critical decisions in time of crisis or political transition, was given a place in the Afghan political process. In the 1964 Constitution, the *loya jirga* was composed of both houses of the legislature and of the chairman of each provincial assembly. It is something of a 'super-parliament', a manifestation of the will of Afghan society that is capable of standing in for a government dissolved by the King. The Shura could be dissolved by the order of the King, for unspecified reasons, but the Shura had to be dissolved, and a *loya jirga* formed to consider amendments to the constitution.

Due to the short reign of the 1964 constitutional regime, the use of the *loya jirga* in this fashion was not tested. Such a super-parliament may be an effective way to deal with political crises, by breaking deadlock. However, the *loya jirga* being used as a political trump may introduce a degree of instability into the system. Careful consideration must be given to the powers (and limitations) of a constitutional *loya jirga*, and the circumstances under which it is invoked.

3. The Judiciary

The creation of a unified and independent judiciary was one of the most significant changes embodied in the 1964 constitution. Under the 1964 Constitution, the judiciary was to be a fully independent and co-equal branch of government, with the Supreme Court the highest judicial authority in the country. The judiciary was charged with applying the laws and constitution of Afghanistan, and the court's writ of jurisdiction was broadly worded, explicitly including litigation brought against the state. The state was required to enforce all judgments, and the supremacy of the constitution and the laws of

Afghanistan was made clear.

The constitution also included safeguards against judicial overreaching, such as public trial provisions and a requirement for the legal rationale for a verdict to be disclosed. All justices were appointed by the king on the recommendation of the chief justice. These appointments could be reviewed every ten years by the king, otherwise the only possibility of removal was via impeachment. In reality, Afghanistan's judiciary, in the short time it had, achieved neither independence nor coherence. The judiciary faced three primary obstacles in its development. First, there were far too few qualified judges and lawyers to ensure the fair and even application of the law. Second, local traditional practices for resolving disputes were entrenched, and undermined formal judicial power. In many cases, this meant that judges either supported the local practices, even when at odds with the law, or they became irrelevant. The third obstacle to independence was the pre-eminence of the king and the prime minister.

4. Provincial and Local Government

The 1964 model of government in Afghanistan is that of a unitary state. This means that all sub-divisions of the state (provinces and districts) are administrative in nature, and that provincial and district offices are extensions of, and directly subordinate to, the government offices in Kabul. According to the 1964 constitution and the 1965 Law of Basic Organization, there were five types of sub-national government entity:

- Provinces (*Wolayat*).
- Districts (*Uluswali*) – with each province containing between 5 and 20 districts.
- Sub-districts (*alaqadri*)
- Provincial municipalities (*Sharwali Wolayat*) – these are independent from provincial administration, administered in Kabul via the Ministry of Interior. One per province. Municipal Districts are *Gozars*.
- Rural municipalities (*Sharwali Uluswali*) largely departments of the provincial municipality – with each district containing at most one rural municipality, but some with none.

Under this model the provinces are not distinct political entities and have a very limited formal role in decisions concerning their structure, leadership, or staffing. The Governor (*Woluswal*) and senior staff, including senior provincial level ministry staff and district heads (*Uluswal*) are appointed by the President. Mid-level staff are appointed by central government ministries and the Governor approves only junior staff appointments.

The 1964 constitution also called for the creation of elected Provincial Councils that would be responsible to assist and advise the provincial government. However, the law required to create the provincial councils was never passed, and the provincial councils were never elected.

5. The Role of Islam

Islam has had a prominent place in the constitutions of Afghanistan. In the 1964 constitution, Islam is the state religion, and religious rites of the state were to be performed according to the Hanafi school. The King was also required to be a Muslim.

The constitution also required that all laws passed by the parliament must not be contradictory to the basic principles of Islam. Therefore, because the legislature had the responsibility to pass the laws of the land, judges were required to base their judgments on the law of the state. Only in those cases where there is no law to cover a case before the judge, the basic principles of Hanafi jurisprudence, in accordance with the limitations of the constitution, are to be applied to secure justice. Therefore, the constitution also required that all judges must have competence in the laws and jurisprudence of the nation.

This system required the laws of Afghanistan to be in accord with the principles of Islam, but allowed the elected representatives of the people to decide how to do that. As the parliament did its work and passed comprehensive legal codes, the need for judges to apply their own private Islamic legal interpretations became less necessary.

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