

ROUNDTABLE REPORT
September 2003

Human Rights and Rule of Law: Constitutional and Legal Reform



Afghan Independent Human Rights Commission



PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH

Forward

The organization of this roundtable involved mobilizing offices in ten provinces, in-depth substantive preparation and research, as well constant communication between human rights advocates in Kabul and legal professionals, civil society representatives, and others throughout Afghanistan. In cooperating on this challenging task, HPCR would like to thank first and foremost the members of the Afghan Independent Human Rights Commission, especially commissioners Zia Langari, Ahmad Farid Hamidi, and Hengama Anwari who committed countless hours and effort to engaging a diverse group of participants from Kabul and the provinces, as well as developing an innovative and challenging substantive agenda. In addition, HPCR would like to thank Thea Herman and Alnoor Meghani of the International Cooperation Group of the Canadian Department of Justice for their guidance and support in this project. This project was made possible with the generous financial support of the Canadian Department of Foreign Affairs and International Trade, the International Cooperation Group of the Canadian Department of Justice, and the Norwegian Royal Ministry of Foreign Affairs.

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Human Rights and Rule of Law: Constitutional and Legal Reform

Roundtable Report

Roundtable organized with the generous support of the Department of Justice of Canada and the Norwegian Royal Ministry of Foreign Affairs

Executive Summary

The opportunities for engaging the Afghan public in the process of constitution building and legal reform are quickly disappearing. Decades of war have left the legal system, and its legal culture, in ruins. The project of constitutional and legal reform will be central to the success of reconstruction efforts. For the first time, Afghan legal professionals, civil society leaders, and other groups have the chance to engage in the rebuilding of their country's legal foundations: both to stabilize a still-insecure country, and to transform their society in more long-lasting ways. However, as the Constitutional Loya Jirga approaches, many key questions regarding the nature of the new Afghan legal order remain, and many Afghans are beginning to feel that they have been left out of the process.

The Afghan Independent Human Rights Commission (AIHRC) is in an ideal position to engage civil society groups and legal professionals in wider debate about the protection and integration of human rights standards in the new legal system. Its mandate includes the harmonization of international human rights standards with national law, and perhaps more importantly, the Commission enjoys access to a nation-wide constituency of individuals and groups who support the central government and the modernization of Afghan law. This roundtable report, which presents topics and analysis from a roundtable co-hosted by AIHRC and the Program on Humanitarian Policy and Conflict Research (HPCR) at Harvard University and entitled *Human Rights and Rule of Law: Constitutional and Legal Reform*, attempts to capture the outcomes of one such effort at engagement and discussion.

This Roundtable was one of the first such meetings in Kabul to engage a broad representation of civil society leaders, legal professionals, and Loya Jirga delegates from provinces outside Kabul. In total, there were about forty participants, with half of the group from Kabul and half from other cities and towns. The Roundtable was led by members of the AIHRC, with attendance and participation by members of the Judicial Reform Commission. A series of background papers in Dari was drafted by HPCR (in close consultation with members of the AIHRC) prior to the Roundtable, and made available to the participants along with a copy of President Hamid Karzai's most recent decree on the Constitutional Loya Jirga and a paper on legal reform in Afghanistan.¹

¹ These background papers and their corresponding discussion questions, may be found in Appendix II.

The organizers of this roundtable decided that the quality and depth of discussion on complex questions would be prioritized over consensus on a brief set of recommendations. Various participants from Kabul noted that they had attended many workshops and roundtables in the capital where they had been asked to focus more on articulating recommendations than the issues themselves. However, it is possible to identify a number of themes that characterized the observations and views of the diverse group of participants.

Overall, they expressed a deep disappointment in the Constitutional process: they felt that the public education campaign had failed, that the draft text should have been released much earlier, and that the consultations were not being carried out in a way that encouraged free and open debate of the issues most central to the text. However, the participants were hopeful that other, less discussed aspects of legal reform could be successful, if thought about strategically and creatively. For example, the participants suggested many innovative solutions for modernizing and reforming customary law, as well as for making significant changes to the Civil and Penal Code. Perhaps most importantly, the participants expressed a great deal of support for the work of the AIHRC in the context of legal reform, demanding better monitoring and enforcement of the law, and bringing existing laws in line with human rights norms. On issues that are often difficult to discuss in a wider group, such as Islamic law reform, the participants observed that it is crucial for the AIHRC and other government bodies to foster more discussion and civil society engagement on a national level.

Introduction

Background

Lawlessness, conflicting legal systems, and overlapping legal foundations have been one of the consequences of decades of war and strife in Afghanistan. In addition to the immeasurable human costs of war and insecurity, there have been massive blows to state infrastructure, capacity, legal institutions, and the legal community. As in all post-conflict societies, one of the most central and long-term reconstruction challenges will be that of rehabilitating the legal system. In this context, legal reform and the possibility for societal transformation and enforcement of the new norms that it brings, is a vital aspect of post-conflict rehabilitation. As HPCR has noted in various reports and briefings, it is critical to understand that the reconstruction of the legal system (unlike the reconstruction of roads or crops) requires difficult debates and decision-making on what values and principles will define the core of the new legal order.

Under the Bonn Agreement, the goal of legal reform in Afghanistan is described as “rebuild[ing] the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.”² A crucial aspect of reconstruction efforts includes the rebuilding of the texts and institutions that support the rule of law. Perhaps unsurprisingly, donors and policy makers in Afghanistan have

² “Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions,” (“The Bonn Agreement”), Article II(2). Available at <http://www.uno.de/frieden/afghanistan/talks/agreement.htm>.

struggled with the breadth and complexity of a mandate that requires not only urgent attention to material and technical needs, but also an appreciation of and engagement with the broader doctrinal and policy questions that will shape the Afghan legal system and, more broadly, the future legal culture of Afghanistan.

Parallel to Afghanistan's material and technical needs, a series of more fundamental questions persists: how will the new legal order accommodate the demand for Islamic legal legitimacy? How will it address diverse local traditions of dispute resolution in rural areas where formal legal institutions have historically had little impact? How will it comply with international standards, especially international human rights law? How will the international community assist a legal reform process centered on and directed by the Afghans themselves?

Well into the second year of legal reform, many of these questions remain, and many of the key choices related to such questions are little discussed in public fora. Addressing them remains challenging, especially for an international community with little experience in effecting legal reform in an Islamic post-conflict environment. Policy makers must continue to foster understanding and informed discussion across the material, technical, policy and doctrinal dimensions of the legal reform process, making explicit the connections that often remain below the surface and exploring the full spectrum of opinion influencing the future shape of the system. If the principles underlying the legal system, or the vision of Islamic law that is enshrined in new legal texts, are antidemocratic or divisive, then investments and efforts devoted to technical assistance will have been built on faulty foundations. The doctrinal and conceptual core of the system, and the degree to which it reflects the desires and hopes of the majority of Afghans seeking a revived and responsive legal system, are integrally connected to the long term impact of material and technical projects.

Human rights commissions play a crucial role in establishing a culture of rule-of-law within the context of post-conflict legal reform. It is widely accepted that the most effective means of protecting and institutionalizing human rights in a society is through the legal system. In addition, the AIHRC has a specific mandate to "promote the harmonization of national law...with international human rights instruments to which...Afghanistan is a party."³ Given this mandate, the AIHRC must be both involved in and knowledgeable about the process of Afghan post-conflict legal reform during and beyond the transitional period.

Within the Bonn Agreement framework for Afghanistan's post-conflict transition, the AIHRC is one of three commissions established to oversee the elements of legal reform, along with the Constitutional Commission and the Judicial Reform Commission.⁴ Of the

³ "Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission," 6 June 2002, Annex One, "Terms of Reference of the Afghan Independent Human Rights Commission," Article 9. Available at <http://www.nhri.net/pdf/commissiondecree.pdf>.

⁴ "Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions," Articles I(6), II(2), III(C)(6).

three, the AIHRC received the most certain long-term tenure under the terms of reference established by President Hamid Karzai. According to his decree, the AIHRC will serve a two-year mandate from the date of its appointment in June 2002. Before the two-year mandate has expired, the AIHRC will present to the Constitutional Commission and to the Constitutional Loya Jirga a proposal for the transformation of the AIHRC into a constitutionally enshrined and permanent human rights commission under the terms of the United Nations Principles Relating to the Status Of National Institutions for the Promotion and Protection of Human Rights (“The Paris Principles”).⁵

As a locus for investment in Afghan institution- and capacity-building, therefore, the AIHRC represents an important partner organization for international reconstruction efforts and a forum for the development of civil society throughout the country. As a relatively apolitical entity, with a broad human rights mandate, the AIHRC has a convening power among civil society leaders and human rights advocates that is unparalleled at the moment in Afghanistan.

The AIHRC has been in existence for thirteen months and is poised to consolidate its policy and advocacy agenda and to articulate its strategic plan for the first phase of its work. Under a broad, aspirational, but tactically vague mandate,⁶ the AIHRC is in the process of developing a focused vision for highly impactful change, and building a constituency to support its work throughout the country and throughout all sectors of civil society.

The Roundtable in Context

In July 2003, the Program on Humanitarian Policy and Conflict Research (HPCR) at Harvard University and the AIHRC co-hosted a Roundtable on *Human Rights and Rule of Law: Constitutional and Legal Reform*. This Roundtable aimed to develop a common understanding of the opportunities for and challenges to legal reform, including the roles of Islamic law and customary law, and to provide a forum for various sectors of Afghan society to share their perspectives with key decision makers on legal reform issues. By carefully selecting topics and designing the format of the sessions, the organizers created the environment for a new kind of conversation on some of the most complex issues in Afghan legal reform, and that pushed into the spotlight the practical challenges to civil society and human rights advocates working for Afghan legal reform.

Running this Roundtable presented some significant organizational challenges. Including invitees from outside of Kabul offered planning and logistical hurdles, and required significant time and energy from the organizers. Discussions on sensitive topics such as Islam and customary law required thoughtful background preparation; framing strategies to support constructive dialogue were developed through multiple meetings between

⁵ “Terms of Reference of the Afghan Independent Human Rights Commission,” Article 15.

⁶ The AIHRC is charged with developing a national plan of action for human rights in Afghanistan, for human rights monitoring, investigation of violations of human rights, development and implementation of a national program of human rights education, national human rights consultations, and the development of domestic human rights institutions. The AIHRC is to carry out these responsibilities throughout Afghanistan in accordance with all applicable international human rights norms, standards, and conventions. “Terms of Reference of the Afghan Independent Human Rights Commission,” Article 2.

organizers and moderators. The challenges, both material (transportation, communication, logistics) and political (deeply controversial topics that lie at the heart of the legal reconstruction project), of working in the current Afghan context should not be understated.

Nevertheless, the ultimate success of this event stemmed from the organizers' willingness to engage these challenges and overcome them, rather than attempt to work around them. It was the synergy created by the presence of both Kabul and provincial participants that sparked the two-way learning and dynamic discussion that characterized both days of meetings. And it was the unflinching approach of the moderators to the sensitive and controversial issues on the agenda that allowed the participants to dig into the most critical problems in Afghan legal reform and to make a contribution to their resolution.

Methodology

The Roundtable agenda was designed to provide one day of discussion on constitutional reform, and one day of discussion on judicial reform (or non-constitutional legal reform).⁷ The topics for the sessions were developed by HPCR in consultation with the AIHRC, and HPCR provided background materials for participants as well as discussion questions to guide the work of the moderators.⁸ AIHRC Commissioners served as moderators for most of the sessions, with one session moderated by a Commissioner of the Judicial Reform Commission.

Participants were selected and invited by the AIHRC. Commissioners in the central office invited Kabul participants, and provincial participants were selected by the satellite offices. In choosing invitees, the AIHRC sought out people who are active in civil society, including many legal professionals and several who had served as delegates to the Emergency Loya Jirga in June 2002. A significant effort was made to include women participants, a challenge made more difficult in Afghanistan whenever travel over long distances is required. The AIHRC succeeded in convening a group of approximately forty participants, around fifteen of whom were women. Participants represented the capital, as well as each of the major urban centers outside of Kabul and rural areas such as Paktika province.⁹

The Roundtable took place during the final stages of the constitutional drafting process, which should lead to the Constitutional Loya Jirga before December 2003. The Loya Jirga and ensuing national elections planned for June 2004 are overshadowed by increasing challenges to security and national unity that threaten to delegitimize them or even render them impossible. As armed groups, some affiliated with the Taliban and others associated with local governors or commanders, continue to threaten and even kill Afghan civilians, and as groups in some areas make it clear that opposition and dissent will not be tolerated in provinces where there are no international forces to provide Afghans with protection, the timeline of the reconstruction process has been put into

⁷ See Roundtable Agenda at Appendix I.

⁸ See Roundtable Session Background Papers at Appendix II.

⁹ Non-Kabul participants included representatives from Bamian, Gardez, Farah, Kandahar, Herat, Paktia, Ghazni, Mazar-e-Sharif and Paktika.

question. While the Constitutional Loya Jirga was set for October at the time of this Roundtable (with the release of the draft Constitution promised on September 1), both events have since been delayed. Further, as demobilization and demilitarization programs remain in question, it is possible that the level of insecurity—especially in areas outside Kabul—will make the benchmarks necessary for a free and fair election (such as voter registration, and the setting-up of polling stations) impossible to accomplish in time for June national elections. Thus, the timing of the Roundtable came at a high point of anxiety and uncertainty about many of the assumptions underlying the UN-led process. It seemed to the organizers that this was exactly the time when it was important to bring Afghans from around the country together—Afghans with a demonstrated commitment to the protection of human rights, respect for Islamic principles, and community organization in support of the rehabilitation of their society—to discuss both fundamental issues as well as detailed technical matters relating to constitutional and legal reform.

Session Report

Session I: Preparing for the Constitutional Loya Jirga

This first session looked at three interrelated questions under the theme of “preparing for the Constitutional Loya Jirga”. First, the participants examined the lessons learned from the Emergency Loya Jirga, in terms of the legitimacy of the representative process and of the decision-making at the event itself. Next, they looked at the current status of preparations for the Constitutional Loya Jirga, including the text of the decree from President Karzai (released days before the Roundtable convened) laying out the procedures for the planning of the Constitutional Loya Jirga and the selection of its delegates. Third, participants reviewed the potential role civil society organizations and the AIHRC should have in supporting a free and fair process for convening the Constitutional Loya Jirga, given the groups’ answers to the first two questions.

Participant comments:

- “The upcoming Loya Jirga is meant to debate at least 172 articles of a new constitution. It is questionable whether it is possible to debate 172 articles of such a critical document in the format of a loya jirga.”
- “Mr. Nehmattullah Shahrani [Head of the Constitutional Commission] is being sent to the provinces to find out the views of the people on the type of government they want, but [contrary to his mandate] he is emphasizing to the people that the future government of Afghanistan needs to be a republic. This demonstrates that the type of government (and many other areas) has already been decided upon.”
- “Popular participation in the drafting and debate of the constitution can only happen if there is security, or if the financial means for such participation exist.”
- “A crucial point is whether to prioritize security over law, or vice versa. Every political process involves positive and negative political components, the question is: how can we negotiate a course between the two? For example, in the previous loya jirga, the commanders considered the people of their communities to be their foot soldiers. There were no checks or supervisions on their overwhelming power.

There should be a legal institution to supervise the Loya Jirga and a course between the positive and negative forces referred to above should be charted by legal experts.”

- “I am a journalist, and I have spent much of my time recently speaking with every-day Afghans about their views about the Constitutional process. The view of a majority of the people of Afghanistan is that the Afghan nation is composed of diverse sections and ethnic groups, but the [free] participation of the people in the election is impossible as the Loya Jirga is in reality nothing but going through the motions. Everything is dictated, whatever anyone says is of no consequence, because the voice of the people is not heard.”
- “The last Loya Jirga was an “Emergency Loya Jirga.” We must focus on this word: *emergency*. The state of emergency is a situation in which there is no rule of law. We, at present, remain in a state of emergency, and the mechanisms suggested by Mr. Karzai are only a continuation of the state of emergency. In such a situation, how can this Loya Jirga—in which we are supposed to decide on something as important as our nation’s constitution—be anything but a continuation of the state of emergency?”
- “How can we pin our hopes on the rule of law when the gun elaborates the views of the people and the meaning of the Qur’an? In Afghanistan, the constitution is invisible and people know nothing about it, despite the fact that the draft has reached the hands of people abroad. The only conclusion [one can draw] is that it is only the people of Afghanistan who are proscribed from seeing it, and they should not expect the forthcoming Loya Jirga to be able to solve the people’s problems as the Loya Jirga is only a cosmetic solution.”
- “Many of the people believe that the constitution has been rushed, i.e. that the process for drawing up a constitution has been given a timeframe of only six months, whereas elsewhere, such as the United States, amendments to any article of the Constitution might take years to accept. It follows that we cannot voice our views on the constitution in such a short time span.”
- “When the delegates arrive at the Loya Jirga, they first look to the local commanders and seek to find out how they can keep *them* satisfied. We need to develop a mechanism to combat this tendency.”
- “We demand that the Human Rights Commission establish its branch offices in all 32 provinces. Only in this way will they be able to engage in a full educational and awareness raising campaign.”
- “I would like to protest the percentage allotted to women for participation in the Loya Jirga. This percentage is too small, it should be in accordance with the percentage of women in the country. The women delegates should not be the sisters or wives of local commanders [as in the last Loya Jirga] and they should be women who are aware of women’s rights and the trials and tribulations Afghan women have undergone during the last 23 years of war.”
- “Many of us say that what we want from the Constitution is social justice. Social justice is a broad, generic concept. There must be a definition to it. If we write the law and there is no guarantee that it will be implemented, it will serve no purpose. The people are fed up with the gun-lords, and they must be done away

with; but the alternatives should not be people who have ruled our country in past decades.”

Participants in this session voiced strong feelings of disappointment, betrayal and disillusionment with the transitional process, including the current constitutional drafting process. They acknowledged the imperfections of the Emergency Loya Jirga and attributed them largely to the conditions of the state of emergency in the country at the time. However they also challenged the government to recognize that the conditions requiring emergency measures in the spring of 2002 have not been alleviated, and that a state of emergency is not an appropriate context for a deliberative process of national construction such as constitution-making. Indeed, the participants’ position presents a good argument for postponing the Constitutional Loya Jirga as some international observers have suggested.¹⁰ But any postponement must be accompanied by measures designed to relieve the conditions of insecurity and lawlessness that are currently standing in the way of any legitimate representative process such as delegate selection. Put differently, any delay must have as its aim the end of the state of emergency.

The participants and organizers of the Roundtable were aware that the Constitutional Commission and the UN are attempting to collect views on the constitution: distributing questionnaires, inviting written recommendations and holding public meetings. Public meetings are designed to separate certain groups, such as *ulama* and women, to encourage open expression. Commissioners are required to produce field reports from their consultations, and all of this data—questionnaires, written recommendations, findings from public meetings and commissioner field reports—will be incorporated systematically into the redrafting process. And the Commission’s vision for the process of the Constitutional Loya Jirga itself is open to procedural innovation based on delegate input.¹¹ In addition, the UN plans to increase staff support for the Constitutional Commission and for the Loya Jirga planning.¹²

Yet the organizers found an unexpected but profound frustration among the participants with the current process. This frustration was widely shared among all participants, across professions, genders and areas of the country. Most participants spoke from recent personal experience with the constitutional consultations. Specifically, participants spoke of feeling that the views expressed in consultations were not taken seriously, and that the questionnaire project was ill-designed and inadequate for collecting popular input. This highlights a troublesome disconnect between the actual process of constitutional reform and the perception of those people most affected by that process.

Participants indicated that the question of the role of civil society and the AIHRC could not be answered in the current context. In the absence of broadly available public information about both the process and the substance of the constitutional project, it is unclear where there is opportunity for civil society leaders to support the effort and to

¹⁰ “Afghanistan’s Flawed Constitutional Process,” International Crisis Group Report, 12 June 2003, ii. Available at http://www.intl-crisis-group.org/projects/asia/afghanistan_southasia/reports/A401002_12062003.pdf

¹¹ HPCR interview, Constitutional Commission representative, 17 July 2003.

¹² HPCR interviews, UNAMA staff, 16 July 2003.

advance a human rights agenda. The participants' preoccupation with concerns for the physical security of independent candidates, delegates and others working to ensure a free and fair representative process demonstrated a sense that the forces ranged against this process are not only well organized and ideologically powerful, but also heavily armed. Ultimately, participants felt, protection of the legitimacy of the process under these circumstances is a task for representatives of the state's power. The nascent and underdeveloped civil society of Afghanistan is ill-equipped, in terms of either resources or organizational capacity, to tackle the political and military entities that they perceive as pitted against democratic progress.

Session II: The Constitution, Customary Law, and Human Rights

The discussion of customary law was introduced by AIHRC Commissioner and moderator Hengameh Anwari. She set up the discussion by asking the participants to acknowledge that certain customary practices occur throughout the country and are not confined to rural areas or particular regions. She encouraged them to recognize the flaws in many customary practices, especially with regard to their treatment of women. She then invited the participants to use the session as an opportunity to share their specific expectations of the AIHRC with regard to customary law.

The session divided participants into groups to discuss two questions: should customary law be formally recognized in the Constitution? And if so, how should it be reformed? Two groups were assigned each question, and then each of the four groups presented its answers for discussion by all participants.

Participant comments:

- “Many of our customs and traditions have pre-Islamic roots. In many instances, customary laws have provided order in society while violating the rights of minority groups, such as women and children. For example, giving a girl *in bad* [retribution]: this is against our laws and against Shari’a.”
- “These customs are against human rights, our laws, and Shari’a, but many of those who implement customary decisions constantly preach the importance of Shari’a while also breaking Islamic law.”
- “As to the first question of whether or not customary laws should be formally recognized, we must understand that all Afghan customs and traditions are neither discreditable *in toto*, nor are they all totally acceptable. Customs should be assessed, and those which are in accordance with Shari’a and human rights should be formally recognized.”
- “Customs, whether creditable or discreditable, did not come into being overnight, they are the result of long-time cultural traditions, and to reform them needs a long time. For example, we have discreditable customs regarding murders, and the murderer must give a living person [a girl] in compensation for the dead victim. It might be better if money were to be given in compensation for the murder. We can therefore conclude that there must be an authority to supervise

the decisions of jirgas so that they would not be able to act in an independent manner.”

- [Group 1] “Assuming customary laws are recognized, we have five recommendations:
 - Jirga decisions should not contravene human rights, Islamic laws, and codified laws;
 - No one should have the right to investigate and rule on an issue unless there is a complaint. There must be an authority that everyone can approach equally. In this vein, it is critical that citizens be made aware of their rights. When citizens know their rights, customary laws will begin to wane in power.”
 - Divorces and marriages must be registered with the judiciary.
 - Minors should not be betrothed for future marriage.
 - Sentencing and criminal punishment must be solely within the power of the judiciary, and must be divorced from the authority of customary laws.”
- [Group 2] “Also assuming that customary laws will be formally recognized to some extent, we have three recommendations:
 - Customary law should be recognized by the constitution and legal decisions reached through customary law processes should be deemed illegal unless registered and legally sanctioned. Jirgas should be held accountable for their decisions;
 - If the rule of law is implemented across the country, with awareness of the rule of law, there will be no need for customary law to hold sway;
 - There are no provisions in our laws for legal proceedings to be initiated unless the victim instigates an action. Entities like the AIHRC and the Judicial Commission should be mandated to look into instances of violations of the law. “

The participants’ answer to the first question, as to whether or not customary law should be formally recognized, was a resounding “yes”. The subsequent discussion offered a critique of the efficiency argument that is often presented in favor of recognizing customary law. This argument says that, given widespread reliance on customary and other informal methods of dispute resolution by the vast majority of the Afghan population, and the general weakness of the formal legal system, the recognition and integration of customary law incorporates into the formal legal system an inexpensive, functional, and readily accessible source of dispute resolution. But participants pointed out that this argument fails to recognize that when the remedies of customary law are inconsistent with human rights and national law, they do not represent a source of justice at all. If the formal justice system is inadequate for the demands of the people, then imperfect, informal, and unmonitored community remedies should not be accepted as a substitute for the challenging and taxing work that will be necessary to make it adequate.

Instead of this argument for integrating and recognizing customary law, participants presented a more pragmatic and critical one. Integration of customary law, they said, will allow the state to reform it through heavy regulation and the encouragement of accountability among its practitioners. Participants additionally pointed out that it is

important to distinguish what can appropriately be considered “custom” and what is illegal practice, suggesting that an exacting eye be turned on customary practices in order to distinguish the former from the latter.

In this session the AIHRC moderators were very successful at framing the discussion in terms of the practical challenges presented by the current practice of customary law, rather than as an abstract question of the authenticity of tribal or regional practices. It also added significantly to the discussion to have two members of the Judicial Reform Commission among the participants. They spoke about the work of the Judicial Reform Commission on this issue, including efforts to draft integrating legislation, and shared their current perspective with the group.

Session III: Human Rights and Constitutional Text – The Bill of Rights

This session addressed two questions pertaining to the Bill of Rights section of the new constitution. First, what rights should be guaranteed in the Afghan Bill of Rights? Second, what role can the AIHRC take in helping Afghans to understand what a Bill of Rights is and why it is important? How can we make awareness of rights permeate our legal culture?

Participant comments:

- “I am concerned that we are not properly prioritizing rights. I think that two issues deserve priority status in our society: women’s rights and minority rights. Democracy cannot be implemented unless women are able to act as equal members of society.”
- “A supervisory entity should be provided for in the Constitution, which would be able to oversee the proper enforcement of rights. This role should be filled by the AIHRC.”
- “Modern day international attitudes and tendencies should not be ignored, even if they are new to Afghanistan.”
- “The more the people are actively engaged in shaping the constitution, and the bill of rights, the more they will be behind its enforcement.”
- “Popular pressure is critical for defending and advocating for rights: it is important for all of us in civil society, and those committed to human rights, to continue to put pressure on the government for rights to be properly articulated in the Constitution.”

Participants observed that in a legal and political culture such as Afghanistan’s there is no understanding of the concept of “rights,” let alone the construction of a legal system based around the protection of those rights. Any conversation about a Bill of Rights or an agenda of human rights advocacy in Afghanistan is meaningless without a conversation about public education on the nature and function of rights in general. Provincial participants were particularly concerned that rights education not be overlooked, as they sensed that without it any debate about which rights should be

protected would remain academic and theoretical, and out of reach for all but the most technocratic Kabul elites.

Participants also observed a significant opportunity for the AIHRC to take on the mandate of rights education. A strong public education campaign around the Bill of Rights would give the AIHRC a chance to explain to Afghans what the Bill of Rights is and why it is important to a new Afghanistan. Through a public education campaign, the AIHRC would define the vocabulary of rights in a new, rights-based legal and political culture. AIHRC would be able to emphasize how the Bill of Rights, as part of the Constitution, incorporates—and is based on—Islamic principles, international human rights law, and the rule of law. This kind of public education effort around what rights are and what they mean in daily life could have a critical impact on the development of a new culture of rights in Afghanistan. Participants emphasized their enthusiastic support for the AIHRC taking on this role.

Session IV: Approaches to Islamic Law

This session began with a presentation of four hypothetical situations by AIHRC Commissioner Langari, and with participants being initially divided into four discussion groups selected to ensure diversity within the smaller groups (e.g., including women participants in all four groups, as well as commissioners or other officials). The issue addressed in this session was how the AIHRC should react to each of the hypothetical situations presented. At the end of the small group period, each group selected a spokesperson to present its conclusions for discussion by all participants.

The topic of this session presented the greatest challenge to the organizers and moderators of the Roundtable discussion. HPCR has observed that most often when Islamic law questions are raised in the context of a discussion on human rights, the question is posed as one of conflict between “Islam and human rights” at the theoretical level. This characterization of the issue rarely goes beyond rhetoric, as it is undeniably true that support for the broad principles protected by international human rights law (equality, justice, dignity for all human beings) lie also at the heart of Islam.

Most scholars and practitioners acknowledge, however that there are specific and concrete places where the legal texts in question conflict. Taking an innovative approach, the organizers sought to go to the heart of this conflict by laying out case examples of these textual contradictions, pointing to areas where Islamic texts and the international bill of rights contradict, instead of comparing the abstractions *behind* the two bodies of law. This approach acknowledges the complexity of an integrative process, which is what devout and faithful Muslims who wish to honor human rights principles in their lives and in their law must grapple with. This is the challenge faced by Afghans, who want an Islamic legal system and also want to protect human rights.

*Participant comments:*¹³

Situation One: Samira is the sole witness to a murder by a man who has been terrorizing her small community for some time. The local judge has deemed that she cannot testify unless there is another woman to testify with her, as well as a man. Samira approaches the local office of the AIHRC and claims that her human rights have been violated, and that she wants to testify in the case. How should the AIHRC respond?

- The participants found this case to be highly challenging. The case was presented by a young professor of Islamic philosophy, who noted that the “reason that Islamic law prevents women from being the equal of men as witnesses is that men and women are biologically and psychologically different, and women tend to have much more mercy and sympathy for the accused. Therefore, Islam recognizes that women may be too soft or nurturing to be able to be a witness and send someone to prison or to death.” Many participants—both men and women—found this position to be objectionable, and argued that this was not a satisfactory foundation for lawmaking. Others pointed out that this rule seemed to contradict the view that Islam treats all human beings equally. While this case generated the most discussion, the group remained unsure of what course the AIHRC should take on the case, noting that it seemed that the woman’s very legitimate claim to her rights was not addressed by the answer that it was contradicted in the law.

Situation Two: In a remote province, two families engaged in a dispute go to a tribal shura in order to seek resolution. The shura decides that the youngest girl from each family should be exchanged in order to bring peace to the village. The father of one of the young girls complains that his human rights are being violated by the decision. How should the AIHRC respond to his filed complaint?

- The group assigned to this case first pointed out that it was critical to understand that the decision of this shura was both against Shari’a, as well as against the codified laws of Afghanistan. One aspect of the group discussion was around the fact that it was critical for Afghans to recognize the frequency of such decisions by small jirgas and shuras. One participant observed: “We all know that these sorts of decisions are even made in Kabul, but we do not really want to admit this to ourselves”. Another participant, however, stated that if the decision was “agreed upon by both families, then once the girls reach puberty, the exchange should take place”. This was strongly disagreed with, with some participants noting that one mistake that often takes place in discussing Afghan laws is that people do not properly distinguish between Islamic law and tribal or customary practices. The entire group agreed that it would be critical for the AIHRC to carry out a full investigation of the case, and in the end almost all participants agreed that the AIHRC should make efforts to ban this practice altogether.

¹³ A full-text version of the hypothetical situations can be found in Appendix II at Page 31, here a brief representation of each case is included.

Situation Three: Mina, a woman with three young children, has a registered marriage to Ishmail. One day, Ishmail declares a triple divorce, and Mina returns to her Father's home. The divorce is not registered. She claims that she is still married, and the court rejects this claim. She files a complaint with the AIHRC. How should they respond?

- Many participants thought that this case was highly realistic, and that this was a situation faced by many women in Afghanistan. Interestingly, the participants focused on strengthening the Civil Code and Marriage Law in order to prevent abuses of women by their husbands. Most of the group felt that in this specific case, the AIHRC's most effective strategy would be to be in touch with the courts in Mina's district, and note that if the *nika-khat* (marriage contract) was registered, then Ishmail will be required to pay her the *mahr* (maintenance). Some suggested that it should be required that divorces be registered, so that it would not be possible for husbands to carry out these types of denunciation divorces without formalizing their decision with a court of law. The participants, after a great deal of discussion, also suggested that the registration of *nika-khats* not only be recommended, but that this registration be made compulsory, with the likely result that men would be discouraged from divorcing their wives, and so that the women's rights would be more strongly protected.

Situation Four: Mahmoud, a young wealthy man, has been arrested and charged for theft, and he confesses to the crime. The judge argues that this form of theft does not fall within the ambit of the Afghan Penal Code, and that Mahmoud must be sentenced to the hudud punishment of amputation. Farooq, another member of the community, files a complaint to the AIHRC on behalf of Mahmoud, arguing that the court is violating the prohibition on torture and cruel punishment. How should the AIHRC react?

- There was consensus by the group that hudud punishments are part of Islamic criminal law, and that the Penal Code allowed hudud punishments to be carried out by carving out only Ta'azir punishments for codification. The group did not suggest that the law itself could be reformed or changed, rather they focused on ensuring that legal procedures would be strengthened and enforced such that punishments like amputation would be minimized. The small group analysis was presented by a professor of criminal law, who noted that it was critical for Afghan legal reformers to heed developments in criminology, forensics, and penal code developments in other countries. For example, he stated that in many countries, the motives of the criminal were often considered (an inquiry also supported in Islamic criminal law, particularly in the case of theft). Also, he added that there might be mitigating factors such as "economic, mental, and physical status". This group also noted that it was important to question the grounds of confessions, and to ensure that they were not proffered under duress.

The participants at this Roundtable represented a diverse group in their views of the proper role of Islam in politics and their level of formal Islamic training. Among the participants were several individuals who had studied Islamic law and were experts in

Islamic law and philosophy. There were also many participants with no Shari'a training, but expertise in statutory law. Among the subset of women participants there was also a similar diversity, with several women involved in Muslim women's groups, one who had studied theology in Iran, and others with no specific background in Islamic studies. In addition, the substantial number of women participants created an important freedom for women to express discomfort with comments that invoked a traditional approach to gender roles under Islam.

The conversation was exceptionally frank and honest, and many commented on the fact that they had not been able to discuss such issues in an open forum before. Participants were at times frustrated, annoyed, and outraged by their fellow participants' comments and conclusions. The conversation also ended in ambiguity, with one male participant asking, "But, in the end, we have a woman who is demanding her rights. And, are we prepared to tell her we have no answer for her?" This discomfort, however, is where the energy for Islamic reform originates. The challenges posed by these hypotheticals, and by the integrative project more generally, have no easy answers. Hearing others acknowledge the difficulty faced by legal reform in a post-conflict Islamic context is liberating and ultimately empowering of creative solutions for Afghan legal reformers. Ambiguity then becomes the beginning, and not the end, of the path toward a system that honors both bodies of law.

Human Rights and the Civil and Penal Codes

Questions/Issues Addressed

This session was opened by a lecture by Commissioner and moderator Farid Ahmad Hamidi on the history, purpose and current role of the Afghan codes in the legal system. Mr. Hamidi also summarized the AIHRC effort currently underway to draft a commentary to the codes in light of international human rights law. The Commission plans to draft and then circulate its commentary when it is completed.

The most common formula for discussing the Afghan legal codes in contexts such as this Roundtable focuses on the question of enforcement, maintaining that the codes are nearly flawless and that the problems that plague the current system arise from imperfect application. In a departure from this formula, participants here acknowledged that the codes themselves are not perfect and are in need of reform. Participants did not back down from the need for better enforcement of the laws as well, but the myth of the perfection of the Afghan codes was deflated. Perhaps because of the immediate juxtaposition of this discussion with the session on the conflicts between Islamic law and human rights law, specific examples of necessary reforms were given that referenced the hypothetical scenarios raised in the Islamic law session. For example, participants commented on the need for registration of marriage and divorce certificates to close loopholes that allow for unequal treatment of men and women with regard to marriage and divorce under Islamic law.

Again, the participants voiced strong support for the AIHRC to take on a role in addressing the issues raised in this session. Participants called for the AIHRC to advance

a reform agenda through advocacy with the Judicial Reform Commission, in order to ensure that their review of the laws is incorporated in an impactful way through practical reforms. They encouraged the current review project described by the Commissioners, and urged the AIHRC to continue to play this role as the process of legal reform unfolds.

Conclusion

The Continued Importance of Dialogue

This Roundtable has demonstrated the extraordinary benefit of conversations between Afghans from Kabul and Afghans from the provinces. Many participants commented on the insight they gained from meeting with and hearing from each other: Kabul participants spoke of the importance of hearing perspectives from the provinces, and provincial participants of the value of hearing the perspective from the center. Every forum in which representatives and leaders from both the provinces and the capital are brought together to exchange views and collaborate is a valuable exercise for both network-building and nation-building. As the AIHRC and HPCR discovered in planning this Roundtable, there is considerable inconvenience, expense, and challenge to planning any event involving participation from the provinces as well as Kabul. It is perhaps understandable that these opportunities do not arise more often. However, because of their field office presence and their capacity to identify community leaders outside of Kabul, this kind of exchange of views and two-way learning is an invaluable contribution to the national dialogue that the AIHRC is uniquely positioned to make.

This event will also help the AIHRC to understand and capitalize on its capacity as a convening forum for policy discussion and for public education on human rights and legal reform issues. By reaching out to civil society throughout the country and involving them in discussions such as these, the AIHRC reinforces its constituency among the Afghan population, a constituency which will provide both a source of political support and a focus for educational efforts. The findings of the substantive discussions will also provide the Commission with additional strategic focus on its mandate, helping to prioritize certain functions such as public education and advocacy or specific reforms with the Judicial Reform Commission.

Messages to Afghan and International Policy Makers

Several themes among the comments of participants sounded as urgent messages to Afghan and international policy makers and other architects of Afghan legal reform. Participants articulated a demand for a voice in the corridors of power. In their criticism of the current constitutional consultation process and their pessimism about future national political events, they called for open debate and greater opportunities for public exchange and participation. They also called for more basic information to be made available, about the Constitution, the plans for the Constitutional Loya Jirga and the national elections, and other crucial elements of the transitional legal process.

Here, as everywhere in Afghanistan, there was also a paramount concern for greater security throughout the country. Provincial participants told harrowing stories of warlord intimidation. No discussion of strategy or policy on legal reform questions could be freed from the shadow of physical violence that hangs over the entire nation.

Participants also felt strongly that in the current Afghan context rights and education as to rights cannot be disentangled from one another. Guarantees of rights without an understanding of those rights, or even what it means to guarantee them, are nothing more than worthless gestures towards the spirit of international human rights law. Rights themselves are an entirely new concept being introduced into the Afghan legal culture. Participants urged legal reformers not to overlook the fundamental building blocks of a rule-of-law culture in their zeal to identify the best technical flourishes to adorn the new legal system.

Finally, it must be observed that optimism is on the wane in Afghanistan. Faith in the legal reform process and even in the role of law as a provider of security and a guarantee of protection has faded significantly since HPCR's previous work in Afghanistan earlier this year.¹⁴ Decision makers face a rapidly disappearing window during which to engage Afghans committed to democratic political processes, the development of civil society and the protection of human rights. If the disillusionment of these Afghans is allowed to harden, the progressive agenda of the UN- and internationally-backed transitional process will find itself without a significant political constituency.

¹⁴ See "Afghan Legal Reform: Challenges and Opportunities," HPCR Policy Brief, January 2003. Available at http://www.preventconflict.org/portal/centralasia/AfghanLegalReform_PB.pdf.

Appendix I: Roundtable Agenda

کمیسیون مستقل
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افغانستان



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د حقوقو خپلواک
کمیسیون

16 جوزا 1381

Afghan Independent Human Rights Commission



HARVARD PROGRAM ON
HUMANITARIAN POLICY AND
CONFLICT RESEARCH

Human Rights and Rule of Law: Constitutional and Legal Reform Issues

A Roundtable Discussion Co-Hosted by the Afghan Independent Human Rights Commission and the Harvard Program on Humanitarian Policy and Conflict Research

July 21 and 22, 2003
AIHRC Conference Center
Kabul, Afghanistan

Agenda

Time

Issue

Monday, July 21 2003

9:00 – 9:20

Reading of the Holy Qur'an and Opening of Roundtable

9:20 – 10:30

First Session: *The Constitutional Loya Jirga*

10:30 – 10:45

Tea Break

10:45 – 12:00

Continuation of First Session

12:00 – 1:30

Lunch Break and Offering of Prayer

1:30 – 2:30

Second Session: *The Constitution, Customary Law, and Human Rights*

2:30 – 2:45

Tea Break

2:45 – 4:00

Third Session: *Human Rights and Constitutional Text – The Bill of Rights*

Tuesday, July 22 2003

9:00 – 9:15

Opening of Second Day of Roundtable

9:15 – 10:30

Fourth Session: *Approaches to Islamic Law*

10:30 – 10:45

Tea Break

10:45 – 12:00

Fifth Session: *Human Rights and the Civil Code*

12:00 – 1:30

Lunch Break and Offering of Prayer

1:30 – 2:30

Sixth Session: *Human Rights and the Penal Code*

2:30 – 2:45

Tea Break

2:45 – 4:00

Seventh Session: *Security and Human Rights*

Appendix II: Roundtable Session Background Papers



I. Preparing for the Constitutional Loya Jirga *Lessons Learned from the Emergency Loya Jirga* *Discussion Paper*

Overview of the Emergency Loya Jirga Process, June 2002

Election of Members

Over a two month process, 1,051 delegates were elected by Afghans living in Afghanistan proper.¹⁵ These elections took place in a two stage process, whereby first local authorities selected a set of candidates using “traditional means,” and second those candidates traveled to a regional center where, together with candidates from other localities, they selected a smaller group by regular ballot from among themselves to attend the Emergency Loya Jirga (ELJ).¹⁶

An additional 450 delegates were elected by refugee groups, universities and other civil society organizations. At the last minute, approximately 100 delegates were added under pressure from regional powerbrokers, including well-known warlords.¹⁷ The total number of delegates was approximately 1,600.¹⁸ Any delegates with a history of participation in terrorism, war crimes, human rights abuses, smuggling or the drug trade were to be specifically excluded.¹⁹

Oversight of the Election Process and Response to Abuses

A Special Independent Commission for the Convening of the Emergency Loya Jirga (“Special Commission”) and the United Nations provided monitoring of both stages of the elections, focusing on election day itself. In addition, every candidate was required to sign an affidavit, declaring that his or her candidacy was valid under the conditions laid out by the UN and the Special Commission.²⁰

¹⁵ International Crisis Group (ICG) Afghanistan Briefing, “The Afghan Transitional Administration: Prospects and Perils,” July 30, 2002, p. 2. Available at http://www.crisisweb.org/projects/asia/afghanistan_southasia/reports/A400719_30072002.pdf, last viewed July 20, 2003.

¹⁶ Human Rights Watch (HRW) Briefing Paper, “Afghanistan: Return of the Warlords,” June 2002, p. 2, note 3. Available at <http://www.hrw.org/backgrounder/asia/afghanistan/warlords.htm>, last viewed July 20, 2003.

¹⁷ BBC News World Edition, “Afghan assembly ‘undemocratic,’” August 1, 2002, http://news.bbc.co.uk/1/hi/world/south_asia/2165049.stm, last viewed July 20, 2003.

¹⁸ ICG, op. cit., p. 2.

¹⁹ “Declaration to be signed by all candidates for membership of the Emergency Loya Jirga,” http://www.eurasianet.org/loya_jirga/affidavit.shtml, last viewed July 20, 2003.

²⁰ HRW, op. cit., p. 2 note 7. See also conditions for valid candidacy at “Procedures for the Election of the Members of the Emergency Loya Jirga,” http://www.eurasianet.org/loya_jirga/election.shtml, last viewed July 20, 2003.

Observers focused on election-day conduct, and did cancel and reschedule several elections under indications that they were not being conducted in a free and fair manner.²¹ There was no mechanism for monitoring intimidation before election day.²² In addition, many observers expressed frustration with their inability to exert pressure on those who were inappropriately interfering with the process, citing their powerlessness in the face of armed gunmen.²³

Although the affidavit signed by the candidates stated that anyone in breach would be required to “give an account” of him or herself, no further enforcement mechanism seems to have been attached to the conditions for valid candidacy. The Special Commission’s spokesman acknowledged that they had no way of preventing unqualified delegates from attending.²⁴

Conduct of the Loya Jirga

No agenda or Rules of Procedures for the ELJ were made available to the delegates until one day before the beginning of the ELJ.²⁵ In addition, they were largely ignored throughout the proceedings.²⁶ Leadership by the chair of the ELJ was inconsistent and confusing, sometimes following rules of procedure, sometimes deviating from them, and often allowing powerful figures to guide the development of the proceedings.²⁷

The United Nations permitted internal intelligence “security” forces to have access to the ELJ at the insistence of the ministries of defense and interior. These security forces monitored the participants openly and intrusively, and even admonished delegates and international observers about their participation. This decision seriously compromised the free and fair democratic nature of the proceedings.²⁸

In addition, though secret ballot mechanisms were provided, they were used only once for the election for head of state. The remainder of the balloting, by show of hands and even by voice, was subject to the scrutiny, pressure and interference of the warlords and other powerbrokers who were present at the ELJ.²⁹

²¹ HRW, “Return of the Warlords,” pp. 7-8.

²² HRW, “Return of the Warlords,” p. 3.

²³ HRW, “Return of the Warlords,” pp. 3-4.

²⁴ HRW, “Return of the Warlords,” p. 2 footnote 7.

²⁵ ICG, op. cit., p. 4.

²⁶ HRW, “Afghanistan’s Bonn Agreement One Year Later: A Catalogue of Missed Opportunities,” December 2002, p. 10. Available at <http://www.hrw.org/backgrounder/asia/afghanistan/bonn1yr-bck.htm>, last viewed July 20, 2003; ICG, op. cit., p. 5.

²⁷ *Economist* Global Agenda, “Small Change,” June 24, 2002, pp. 1-2; BBC News World Edition, “Loya jirga’s mixed message,” June 19, 2002, http://news.bbc.co.uk/1/hi/world/south_asia/2054919.stm, last viewed July 20, 2003; ICG, op. cit., pp. 4-5.

²⁸ ICG, op. cit., pp. 3-4.

²⁹ HRW, “Afghanistan’s Bonn Agreement One Year Later,” p. 10; ICG, op. cit., p. 3.

Possible Lessons Learned

Election of Members

- Elections were broadly problematic
- Intimidation started early and was aimed at independent candidates as well as at voters on election day

Oversight of the Election Process and Response to Abuses

- Observers reports of abuses resulted in no clear sanctions of the perpetrators
- No sanctions for abusers were made clear ahead of time, so there was no deterrent effect
- Early offenders were not dealt with expediently and according to due process, emboldening further inappropriate interference
- At some candidate elections, secret ballots were not used
- Security forces or gunmen were allowed in voting areas, compromising people's faith in the secrecy of balloting

Conduct of the Loya Jirga

- Undemocratically selected or elected members delegitimized the process
- Secret ballots were not used for decision-making at the ELJ
- Bodyguards and security forces were given access to ELJ compound and allowed to harass and intimidate participants
- Intelligence officials were given access to ELJ compound and allowed to monitor and harass participants
- No clear agenda and rules of procedure were provided to delegates ahead of time
- Rules of procedure were not respected by the UN and ELJ officials

Looking Ahead

The recent decree from President Hamid Karzai laying out the procedure for the convening of the Constitutional Loya Jirga in October 2003 suggests that the ATA and the UN are mindful of many of the problems that arose at the ELJ and are seeking actively to avoid them at the CLJ.

Measures taken to ensure a free and fair CLJ include:

- Formation of an Executive Council to monitor election and deliberation process for abuse and undue influence
- Exclusion from candidacy of senior government officials including governors, deputy governors, district administrators, mayors, army, police and National Security Directorate
- Requirement of at least 95 women representatives out of a total of 500 (19%)



II. Integration of Customary Law in Post-Conflict Legal Reform

Discussion Paper

In developing the new legal system of Afghanistan, legal reformers face the question of whether, and to what degree, they should include principles and processes drawn from customary law. The Bonn Agreement makes reference to “Afghan traditions,” and many have noted that some tribal practices such as *jirga* offer an efficient and trusted means to resolve disputes and strengthen local legal mechanisms. Others, however, have expressed concern many of the practices condoned by customary law violate Islamic principles or international human rights norms; and argue that they should not be formally recognized in the new legal order. Many Afghans who live outside Kabul see customary practices as part of the legal structure – as formal as their local courts and prosecutors, leading some to note that it would be impossible to remove customary practices and that the focus of reformers must be on bringing them into conformity with Islamic and human rights principles.

Other countries in transition have also dealt with this challenging issue, and may provide useful examples for Afghan legal reformers and human rights practitioners. This discussion paper provides the key aspects of the process in Burundi, a country with a strong tradition of customary law, and also provides some questions for participants to consider.

In Burundi’s legal reform process, customary law in the form of the *Ubushingantahe* institution was specifically incorporated and approved in the Arusha Peace and Reconciliation Agreement of August 28, 2000. The Arusha Agreement ended years of conflict between the dominant Tutsi minority and the historically oppressed Hutu majority. The *Ubushingantahe* tradition of local councils of experienced and respected individuals dispensing community justice had existed in Burundi long before the colonial period, and practitioners were drawn from both the Tutsi and the Hutu ethnic groups. Therefore it served as a valuable and inclusive system for promoting reconciliation at the local level. The Arusha Agreement acknowledged this traditional role, formally mandating the *Ubushingantahe* Council to “administer justice in a conciliatory spirit.”

Burundi’s experience suggests that the integration of customary law and legal procedures into the formal judicial system as part of post-conflict legal reform may be a constructive treatment of traditional dispute resolution mechanisms that enjoy local community trust and respect, and which are deeply engrained in cultural tradition.

Burundi’s example suggests that customary law and legal procedures may coexist with—and even enhance—the formal legal system. This may be also be true in other situations where:

- There is widespread endorsement or acceptance of customary law and processes as legitimate;
- The spirit of customary law and legal procedures is in congruence with the aims and objectives of the emerging post-conflict authority, the nation's constitutional provisions, and international human rights norms;
- The interface between the customary legal system and the statutory or formal legal system has been clearly understood and articulated;
- Customary law traditions are homogenous and widespread enough to support national reconciliation in a divided society.



III. The Afghan Bill of Rights *Discussion Paper*

Overview of a Bill of Rights

Human Rights and Bills of Rights

According to the South African Human Rights Commission, human rights are “the rights and freedoms which it is generally agreed that everybody has from the moment of birth, simply because they are human beings. They are not privileges which need to be won and they apply equally to everybody, regardless of age, sex, race, ethnicity, wealth or social standing.”

In many countries, these rights are listed in the Constitution as a Bill of Rights. The Bill of Rights records what rights are protected and makes them a part of the highest law of the country, so that they are difficult to change or take away from people. When human rights are enshrined in the Constitution in this way, people can use them in the country’s courts to protect themselves from violations by the government or by other people. A Bill of Rights shows a country’s commitment to a culture and a law that honors, respects and enforces human rights.

Function of a Bill of Rights

The first Bill of Rights to appear in a constitution, the United States Bill of Rights, was written to protect the American people from abuse of power by the new government they had created. Many Bills of Rights operate in this way, to protect people from abuses by their governments. For example, in the South African Constitution the right to vote is included in the Bill of Rights to make sure that all citizens can vote and that the government cannot decide to write a law saying that only men can vote. This function of a Bill of Rights operates *vertically*, that is, between the government and the people.

Since the American Bill of Rights was written, people have come to recognize that many human rights can be violated by other people, as well as by governments. When the rights in a Bill of Rights operate between people, they are said to operate *horizontally* as well as *vertically*. For example, the South African Bill of Rights says that *no-one* is allowed to discriminate against anyone else (that is, people are not allowed to treat other people differently because of their race, sex, age and so on). The South African Constitution says clearly that the Bill of Rights operates *horizontally* whenever possible.

Public Education and Afghanistan’s Bill of Rights

Afghanistan may benefit from a campaign of public education and constituency-building around the Bill of Rights. A strong public education campaign around the Bill of Rights would give the AIHRC and civil society organizations a chance to explain to Afghans what the Bill of Rights is and why it is important to a new Afghanistan. The Bill of

Rights could be a source of pride for all Afghans: an articulation of the new culture of human rights that was being created.

A public education campaign would provide the AIHRC and civil society organizations with the opportunity to build support among the population for the Bill of Rights section of the new Constitution in anticipation of the Loya Jirga. Further, the AIHRC and civil society organizations would be able to emphasize how the Bill of Rights, as part of the Constitution, incorporates (and is based on) Islamic principles, international human rights law and the rule of law. This kind of public education effort around what rights are, and what they mean in daily life, could have a critical impact on the development of a new culture of rights in Afghanistan.

Human Rights and the New Afghan Constitution

Unfortunately, Afghanistan has a long history of human rights abuses, both by its governments against its people and by its people against each other. Afghanistan is resolved to move beyond this history, and to develop a new culture of human rights. The creation of the AIHRC is a symbol of that commitment. But the new Constitution will be the ultimate symbol of the new state. To show the seriousness of Afghanistan's dedication to human rights, the Constitution must not only guarantee those rights on paper, but must explain how those rights will be protected. That is, it is not only necessary to have a Bill of Rights written in the Constitution, but it is also necessary to build in mechanisms for enforceability and justiciability at the moment of transition to a permanent system.



IV. Practical Approaches to Human Rights

Situations Involving International Human Rights Law and Islamic Law

Introduction

It is at this point almost certain that Afghanistan's new Constitution will clearly be based on Islamic principles, and will reinforce the role of Islam as an integral part of the nation's future. Islamic law lies at the foundation of Afghanistan's previous constitutional law and its codes, and as a body Afghanistan's laws are widely considered to be among the most thoroughly Islamic in the world. Additionally, where the codes are silent on a legal issue, Afghanistan's constitution will likely authorize judges to turn to their individual understandings of *fiqh* in order to see that justice is done, as did Article 102 of the 1964 Afghan Constitution.

The Afghan Constitution will likely also require Afghan law to be consistent with international human rights law, and specifically with international human rights treaties which Afghanistan has signed and ratified. Of course Islamic principles of justice, equality, individual freedom of conscience and the protection of vulnerable groups in society are synonymous with the principles of international human rights law. As a practical matter, however, there are always challenges when two bodies of law are not entirely identical, but nonetheless must be integrated. This is true no matter how broadly similar the principles behind these laws are.

The mandate of the Afghan Independent Human Rights Commission (AIHRC) includes hearing and documenting individual complaints of human rights violations. Therefore, the AIHRC will be involved in this integrative process, facing specific cases where Afghan law, Islamic law and international human rights law must be applied to protect the rights of the Afghan people. Below please find a few hypothetical situations, which have been drafted to provide an intellectual exercise in integrating these bodies of law. These hypothetical situations are designed to prepare the thinking of the participants for practical fact patterns. In the new Afghan legal system, creative and sophisticated responses will be required in order to ensure that justice is done, and in order to honor the laws of Afghanistan as well as international human rights principles.

Hypothetical Situations for Discussion

Situation #1

Samira comes to an AIHRC satellite office and states that she has witnessed a murder, and the case is going to trial. There were two witnesses to the crime, one man and Samira, who is a woman, and Samira wants to go to court and testify to what she saw. Samira is known in the community as a devout and faithful Muslim, she has never been

convicted of a crime, she has full mental capacity, and she is willing to take the oath of truthfulness.

The judge has said that Samira cannot testify unless there is another woman to testify with her, because she is a woman. The accused is widely considered to be a threat to the community, and most in Samira's district would like to see him behind bars. International human rights law states that "Everyone has the right to recognition...as a person before the law," and that this right must be enjoyed equally by men and women. These rights are guaranteed in the Universal Declaration of Human Rights³⁰ and the International Convention on Civil and Political Rights,³¹ both of which Afghanistan has ratified.

Samira claims that her human rights are being violated because she is not being treated as an equal by the City Court. The questions for the AIHRC staff member in the satellite office are:

- Are Samira's human rights being violated?
- How do you respond to Samira's complaint?

Situation #2

In a remote province, two families belonging to a tribe are engaged in a dispute, and go to the *jirga* to settle the case. Both families agree to abide by the decision of the *jirga*, and sign a form attesting to this agreement. However, the form is only signed by the *rish sefid* of each family.

When the *jirga* reaches its solution, it orders each family to trade its youngest daughter to the other family. Hamid, the second son of one of the families and the father of one of the girls to be traded, comes to the local AIHRC office and files a complaint arguing that his human rights are being violated because he is being forced to give his daughter over to another family. He believes, having attended one of the AIHRC's seminars in the region, that human rights law protects his right to raise his children, and make decisions about their welfare. (UDHR³²), (ICESR³³), (ICCPR³⁴).

³⁰ Everyone has the right to recognition everywhere as a person before the law. (UDHR 6). "All are equal before the law and are entitled without any discrimination to equal protection of the law." (UDHR 7).

³¹ "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." (ICCPR 3). "Everyone shall have the right to recognition everywhere as a person before the law." (ICCPR 16).

³² "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." (UDHR 16:3). "Parents have a prior right to choose the kind of education that shall be given to their children." (UDHR 26:3).

³³ "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children." (ICESR 10:1).

³⁴ "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (ICCPR 23:1)." "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions." (ICCPR 18:4).

President Karzai has recently signed a decree, based on a recommendation from the Judicial Reform Commission, stating that the decisions of *jirgas* cannot conflict with Afghan law, Islamic principles, or international human rights law. This case was originally based on a major property dispute, and you should assume that it was an appropriate case to be heard by *jirga*. The community is very pleased with the resolution to this serious conflict, arguing that the *jirga* has brought peace back to the small district.

The question faced by the AIHRC staff member is:

- Is Hamid’s claim legitimate?
- How do you respond to Hamid’s formal complaint?

Situation #3

Mina, a woman with three young children, is married to a man named Ishmail. They have been married for ten years. The *nikahnama* is registered. Recently, they have been arguing a great deal, and one day, frustrated over Mina’s continued complaints about Ishmail’s inability to maintain a job and provide for the family, Ishmail turns angrily to Mina and clearly states, three times: “I divorce you.”

Three months pass; Ishmail has been living with his brother’s family and Mina at her father’s home. Mina cannot support her children properly. Mina claims that she has a right to maintenance, and that Ishmail and she are still married because the divorce was not registered. Ishmail claims that under Islamic law, his triple-*talaq* was legal, and that he properly divorced her. The court agrees with Ishmail that the divorce is legal and that Mina is not entitled to maintenance, and makes a decision to that effect.

Mina comes to the AIHRC office and files a complaint saying the court has violated her human rights, and asks the AIHRC to follow up her case.

(UDHR³⁵), (ICCPR³⁶) (Also see footnotes 1 and 2).

The questions for AIHRC staff are:

- How might the Commission respond to this claim?
- What advice do you give Mina?

Situation #4

Mahmoud, a young man, has been convicted of a serious case of theft—he stole a great deal of money and goods from a children’s orphanage. He is from a wealthy family, he is sane, and he does not have any mental incapacities. Two acceptable witnesses testify to Mahmoud’s guilt. Further, Mahmoud confesses to the crime of theft.

³⁵ “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.” (UDHR 16:1).

³⁶ “States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.” (ICCPR 23:4).

His case comes before the local city court, and the judge decides that the case falls under the category of *hudud*. He argues that because the crime of theft, in this definition, is not covered by the Afghan Penal Code, the Constitution under Article 102 guides him to turn to Hanafi *fiqh*. The judge, having examined the case, determines that as a crime of *hudud*, the punishment for theft in the first conviction is cutting of the right hand.

Farooq, a member of the community who is well respected, comes to the AIHRC office, and makes a complaint based on the violation of Mahmoud's human rights. He argues that while Mahmoud committed a terrible crime, the cutting of the hand is a "cruel, inhuman or degrading treatment or punishment," and is forbidden under both the Universal Declaration of Human Rights³⁷ and the International Covenant on Civil and Political Rights.³⁸

The question for AIHRC staff is:

- What does the AIHRC staff person do in this case?

³⁷ "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." (UDHR 5).

³⁸ "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." (ICCPR 7).



VII. Security and Human Rights

Discussion Paper

Introduction

Afghans are desperate for greater security to enable the physical and political reconstruction of their country. The media has covered statements by President Hamid Karzai, Special Representative Lakhdar Brahimi, Minister of Finance Ashraf Ghani and others calling for the international community to rise to the challenge of Afghan reconstruction and extend security support to the rest of the country outside Kabul. In conversations with Afghans and international observers in Kabul between May and July 2003, many have stated that security must be prioritized during this critical and sensitive period.

Often it seems that this prioritization of security must come at the cost of a national dialogue on human rights, the establishment of procedures for transitional justice, and developing mechanisms to address key human rights concerns in Afghanistan. Human rights and security are sometimes explicitly, and often implicitly, presented as competing agendas, between which scarce resources, time and attention must be allocated. Some officials (both ATA officials and UNAMA staff) have suggested that Afghans are not prepared for human rights, that what they need and want most is security.

Thus, the conversation around security and human rights is often seen as two extremes:

- 1) Continuing pressure and lobbying for greater security, and an emphasis on maintaining stability while the government is able to extend its influence to the entire country (sometimes at the cost of developments and debates on human rights), a position that holds that human rights developments can only come *after* security has been ensured; or
- 2) Encouraging a full agenda of human rights – including pressure to increase civil and political rights protections such as free speech and freedom of assembly, political party establishment, accountability for war crimes, even if such an effort were to undermine the control of the government, or were to create security concerns.

Between these two positions, there may be a spectrum of strategies and approaches available to those concerned about both security *and* human rights issues: there may be ways in which priorities can be set in both categories, and developments can be made in parallel.

According to one scholar, peacebuilding has two distinct elements, positive and negative. *Negative peace* “represents an absence of direct violence.”³⁹ This may be equated to a security agenda, and it has manifest itself in Afghanistan in efforts to undertake DDR

³⁹ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Malden, MA: Polity Press and Blackwell Publishers, 2002), p. 12.

(disarmament, demobilization and reintegration) and discussions of the building of a national army or the expansion of ISAF presence beyond the capital. *Positive peace* “represents the removal of structural and cultural violence.”⁴⁰ These efforts include the goals of a human rights agenda in post-conflict transition, and in the Afghan context this may be seen as part of the mandate of the Afghan Independent Human Rights Commission (AIHRC).

Experts and observers emphasize repeatedly the need for peacebuilding processes to balance these two elements, the positive and the negative, and to allow them to complement each other. As Rama Mani notes, “Peacebuilding has to aim to achieve its objectives of negative and positive peace simultaneously—and not consecutively—in order to be sustainable.”⁴¹ However, it is also widely acknowledged that specific cultural and historical contexts are strong shaping influences in peacebuilding efforts, and that success depends far more on the national authenticity of the process than on the importation of “lessons learned” from international experts or commentators.

The question, then, is how to balance negative and positive peacebuilding efforts in Afghanistan. Further, how can the Human Rights Commission, and those working closely with the Commission, both represent the desire of most Afghans to improve security and stability as well as pursue a human rights agenda during this transitional period?

Discussion

The current challenge in Afghanistan includes the effort to balance human rights and security interests during post-conflict transition and reconstruction. One way to think about this challenge is to imagine a spectrum of possible responses. At one end of the spectrum is the position that human rights concerns, positive peace, must take a back seat to security, or negative peace. This position holds that Afghanistan cannot “afford” open and challenging discussion of human rights until the security of the country is assured. At the other end of the spectrum is the position that human rights protection must be pursued strenuously, even if this entails risks to central government stability. This position holds that there can be no compromise on human rights in the name of security, because any peace built on human rights abuses provides only a false security. In the words of Guatemalan Nobel Peace laureate Rigoberta Menchu, “Peace without justice is only a symbolic peace.”⁴²

One might also imagine a middle ground between these two positions, where human rights concerns are pursued in stages, phased according to some criteria that is sensitive to the realities of the current security environment. In this view, some human rights issues would be given top priority along with nationwide security, but others would be considered later, as the security situation improved. Negative peace would be prioritized, while positive peace would not be neglected.

⁴⁰ Ibid.

⁴¹ Mani, *op. cit.*, p. 13.

⁴² Quoted in Mani, *op. cit.*, p. 4.

This middle ground approach may seem the most attractive but it raises some difficult questions. For example:

- How can one choose between fundamental human rights, in order to prioritize some over others?
- How can one communicate the need to adopt this approach to those whose rights may be deprioritized or considered at a later date?
- What criteria will be used to determine that the security situation has improved such that a new set of rights can be engaged?

Take the example of women's rights in Afghanistan. Many in the international community advocate a position at one end of the spectrum. They advise that women's education, right to vote, equal access to the justice system, etc., should be pursued immediately in Afghanistan, regardless of the security environment.

But is it realistic to prioritize these rights in the current security situation? Under the first approach described above, Afghan leaders might choose to leave all these rights aside until security has improved. This approach has the benefit of not raising a set of questions that are very controversial in some parts of Afghan society. Women's inequality is deeply ingrained in some areas of Afghanistan, and in some customary processes, and some powerful leaders have opposed any centrally imposed changes in this situation. However, this approach would send a public message of the "deprioritization of women's issues," and would allow the new state to start to build itself upon a flawed foundation of unequal access, and unequal protection of human rights.

Under the second approach, human rights practitioners might argue that security can never improve for women until these rights have been assured, and that they must be pursued with a prioritization equal to other elements of the security situation. This approach would emphasize clearly the importance of redressing historical inequalities in Afghan society. But different understandings of Islamic law and customary practices on the role of women in society might divide elements in Afghan society that would otherwise be united in pursuing stability and security. Scarce resources might be spent on protecting newly opened girls' schools and women's polling places instead of, for example, on providing ordinary policing to more Afghan neighborhoods.

- What might the middle ground approach to this question look like?

Conclusion

The same exercise proposed here could be undertaken with any number of rights. How should Afghanistan balance minority rights and security? Freedom of speech and security? Human rights are articulated and protected precisely because certain constituencies have incentives to violate them. Any human right you can think of requires enforcement against some elements in society, and must be protected with scarce resources. This enforcement and protection may create friction, disagreement, and potential political difference in any society, and will draw energy from other aspects of

the pursuit of security. At the same time, many Afghans acknowledge the need for increased protection of human rights, and open discussion of human rights issues in Afghan society during this time of transition.

If the answer lies in the middle ground, certain rights may need to be prioritized in the early stages of establishing security, and others engaged only as the security situation improves. In this case, a careful balancing act faces the AIHRC and other Afghan leaders. Not only must rights and security trade-offs be thoughtfully phased so that neither is compromised more than necessary, but these trade-offs must be clearly communicated and explained to the public and perhaps the international community, so that the perception of unfairness or of failure to respect human rights norms is kept to a minimum.

About this Report

This report is part of an ongoing series of activities aimed at enriching the information environment in which legal reform decisions are made in Afghanistan by the Transitional Administration, the Constitutional, Judicial Reform, and Human Rights Commissions, the United Nations Assistance Mission in Afghanistan (UNAMA), and the international donor community. These activities include research and advisory services on legal reform, publication of a report on the legal reform process, and consultations with legal reform actors. The report was written by Naz Modirzadeh, HPCR Program Associate, Middle East and Central Asia. Contributors include Claude Bruderlein, HPCR Director, and Rebecca O'Brien, HPCR intern. HPCR would like to thank and acknowledge the participants to the roundtable, as well as those who were interviewed for this report. HPCR would like to thank and acknowledge the substantive contributions of the members of the Afghan Independent Human Rights Commission.

The Program on Humanitarian Policy and Conflict Research (HPCR), based at Harvard University, is engaged in research and advisory services on conflict prevention strategies, the management of humanitarian crises and the protection of civilians in conflict areas. The Program advises international organizations, governments and non-governmental actors and focuses on the protection of vulnerable groups, conflict prevention strategies, and the role of Information Technology (IT) in emergency response. The Program was established in August 2000 with the support of the Government of Switzerland and in cooperation with the United Nations. For additional information about HPCR, please visit our website at: www.hsph.harvard.edu/hpcr