

HPCR CENTRAL ASIA

**THE FUTURE OF THE AFGHAN LEGAL SYSTEM:
PERSPECTIVES FROM THE YOUNG GENERATION**

HPCR ROUNDTABLE REPORT

JUNE 2003



Harvard Program on Humanitarian Policy and Conflict Research
<http://www.preventconflict.org>

Introduction

The purpose of this report is to present the results of a youth roundtable on constitutional and legal reform, hosted February 5-6, 2003, by the Harvard Program on Humanitarian Policy and Conflict Research (HPCR) and co-organized by the Afghanistan Youth Center (AYC). This roundtable discussion, entitled “The Future of the Afghan Legal System: Perspectives from the Young Generation,” was held at the Khyber Hotel in Kabul, Afghanistan. The roundtable was organized as one of a series of activities aimed at enriching the information environment in which legal reform decisions are made in Afghanistan by the Afghanistan Transitional Administration (ATA), the Drafting Committee of the Constitutional Commission, the Judicial Reform Commission, the United Nations Assistance Mission in Afghanistan (UNAMA), and the international community of donor nations. The current publication reflects further research and observation in the months of February through June 2003. It is hoped that many of the views expressed by the participants will serve as an example of the types of frank and open conversations on sensitive issues that can and should take place in the critical months leading to the Constitutional Loya Jirga in October 2003.

Background

The current Afghan legal reform and constitutional process is in a race against time. The planned public consultation process leading up to the Constitutional Loya Jirga (CLJ) has been repeatedly delayed, and finally began on June 2003. Observers and commentators have criticized this process for various reasons, including the recent decision by the Commission to keep the draft text secret until September, conducting initial public consultation without it; the perception that there is insufficient UNAMA expertise and staff support to allow for a full-fledged national consultation process¹; and reports that provincial consultations will be arranged in cooperation with local governors, possibly curtailing open discussion among Afghans.

Given the rapidly approaching completion of this initial phase of the constitutional process, it is critical that the focus of the international community and the ATA remain on the future, and not on apportioning blame for failures of the process thus far. HPCR research, and the results of the roundtable explored below, suggest that reasons for hope remain. This hope will only be translated into results if the Afghan people are brought into the Constitutional process, and engaged in dialogue on the fundamental issues that will define whether Afghanistan slips back into disorder or is able to live up to the promise of Bonn.

It is difficult to overestimate the stakes of the consultation process currently underway. Opportunities for dialogue exist on three key levels: there is a practical opportunity for substantive input and opinion sharing; a political opportunity for obtaining ‘buy-in’ to the constitutional text as well as to the *process* itself in advance of the CLJ; and finally the

¹ HPCR interviews, Kabul, February 2003; Phone interviews with Afghan and international analysts, June 2003.

unique opportunity to create public awareness of the government's vision for a new Afghanistan. Of course these three areas are interconnected, but all require planning (and in some cases restructuring) for the months ahead with an awareness of the urgency of the substance and format of the consultations and accompanying public education campaign.

In its previous policy reports, and in consultations with UNAMA and ATA officials, HPCR has consistently urged a consultative approach to engaging the policy and doctrinal issues underlying legal reform efforts. In the first instance, HPCR recommends consultations and information-rich conversations with a broad spectrum of actors. The February roundtable provides an example of such dialogue, and provides an encouraging, and much needed reminder not only that such conversations are necessary and possible, but that they can be productive.

HPCR's experience in promoting public dialogue for policy action has led to the conviction that broad facilitated conversation about difficult issues, among key actors and constituencies both current and future, is critical to the resolution of Afghanistan's legal reform challenges. To this end HPCR convened this youth roundtable with the goals of engaging a diverse set of perspectives to develop a common understanding of the opportunities for and challenges to the current legal reform process, and of capturing the views of an often overlooked segment of the Afghan population.

Methodology

The group was composed of both men and women representing the various ethnicities, religions, regional affiliations, socioeconomic classes and education levels of Afghan society. This included recently returned refugees from Iran and Pakistan, Hazara Shi'as, Pashto-speaking Kandaharis, Heratis, and others. All members of the group were between the ages of 21 and 35. Participants were selected based on their engagement with the current legal reform process: the group included junior professors from Kabul University Law Faculty and Shari'a Faculty; employees of the Ministry of Foreign Affairs, the Ministry of Justice, the office of the President; prosecutors from the Attorney Generals' office, as well as staff of NGOs working on legal and youth advocacy issues. All proceedings were held in Dari, the ground rules of the session called for non-attribution, and there were no international observers or members of the press in attendance.

It is worth noting that during HPCR preparation for the roundtable, including conversations with staff from UNAMA, NGOs, and Afghan civil society groups, there was a widespread belief that key "sensitive" issues could not be discussed openly among a diverse group of Afghans with opposing political views. Specifically, many stated that the issue of Hanafi and Ja'afari fiqh, the standard for Islamic legitimacy in judicial review, and the question of the formal recognition of tribal or customary law could not be debated in a roundtable setting. Many internationals seemed to believe that Afghans were not capable of discussing these issues constructively. This pervasive view--that deep ideological, ethnic, and political divisions prevent the open discussion of

fundamental doctrinal and policy questions among Afghans--stymies debate, marginalizes key stakeholders, and limits Afghan engagement in the shaping of their own Constitution and political institutions. Most critically, this assumption may be behind the decisions of the Constitutional Commission not to release the draft Constitution to form the basis of public consultations, and to limit consultation topics to very broad, generic themes.

HPCR and AYC facilitators chose to deal with the risk of sensitive, tension-creating issues by turning the agenda-setting over to the participants themselves. The facilitators opened the roundtable by giving each participant a copy of the 1964 Constitution, and asking them to take thirty minutes to list three topics for discussion and debate. The contributions were collected anonymously, and the discussion of key constitutional issues that followed was based on these inputs. Although the 1964 text serves as the basis for the interim government's mandate under the Bonn Agreement and is likely to provide the textual foundation of Afghanistan's new constitution, this was the first time many of the roundtable participants had seen a copy. The results of this approach surpassed all expectations. The agenda which the participants created raised many controversial issues, and the discussion that followed was frank, constructive and collaborative. Participants raised issues such as religious pluralism, the capacity of Islamic law to address the needs of modern society, and whether specific guarantees of protections for women are needed. While many times the discussion around such issues was heated, participants consistently sought to reach understanding and compromise, with the most opposed participants often coming together during discussion breaks to continue their debate and their search for common ground.

Two characteristics of the conversation are worth highlighting here, as they represent insights into the dynamics of current public policy debate in Afghanistan. The first was a sense of collective responsibility among the younger generation represented in this group. The participants demonstrated a significant level of engagement and enthusiasm. There was an accompanying sense of urgency, however, suggesting that this engagement might have an expiration date, if cynicism and disappointment are allowed to grind down their vision and energy for change.

The second was an awareness of a generational hierarchy in Afghan culture. Participants voiced disappointment with the lack of opportunities to participate in the national debate because of their age. There was a sense that Afghans defer to Afghan "elders" to the exclusion of younger people, and that the views of these elders are not representative. Internationals tend to acquiesce in the hierarchy, perhaps in an attempt to show sensitivity to Afghan culture. The result is a sense of disenfranchisement among the next generation of Afghan leaders at the beginning of a difficult process which will require their active participation.

Both of these elements reinforce the importance of creating forums for discussion, particularly regarding the difficult and therefore most important issues facing the process of Afghan legal reform. This need is particularly great among groups whose personal investment and trust in the process may be at risk if their voices are not heard. While this

roundtable provided one such opportunity, more frequent conversations are still needed. As one of the participants noted: “why is this the first time we are all here together? Why is this the first time we are discussing these issues openly?”

I. Participant Responses

The following are examples of participant comments and questions on the text of the 1964 Afghan Constitution.

- “In order to move away from a Taliban model of governance, there must be a bill of rights in the new constitution that follows international human rights law.”
- “How do we address the fact that while Afghanistan must become a member of the international community, it is also committed to a set of Islamic ideals which set it apart from many members of this community?”
- “Why is there no oversight authority over the Constitutional Commission, given that they have such broad powers? How were the members of this Commission selected, what are their qualifications, and why were the people not consulted on this decision?”
- “Should religion and politics be separated?”
- “Even though the 1964 Constitution explicitly states that Hanafi fiqh should be followed, why do we accept this, and why do we only discuss Shi’a fiqh as the alternative? Should the new Afghan constitution embrace pluralism, including all religions?”
- “If, according to Article 25, the law is applied to all Afghans equally, then why does the government (and the Constitution) allow religious discrimination, favoring Hanafi fiqh?”
- “In order to improve the Constitution, how do we consider the fact that we are writing a constitution which must address the very weak and destroyed state Afghanistan is in now but must also provide a basis for creating a better future for our country? That is, how do we create a constitution that is flexible and is allowed to grow as our society improves? If we include text that is meant to satisfy the more conservative, older generation, as well as the religious or tribal conservatives, we will not allow for change to occur.”
- “In the 1964 Constitution, the King (or the President, now) has too much power. There should not be the power to dissolve parliament, nor should there be power to appoint judges. This would not allow for independent branches of government.”
- “It is not clear to me in the Constitution whether women and men have the same rights. In the new constitution, legal terms should be very clearly defined, so that there is not confusion, and so that terms are not misused.”

II. Discussion Themes

Three major themes surfaced through the discussion. The first was a concern with accountability and checks-and-balances. The second was a visionary and best-in-class approach to encounters with foreign and international law and an aspiration to bring

Afghanistan up to the international standards of modern statehood. The third was a pervasive sense of realism and a bottom-line concern with administrability.

Each of these themes manifested an overriding pragmatism. These conversations were driven not by ideology but by a sincere desire for improvement in a context of self-awareness as to the social and political differences in Afghan society. This pragmatism served as a platform for compromise between differing views, and supported the emergence of broad areas of consensus.

Accountability

Participants had increased expectations for both the degree of popular representation and the legitimacy of the Constitutional Loya Jirga scheduled for October 2003. They criticized the Emergency Loya Jirga of June 2002, saying that too many of its delegates had been appointed rather than elected and that some delegates had gained their positions through the use of force. They suggested that the decisions of the first Loya Jirga were not representative of the Afghan people as a whole. They voiced the expectation that the next Loya Jirga will benefit from these “lessons learned.” They observed the pseudo-parliamentary role the Constitutional Loya Jirga will play in the Afghan transitional process, and expressed the hope that it will live up to the representative standards of its parliamentary function.

Participants also called for increased accountability in the Afghan judiciary. They expressed concerns about the process of nomination and selection for Supreme Court justices, the standards of qualification for justices and judges, and the extent of Supreme Court authority including its relationship with the President. “The head of the state cannot ignore the law that was ratified by Loya Jirga,” said one participant. “Now how can we reckon this problem: whether the head of the state has the authority to designate or remove the Chief Justice?” They also discussed the tension between providing adequate immunity for judges to protect their independence on the one hand, and ensuring the accountability of the judicial branch on the other.²

A discussion of the role of the Attorney General’s office questioned the implications of the governmental organizational structure. There was a general concern that an independent Attorney General, operating as a “fourth branch of government,” would invite corruption and condone ineffectiveness as participants felt it had in other countries. The consensus of the group was that the office of the Attorney General should be overseen by the Ministry of Justice in order to ensure its accountability.

The participants also expressed concerns about the accountability of the commissions established by the Bonn Agreement to lead the legal reform process alongside the ATA. “The members of the [Constitutional] Commission are appointed,” said one participant. “They don’t have the legal right to speak for the entire public.” They observed that the

² It was proposed that the latter could be achieved through freedom of the press and exposure to public opinion, by limiting the scope of the court’s power in the constitution itself, or through some sort of subordination of the judiciary to the executive branch.

selection process for membership on the commissions had not been transparent and that the qualifications and degree of popular representation of the commission members were not clear in all instances. In a discussion of nationality requirements under the new system, it was observed that a requirement of single nationality for Afghan citizenship would eliminate most of the Cabinet and many members of the Judicial Reform and Constitutional Drafting Commissions, many of whom hold multiple nationalities. Reservations were expressed as to the alignment of interests between those with multiple nationalities and the emerging Afghan state, and participants felt that those with multiple nationalities might not be as invested in the success of the new state as those millions of Afghans with only Afghan nationality.

The Role of Foreign and International Law

On the question of the potential role of foreign and international law as influences on the future Afghan legal system the participants took a modular approach, seeming to select from a “menu” of legal and political structures observed in other countries to design a best-in-class system suited to Afghanistan. Significantly, the participants did not seem to see alternative systems and structures as opposed to one another, nor choices between them as black-and-white or ideologically charged. They did not necessarily identify foreign law with the West. They took a utilitarian comparative approach to closing the gap between Afghanistan’s current situation and what they saw as the international standards for modern democratic states.

Among the participants there was a keen awareness of the significance of this historical moment for Afghanistan. They saw themselves and other leaders of the reform effort as architects of the new Afghan state, one participant noted that the current situation is one where the young people should not only be concerned with the “materials such as the brick, the wood, and the roofing materials that go into the building of our future state, but we are truly the architects of this building—we will be the ones who have to make sure that it will stand in the future.” The participants’ openness to international influences and examples, and their avoidance of defensiveness and ideological rigidity demonstrated a commitment to constructive engagement with a challenging and long-term rebuilding process.

Examples of this aspect of the discussion included participants’ approach to minority rights. One participant suggested that “in order to...accomplish the constitutional law we should follow a model and learn from the experiences of other multi-ethnic, multi-religious and successful countries.” They also aspired to a system of modern parliamentary-style representation for all Afghans. One participant said he preferred “a parliament that makes law in such a way that individuals from cities, villages, tribes and distant places actively participate in it.” It was suggested that Afghanistan would best develop procedural guarantees of pluralism by learning from countries that had faced similar challenges. The participants felt that legal examples and parallels should be drawn from many countries, including those with no tradition of Islamic law- their view was that those lessons and warnings should be taken from whatever historical experiences proved telling. For example, one participant noted that tribal and customary law could be

thought of as very similar to common law in the Anglo-American legal system: “there is a sense of precedent and usage, it is based on tradition, it is very difficult to change, and it depends on judges to change it.”

Administrability

An overriding concern with administrability colored discussion of the most difficult issues facing Afghanistan’s legal reform process. The participants’ comments reflected an awareness of a majority Afghan experience that differs significantly from the experience of elites in Kabul. They evoked a population which is rural, largely illiterate, deeply attached to tribal customs and suspicious of institutionalized law. “We have had very good laws in the past that have been very progressive,” said one participant, “but have not been properly based on the needs of the people.” The participants were concerned with facing up to the practical limitations on Afghanistan’s current capacity for reform and development, and were interested in planning for realistic, gradual and appropriate change while keeping long-term aspirations in mind. “We need to think about enforceability,” said another participant. “Peace is necessary in our country. First we need to think about the grounds for peace.”

In the lengthy discussion of the role of customary law in the future of Afghanistan’s legal system, participants acknowledged the powerful role of tribal dispute resolution methods in the lives of Afghanistan’s large rural population. “If we want the law to be enforceable throughout the country,” said one participant, “we cannot ignore customary law.” “We cannot get rid of customary law quickly,” said another. “It is going to take a long time.” “This was the mistake of the communists,” observed another. “We cannot make this mistake again.”

On the subject of making the education of women compulsory, for example, participants said, “[M]aking school compulsory doesn’t necessarily change things...[it] would be unacceptable to people, especially in the provinces.” The participants argued that these kinds of changes needed to be made slowly in order to avoid alienating the Afghan people, and in order to allow their traditional relationships with one another to change. “We must prepare the people for the law,” said one participant, “and this will only happen with a massive public education campaign.”

As their own discussion demonstrated the complexity and volatility of the issue of formal recognition of customary law and practices, the participants decided to address this challenge by collectively drafting a sample constitutional article. The result: “Tribal and customary laws are respected by the constitution to the extent that they do not violate this constitution, Islamic principles, or international law.” Even though a vast majority of the group thought that tribal and customary laws should be excised from Afghanistan altogether, their consensus end-product combined principles of human rights and internationalism with a pragmatic instinct about nationwide enforceability.

Several participants raised examples from the Qur’an and Sunnah in arguing for gradualism in the project of modernizing Afghan laws. They noted that in eventually

prohibiting wine drinking, the Prophet used a step-by-step methodology, rather than suddenly declaring a customary practice illegal. Underlining the continuing centrality and relevance of Islamic discourse, and Islamic concepts to the Afghan legal system and Afghan legal culture, another participant noted that in discouraging polytheism in the early days of Islam, a gradual approach was undertaken as the people were “new to Islam.”

Conclusion

The young legal professionals of Afghanistan will be responsible for sustaining and carrying out the promise of the new Afghan legal system and its emerging political institutions. The diverse group which participated in the Youth Roundtable in Kabul represents a broad spectrum of Afghan society: men and women from different ethnic groups, political affiliations, religious backgrounds, and regions of the country. While they disagreed on many issues, they also represent a mainstream impulse for optimism on the part of the Afghan people: the desire to identify pragmatic, enforceable means to create a sustainable and peaceful Afghanistan under the rule of law. The participants, even when debating the most sensitive issues facing the country--such as the role of Islam in the future legal order, the inclusion of tribal and customary law in the formal legal system, and the balance of power between various legal institutions--demonstrated a consistent avoidance of ideology or identity based arguments. In the discussion, Islam was used as a framework for discussion, a source of good examples and a common legal language: but it was not used to intimidate, silence or rally emotions around a political position. Across all sensitive and difficult issues, the organizers of the roundtable found a deep sense of responsibility among the participants, and an awareness that the current window of opportunity will soon close. The participants' approach to this temporal urgency, and the substantive challenge of the most fundamental choices facing the transitional administration as it builds the framework for the future of the country, was consistently pragmatic. This pragmatism--the participants' emphasis on the aspirational and forward-looking nature of the constitution and new legal institutions as well as their constant sense that legal reform must be carried out with the reality of today's Afghanistan in mind--may be found in other constituencies across the country.

At a time when the Constitutional Commission has initiated public consultations around Afghanistan, and when decisions are being made about the format and makeup of the Constitutional Loya Jirga, it is critical that decisionmakers in the ATA and UNAMA engage a broad spectrum of the Afghan population in their consultations. Most importantly, these decisionmakers must trust Afghans to engage in open and sometimes contentious debates about the fundamental policy and doctrinal issues that will affect them most, and that will determine the shape of their future. While much has been said in criticism of the current process, and while it was indeed seen as significantly flawed by the participants, there is still hope that the conversations and discussions that *do* occur in the coming three months will tap into the vision, optimism, and capacity for compromise of the Afghan people. This will require openness to raising difficult issues in a facilitated environment, and it will require reaching out to actors who are not often thought of as central to the reform process. The proceedings of this roundtable, and HPCR interviews

and conversations since then, demonstrate a consistent turn to pragmatism as a way to approach complex issues and identify paths to compromise.

While much is made of the violence and strife of recent Afghan history, it has been a cohesive society of multiple ethnicities, tribes, cultures and religions for centuries. The participants recognize that this latent cohesion stems from a capacity for compromise, and an avoidance of ideological extremism. If the international community, the Constitutional Commission and ATA officials harness this pragmatic and optimistic energy, they may find that the reform process is supported by a quiet but powerful Afghan majority.

Cambridge, 24 June 2003

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 especially like to thank the Afghanistan Youth Center for their assistance with the roundtable, and the invaluable contributions of Mr. Hamid Saboory.

The Program on Humanitarian Policy and Conflict Research, 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.