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The Implementation of Constitutional Human Rights in Afghanistan

by Mir Hermatullah Sadat

RECENT AFGHAN HISTORY HAS BEEN MARRED by war crimes, transnational terrorism, drug cultivation, gender apartheid, and draconian religious extremism. The fall of the Taliban, however, ushered in an effort to break this tradition of human rights violations. The Bonn Conference initiated a process that produced the newly announced Afghan Constitution. Now, after a decade-long spell of enduring lawlessness and anarchy, Afghan authorities and critics have initiated a genuine debate over how to reconcile the country's history of abuse and its aspirations for a peaceful future.

The new Constitution incorporates the ideals of democracy, freedom, and individual rights while maintaining a strong emphasis on Afghanistan's Islamic heritage. Although there is no inherent conflict between these ideals, the wording of the Constitution itself and the current model for implementation make conflict likely. Some scholars believe the constitutional provisions that ensure basic rights and freedoms are expressly contradicted within the text, and that other provisions could be interpreted by the current judiciary to be religiously fundamentalist. This article presents a human rights analysis of the new Constitution and explores potential pitfalls to its implementation.

BACKGROUND: DRAFTING THE NEW CONSTITUTION

AFTER THE DEMISE OF THE AFGHAN GOVERNMENT in April 1992, *mujahidin* guerrilla factions converged on the capital city of Kabul where their violent collision cascaded into a full-blown civil war. By 1996, Afghanistan was divided into two military groups: the United Front (former *mujahidin*), also known as the Northern Alliance, and a new group called the Taliban, who ruled over most of the country until 2001.

In October 2001, in response to the terrorist attacks of September 11th, an international coalition led by the U.S. launched Operation Enduring Freedom to unseat the Taliban regime, which harbored the Al-Qaida network. On November 27, 2001, a collection of Afghan exiles assembled in Germany for the UN-sponsored Bonn Conference (BC). On December 5, 2001, BC participants, including representatives of the abdicated king, Zahir Shah, and the United Front, announced a roadmap for national reconstruction which became known as the Bonn Agreement (BA). The BA, which combined a revision of the 1964 Constitution and other laws, established a 6-month Afghan Interim Administration (AIA) under the chairmanship of Hamid Karzai. On June 9, 2002, a national gathering known as the Emergency Loya Jirga (ELJ) elected Karzai to the presidency of the Islamic Transitional State of Afghanistan, a position he will hold until national elections take place in June 2004. The BA also called for the creation of the Afghan Judicial Commission (AJC), the Afghan Independent Civil Service Commission (AICSC), the Afghan Independent Human Rights Commission (AIHRC), and the Constitution Commission.

On October 5, 2002, President Karzai appointed a nine-member Constitutional Drafting Commission chaired by Vice-President Nematullah Shahrani to produce a preliminary draft constitution. The document was then submitted to another 30-member Constitutional Review Commission inaugurated in March 2003 by the former king, Zahir Shah, now symbolically called 'Father of the Nation.' These efforts yielded Afghanistan's draft constitution, which was presented

to the public for review on November 3, 2003. One month later, the draft constitution was presented to the Constitutional Loya Jirga (CLJ) for discussion, amendment and adoption.

CONSTITUTIONAL LOYA JIRGA

The CLJ was a national gathering of 502 delegates which included 52 presidential appointees and 450 district representatives, elected from some 15,000 ELJ district representatives. On the first day, the chairman of the CLJ, a cleric, set a disappointing tone in addressing the women delegates: "Don't try to put yourself on the same level with men... God has not given you equal rights... two women are counted as equal to one man." This statement evoked memories of the Taliban's gender apartheid. Indeed, some 50 former Taliban officials took part in the CLJ. Surprisingly, neither the AIHRC nor international organizations challenged their presence.

A Human Rights Watch observer commented that the CLJ was marked by the presence of alleged human rights' violators. While military commanders and leaders of private militias were officially barred from becoming CLJ delegates, they made political inroads and took



Democracy protest in Afghanistan.

leadership positions in the ten amending committees and the reconciliation committee, which reviewed the decisions of the amending committees. When an elected female delegate, Malalai Joya, spoke up about their past atrocities and monopolization of the CLJ proceedings, the chairman sought to remove her from the CLJ. Furthermore, warlords, clerics, and their proxies used filibusters to derail the process and further their own political goals. As a result, the CLJ lasted well beyond the ten days originally allocated, as it was interrupted by boycotts, temporary chaos, and even shelling from Taliban rebels.

Many delegates expressed dissatisfaction with the process, claiming that the political climate inside the CLJ prevented them from making their proposals and advocating for their amendments. For example, delegates who appropriately presented more than the 151 signatures required for proposing an amendment, were threatened by the chairmen and called "infidels" when they proposed that Afghanistan be called the "Republic of Afghanistan" instead of the "Islamic Republic of Afghanistan." Delegates also complained that the amended draft of the constitution, which was ultimately adopted by the CLJ, was different from the final draft which was signed by President Karzai. They said that the draft had been altered and did not reflect the findings of the ten amending committees submitted to the reconciliation committee. Additionally, many local and international

groups expressed their belief that the unrestricted and inviolable protection of human rights and religious freedoms was bargained away in return for support of a strong presidential system.

Despite these obstacles, on January 25, 2004, the new 162-article Constitution of the Islamic Republic of Afghanistan was signed into law by President Karzai and is currently exists the supreme law of the land.

THE CONSTITUTIONAL DEBATE

THE FIRST AFGHAN CONSTITUTION was ratified in 1923 by traditional gatherings known as the Loya Jirga. Since then, Afghan history has been punctuated by at least ten constitutional adoptions and modified adaptations, the last of which took place in 1990. The International Crisis Group (ICG) notes, "Afghanistan's previous founding documents have consistently suffered from two flaws. First, they reflected basic flaws in the underlying political architecture, flaws that often precipitated the fall of regimes. Secondly, they invariably failed to translate into practice."

The new Constitution was intended to address the ills of the past and set ambitious new goals for Afghan society. President Karzai conveyed this when he said, "[O]ur Constitution should not be for one or two years, or for the benefit of few people. It should be a Constitution forever, ensuring the rights of all." The conflicting interests that arose during the CLJ, however, can be read in the document itself and raise concerns that the ICG critique may also ring true for Afghanistan's new Constitution.

HUMAN RIGHTS PROVISIONS

The new Afghan Constitution includes a variety of commitments to internationally recognized human rights and sets up institutional mechanisms to ensure their protection.

The preamble and Articles 6, 7, and 48 of the Constitution commit it fully or in part to respecting the Universal Declaration of Human Rights (UDHR), assuring a wide range of civil, political, economic, social, and cultural rights. Articles 29 and 49 prohibit forced labor, torture, and other inhumane punishments, while Articles 52 and 43 assure free health care and education respectively. Under Article 7, "the state shall abide by the UN Charter, international treaties and international human rights conventions that Afghanistan has signed and the Universal Declaration of Human Rights." Since Afghanistan is a signatory to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), there is an implicit prohibition on sex discrimination in both public and private sectors of society.

In addition, Articles 62, 72, 85, and 118 prohibit the election or appointment of a president, vice-presidents, ministers, national assembly members, or Supreme Court justices who have been convicted of crimes against humanity.

According to Article 58, any person whose fundamental rights have been violated can file a complaint with the AIHRC, which can refer cases to legal authorities and assist in defending the rights of the victim. Article 134 requires the police to discover crimes and the Attorney's Office to investigate and prosecute them.

Though there appears to be strong *de jure* support for human rights, the concern is that conflicting provisions and their interpretations will limit the *de facto* realization of such rights.

RELIGION AND THE STATE

The basis for constitutional law in Afghanistan is a combination of civil law and Islamic beliefs, provisions, and principles. However, as the state religion, Islam plays a major role in guiding all things from education to political parties to judicial interpretation.

Article 2 of the Constitution establishes Islam as the state religion. Article 3 states "no law can be contrary to the beliefs and provisions of the sacred religion of Islam," and Article 35 requires that the platform and charter of political parties be consistent with the principles of Islam. Article 45 declares that educational curricula must be, in part, based on the provisions of Islam. In addition, Article 54 calls for the elimination of all traditions conflicting with Islamic principles. Articles 19 and 20 ensure that even the national flag and anthem incorporate Islamic wording and symbols. Additionally, Article 149 explicitly states "the provisions of adherence to the fundamentals of the sacred religion of Islam and the regime of the Islamic Republic cannot be amended."

Articles 130 and 131 call for the development of Sunni and Shi'a Islamic jurisprudence in the absence of existing laws or cases dealing with personal status, and nothing in the Constitution prevents the implementation of Sharia, or Islamic law. Of particular concern is the failure to define legal parameters for how "the beliefs and provisions of Islam" should be construed. Since a unified, codified Islamic law does not exist, Islamic interpretation will surely become common within the judiciary. Indeed, Article 121 gives the Supreme Court power to review laws, legislative decrees, international treaties, and international conventions, and interpret them, in compliance with the Constitution. Given the sweeping provisions of Article 3, the Supreme Court could reject any law or treaty arguing that it violates Article 3 and bring charges of blasphemy or apostasy.

The subjective application of the aforementioned constitutional provisions has clear implications for the protection and promotion of human rights. There is currently no mechanism, other than the interpretive power given to the Supreme Court, to resolve the built-in conflicts and apparent contradictions between the human rights provisions of the Constitution and the clauses asserting Islam as the state religion and supreme law of the land. Given the current fundamentalist tendencies of the Supreme Court, it is not far fetched that a *de jure* theocratic state could take shape in the future.

RELIGIOUS FREEDOM, MINORITY RIGHTS AND DISCRIMINATION

While most Afghans belong to either the Sunni Muslim majority or Shi'a Muslim minority, the Constitution does not guarantee Muslims or non-Muslims the right to dissent with Islamic beliefs or interpretations. Furthermore, there is no explicit declaration of equality between religions; indeed, Article 2 states that "[t]ollowers of other religions are free to exercise their faith and perform their religious rites *within the limits of the provisions of the law* (emphasis added)." Such "limits and provisions" could be construed as sanctioning discrimination. It also offers very little security to non-Muslims in the legal framework described above. Article 3 talks only about respect for Islam and does not mention other religions.

While Hindu and Sikh Afghans are native inhabitants of Afghanistan, today they represent a very small minority. During the last decade the Hindu and Sikh communities suffered at the hands of religious fundamentalists. This sad history is reflected in the new Constitution, which implicitly discriminates against Hindus and Sikhs. Article 62 stipulates that any head of state must be Muslim. The oath of allegiance to God and Islam taken by the president, vice-presidents, ministers, and Supreme Court justices has clear marginalizing effects. In addition, Articles 72 and 118 require potential ministers and Supreme Court justices to have a "good reputation." As there are no criteria for determining what is a "good reputation," this normative statement can be used as a discriminatory legal tool against anyone

whose political or religious views are disfavored by the establishment.

Furthermore, Article 17 mentions state responsibility for improvements to mosques and religious schools and centers, while Hindu and Sikh temples are not mentioned. As noted above, Article 35 says that the platforms or ideologies of political parties cannot conflict with the principles of Islam, but theoretically may offend the Hindu or Sikh faiths. In addition, Article 54 may be used to curtail Hindu and Sikh traditions under the allegation of being contrary to Islam.

The state-sanctioned discrimination that runs throughout the new Constitution clearly contradicts the commitment to human rights and equal participation included in other provisions of the Constitution. The manner in which the State implements the new Constitution will determine which principles will prevail. A look at the judiciary, the main vehicle for implementation, raises genuine concerns about the potential for human rights abuses.

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CONSTITUTIONAL IMPLEMENTATION AND CRISIS

CONDITIONS ON THE GROUND IN AFGHANISTAN pose significant challenges to the Constitution’s implementation. Much of rural Afghanistan remains under the control of Taliban rebels and warlords-turned-governors, who continue to threaten, steal, rape, restrict women and children’s rights, and occasionally kill locals, political opponents, rival commanders, and humanitarian workers. Even in Kabul, relatively the safest city in the country, law enforcement officials sometimes seize land or other property, arbitrarily arrest and detain citizens, and beat or mistreat detainees.

As mentioned above, the AIHRC cannot prosecute war criminals or human rights’ violators but must refer them to the court. This means that the implementation of the human rights standards enshrined in the new Constitution will fall to the judiciary. The current judiciary is notoriously unrepresentative of the broad spectrum of views in Afghanistan. Trial court judges lack commitment to human rights principles, a problem that is exacerbated by the Supreme Court’s custom of deciding appeals without hearing arguments. The U.S. Commission on International Religious Freedom stated in a November 2003 report that the current Supreme Court Chief Justice, Fazl Hadi Shinwari “rejects three crucial freedoms—expression, religion, and equality of sexes—all of which are international standards protected by the Universal Declaration of Human Rights.” Together, the Supreme

Court and the Ministry of Justice have restricted the freedom of the press; ordered the execution of two journalists for blasphemy; charged a sitting minister with blasphemy; refused to register a political party; banned cable, coeducation, and female music videos; and proposed the revocation of an expatriate beauty pageant contestant’s citizenship.

The new Constitution envisions the judicial branch as an independent organ of the government consisting of High Courts, Appeals Courts, and the Supreme Court. The Supreme Court will consist of nine members appointed by the President for a period of ten years with the approval of the legislature. In order to ensure rotating terms of office, the proposed appointment process calls for three members to be appointed for a period of four years, three members for seven years, and three members for ten years. Later appointments will be for a period of ten years. A member of the Supreme Court must have a higher education in law or in Islamic jurisprudence, and sufficient expertise and experience in the judicial system of Afghanistan. The members are not permitted to be appointed for a second term and, under Article 127, can only be dismissed from their service before their term ends by a vote of one of the houses of parliament “due to a crime committed during the performance of duty.”

Although the model is sound, many believe that with Supreme Court justices like the current ones, it is not a question of structure, but rather a problem of substance. As the Supreme Court asserts the powers granted it by the Constitution, becomes financially viable, and gains legitimacy, anxiety about a potential increase in restrictions on freedoms will likely be validated. The Supreme Court has already expanded from 9 to 137 justices, and created a Religious Edict Council that has the potential to manipulate the National Assembly, the President, political parties, academic freedom, and the rest of civil society under the pretext of upholding the provisions of Islam according to Article 3. The concern is that this course of events will spark a constitutional crisis and further polarize an already fragmented government and society.

The potential for the Supreme Court to abuse its constitutional mandate was witnessed only days after the adoption of the new Constitution, when the Court clashed with the Ministry of Information and Culture (MIC) over the broadcast of old footage of a famous Afghan woman singing patriotic songs on television. Although the footage violated a ban on female singers imposed earlier by the Supreme Court, the MIC cited that men and women were equal in the eye of the new Constitution’s Article 2 and therefore justified the broadcast. The Supreme Court reacted by reasserting its ban on female singers. Not surprisingly, the Governor of Herat banned local female singers and warned the MIC against violating religious law by broadcasting female singers again. Immediately, the Supreme Court applauded the Governor’s defiance of the MIC, while the MIC publicly criticized the Supreme Court decision. This potential clash between government entities is a constitutional crisis that Afghanistan cannot endure.

CONCLUSIONS AND RECOMMENDATIONS

THE INVOLVEMENT OF RELIGIOUS EXTREMISTS and warlords alleged to have had a hand in crimes against humanity transformed the entire process and outcomes of the BC, the ELJ, and the CLJ. Now, those same actors are threatening the fairness of the upcoming elections in Afghanistan by intimidating voters from registration, violating human rights, and swaying political preferences in an effort to hijack the legislature.

Despite the many improvements in Afghanistan since the fall of the Taliban, such as the restoration of some democratic institutions, the partial lifting of press censorship, and the signing of several international

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human rights instruments, there remains much ignorance and resistance to human rights from within the central and provincial government.

Unfortunately, the international community and the UN have been generally ineffective in promoting human rights in Afghanistan. The UN has been non-committal because its main agency, United Nations Assistance Mission in Afghanistan (UNAMA), wants to maintain a “light footprint” presence in Afghanistan. The international coalition, supplying security forces or reconstruction funds, has failed to take a pro-active role in addressing human rights issues. This policy of neutral disengagement must be reversed.

The international coalition should take an active role in persuading Afghan governmental institutions to implement the human rights provisions of the Constitution and to respect human rights principles and promote them throughout the governmental system. Improving human rights is not merely about disbanding and disarming private militias, but also must include a program to replace them with police, military, and other state officials who are sensitized to human rights. Furthermore, it is within the criminal justice system where the Afghan government’s real-life commitment to the implementation and principles of human rights and signed international treaties will be challenged.

There must be improvements within the legal system, where religious conservatives have packed the Supreme Court and Ministry of Justice. The current Supreme Court must be disbanded. New judge appointees must pledge to uphold the human rights principles and international treaties enshrined in the Constitution, such as those guiding the UDHR and CEDAW. Furthermore, the Supreme Court should only issue rulings after properly hearing cases and should implement

the human rights provisions of the Constitution without caving in to conservative interpretations that would gut the letter and spirit of the Constitution’s attempt to balance religion and human rights.

Progressive reforms can be made vis-à-vis the AJC, whose mission is to rebuild the justice system, and the AICSC, which is charged with ensuring competence and ethical standards for government officials and employees. The AIHRC needs more power and resources delegated to it in order to bring the violators of human rights to justice. The immediate expansion of the International Security Assistance Force (ISAF) outside of Kabul and those territories where defiant warlords rule still must occur. The UN human rights monitors must be deployed throughout the country to assist the AIHRC and also to fulfill its UN chartered duty to document human rights violations.

While a reconciliation of Islam and human rights can be achieved in theory, there exists very real political divisions in Afghanistan, which challenge the Constitution’s practical implementation. If hopes for the respect of human rights are raised but later crushed, then the result will be resentment, polarization, extremism, and instability in an already distraught country. Although no one expects an overnight solution, when the chief architects of alleged war crimes carry out constitutional implementation and justice, concerns for the country’s future must be considered seriously. If human rights are not realized, then the notion of a democratized Afghanistan will remain an illusion. Only time will tell whether this Constitution will be the basis for democracy, which many Afghan citizens desire, or just another obsolete document full of unrealized promises. *HRB*



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