



**CENTER ON
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Summary of Proceedings of Meeting of Legal
Affairs Working Group

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The meeting discussed three sets of issues: the current constitution of the interim and transitional governments; urgent legal and regulatory matters; and texts for the constitutional commission charged with drafting a permanent constitution starting August 2002. This text integrates a summary of the discussion with some additional analysis provided by the author. This summary reflects the author's views, not a consensus of the group.

Current Constitution

The constitution of the Interim Authority of Afghanistan and its successor, the Transitional Authority of Afghanistan, consists of the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions known as the Bonn Agreement.

Under the Bonn Agreement, the legal framework consists of:

1. The Constitution of 1964 with the exclusion of:
 - a) Provisions regarding the monarchy and the executive and legislative bodies of the state; and
 - b) Any provisions inconsistent with other provisions of the Bonn Agreement, or resolutions of the UN Security Council.
2. The Provisions of the Bonn Agreement setting forth the structure and functions of the Interim Authority and Transitional Authority, which replace in part the provisions of the Constitution of 1964 excluded by 1) a).
3. Existing laws and regulations, subject to the exceptions in 1) b), or those that contradict international agreements to which Afghanistan is a party; these laws and regulations may be repealed or amended by the Interim Administration through the procedures set forth in the Bonn Agreement. The provisions in items 1 and 2 above will herein be referred to as the implicit constitution. In order to clarify the current implicit constitutional structure, one participant (Ramazan Bachardoust) prepared a draft consisting of the applicable portions of the Constitution of 1964, modified where applicable in accord with the provisions in 1.b),¹ plus a new chapter setting forth in one constitutional chapter the constitutional provisions of the Bonn Agreement. (See Appendix A.) In addition,

¹ Another participant (Ateeqi) stated that he had also prepared a similar document. We should obtain that as well and examine their consistency. To facilitate discussion, the proposed draft should be annotated article by article, explaining which modifications of the text are proposed and in line with which principles. In the event that the changes are dictated by inconsistencies of a provision of the 1964 Constitution with the Bonn Agreement or applicable international agreements, the specific provision(s) of either of the latter should be cited as well as the reasoning behind the mode of application, if necessary. Note that this modification in no way amends the implicit constitution bestowed on Afghanistan by the Bonn Agreement, as the Agreement contains no mechanism for amendment before the adoption of a new constitution by the Constitutional Loya Jirga.

in order to clarify certain questions left unanswered in the texts referred to above, the author proposed measures dealing with necessary matters as well as certain powers of the king, which the author proposed, were implicitly transferred to the chairman of the interim administration by the Bonn Agreement.

Regarding the latter, the author drafted provisions for succession to the chairmanship of the interim administration in the event the latter dies or is incapacitated, carrying out of the function of chairman while the latter is traveling abroad, the power of the chairman to ratify international agreements, and the power of the chairman to issue decrees. The author of the draft argued that the Bonn Agreement implicitly transferred elements of the royal powers to issue decrees and ratify international agreements to the chairman, providing that the chairman consulted with appropriate bodies of the Interim Authority. Some participants disagreed, arguing that the provisions of the Bonn Agreement regarding the functioning of the Interim Administration stated that decrees could be issued only pursuant to a decision of the interim administration in accord with the procedures (quorum, voting) set forth in the Agreement. One can use '64 Const.: IV:77 which allows the government to issue decrees in the absence of the shura, provided that those decrees be ratified within 30 days from the convening of the new shura. Also, XI:125:3 &126

The author also argued that the Bonn Agreement implicitly abolished the chapter of the 1964 Constitution concerning the Loya Jirga, as the structure of the Loya Jirga in that Constitution depended on the constitutional chapters on legislative, executive, and monarchical institutions exempted from application by the Bonn Agreement. The Bonn Agreement provides for two Loya Jirgas, but neither is based on the 1964 Constitution's provisions for a Loya Jirga. The Emergency Loya Jirga (ELJ) refers to a plan elaborated by the Rome group led by His Majesty Muhammad Zahir, the former king of Afghanistan, and the Special Independent Commission is charged with convening it according to rules drafted by the SIC. The Bonn Agreement is silent concerning the method of organizing the constitutional Loya Jirga. Presumably this will be determined by the transitional administration in consultation with the Constitutional Commission, or by the Constitutional Commission in consultation with the transitional administration. I think this should be included in the agenda for the ELJ.

This point requires clarification, as do many others, especially concerning the transition from the interim to transitional authorities as well as the legal framework for the latter. The structural and functional provisions of the Bonn Agreement apply explicitly only to the Interim Administration and Authority, but the Agreement contains no mechanism for amendment of the implicit constitution except through the drafting and adoption of a permanent constitution, which will occur only at the end of the transitional administration. This silence gives rise to the presumption that the provisions concerning the structure and functions of the Interim Administration will apply equally to the Transitional Administration, except that the latter will include a head of state, to be elected by the Emergency Loya Jirga. But in this case the executive powers vested only in the chairman by the Bonn Agreement will be restructured and divided between the head of state and the chairman of the transitional administration. The Bonn Agreement

does not explicitly vest any power in the ELJ except electing the head of state and approving the structure and key personnel of the transitional administration, but in order to do so it may need to amend certain constitutional provisions. Changing the constitution is among the customary powers of the Loya Jirga, but it is not explicitly vested in the ELJ. The SIC may be required to submit proposals to the ELJ on the “structure” of the transitional administration as part of its mandate of drawing up procedures for the operation of the ELJ.

The timing of the transition from the interim to transitional authorities appeared to some participants to require clarification. Presumably the Emergency Loya Jirga, in conformity with procedures established by the SIC, would specify the precise nature of this transition. The permanent constitution would presumably include a chapter on provisional or transitional measures, as did the Constitution of 1964, providing for the government of Afghanistan from the conclusion of the Constitutional Loya Jirga and the adoption of the constitution to the election of a new government.

In light of these and other problems, a significant number of the participants argued that a mechanism for amendment was necessary. One participant proposed the establishment of a commission on amendments. It is unclear what would be the constitutional or legal basis for establishing such a procedure. Many of the problems, however, could be dealt with through a process of interpretation and reconciliation of various provisions of the implicit constitution, which could be adopted by various bodies of the interim or transitional administrations by decree, without claiming a power of amendment. It can be based on BA: V:6 (“Rules of procedure for the organs established under the IA will be elaborated as appropriate with the assistance of the UN.”)

Centralization and Decentralization

In no area of governance of Afghanistan is the gap between legal provision and social reality as great as with respect to the centralization of the administration. The credibility and capacity of Afghanistan’s new institutions will largely depend on bringing reality and law more closely into line. This will most likely require both the curbing and institutionalization of the powers of regional leaders (so-called “warlords”) and some measures for decentralization.

The Constitution of 1964 provides for a territorial administration based on the “principal of centralization.” In practice, this appears to require that the administrative heads of the subordinate territorial units -- governors of provinces (*walis*), and administrators of districts and sub-districts (*uluswals* and *alaqadars*) -- be appointed by the central administration. All powers of legislation and taxation are reserved to the Central Government. The constitution also provides, however, for elected provincial and district councils, though these measures were never fully implemented. These councils are advisory in nature. [(in the chapter on “administration,” (VIII:108) the “principal of centralization” is stated, but only in terms of administrative structures and not functions, powers, and inter-relations, therefore, one may not need amendments to the Constitution to formulate an effective distribution of power, responsibilities and function for the Interim as well as Transitional periods)need to check and clarify here what is the

constitutional meaning of “centralization.” What aspects of the administrative structure are established by the constitution and hence cannot be changed in the short run, and which are established by law and hence could be changed?]

In reality, today’s Afghanistan is largely ruled by powerful men exercising both military and political functions independently of whatever office they may hold, as a result of their role in the war and particularly in the last stage, the US-supported defeat of the Taliban. Virtually all these figures have declared allegiance to the Interim Authority and have been appointed to positions in either the administration or the military, but the nature of the powers they exercise are not defined or constrained by law, and their allegiance remains conditional.

Such leaders often exercise de facto power over units of territory that do not correspond to the legally established territorial divisions of Afghanistan. There are many small commanders in various localities. More importantly, several leaders exercise power over “zones” (hawza), including several provinces or portions thereof. These zones often correspond to the old provinces of Afghanistan or areas that express ethnic, tribal, or regional identities (Kabul, Qataghan-Badakhshan, Turkistan, Herat, Qandahar, Jalalabad, Loya Paktia, Hazarajat). It was precisely to break up the basis for mobilization of these units that the rulers of Afghanistan over the last 120 years, from Abdul Rahman Khan to the Taliban, divided the territory into more numerous and smaller provinces and districts.

The emergence of commanders of these areas resulted in part from the disintegration of state institutions and the formation of ethno-regional political-military forces in that institutional vacuum, with international support. It also reflected the imperatives of military organization. As a result of the importance of military force in the exercise of power in Afghanistan, where the administrative power of the state is weak or non-existent, the structure of military organization also needs to be taken into account in assessing or reforming the centralization or decentralization of the state.

Since the Communist regime the Afghan military has established commands for various zones, which constitute the only legal existence of these territorial units. General Abdul Rashid Dostum, for instance, as Deputy Minister of Defense, is now also officially the commander of the Northern Zone, which largely corresponds to the old province of Afghan Turkistan. At present, several people officially appointed as governors of single provinces appear to be de facto military commanders of zones (Qandahar and Herat), while some military zone commanders appear to exercise power over governors (the northern zone). Separating the military and administrative functions will constitute one of the key and most difficult tasks for the administration and one likely to incite some degree of violence, especially if de facto power holders have international support. The expansion of the International Security Assistance Force to major regional centers (the de facto capitals of zones) could assist in bringing the military structure more in line with the administrative structure, but the major powers have for now rejected that option.

Though the construction of a more functional Afghan national state will also need to take into account the inter-relationship of military and administrative structures, the meeting discussed only the structure of the government administration. Professor Michel

Lefondret of the University of Caen presented a short proposal for future restructuring of the administration. Noting the French experience with introducing a greater degree of local self-government into a highly centralized administration, he acknowledged the need to reconcile the unity of the country with increased local self-government. His proposal focused on increasing the self-governing powers of the lowest levels of the administration (uluswali and below, such as municipalities and villages) while maintaining a relatively centralized provincial governance structure. He recommended against recognition of zones. Most important, however, is to elaborate appropriate systems of administration for different government functions.

The discussion included both general political considerations, which of course can be settled only by Afghans in Afghanistan, and some legal considerations, especially concerning past attempts by Afghans to restructure the administration. Views ranged from advocates of a strong, centralized government, in order to maintain the unity of the country, to cautious advocacy of federalism. One taking the latter point of view noted that Pakistan and India had federal systems but had not broken up. In Afghanistan federalism often implies recognition of zones as units of administration or representation. Some schemes would recognize zones for some functions (e.g. more integrated economic planning) and not for others (policing, representation). But this meeting did not discuss such details. Some noted the need for building effective capacity for reconstruction; though there was no agreement on what structure would best serve this purpose.

The current constitutional structure is compatible with various degrees of centralization. For instance, a common practice in the past has been to increase centralization by naming governors and uluswals from outside the areas in order to assure that the officials represent the interests of the central government to the locality and not vice versa. The same practice applies to zone commanders. In the past governments sometimes tried to assure control by appointing zone commanders from outside the region, as when Najibullah appointed Juma Atsakh commander of the northern zone in 1992, leading to Dostum's mutiny. Given the actual distribution of power in the country, however, the chairman and administration cannot impose outside zone commanders or administrators on most areas. In response to the conflict over the appointment of a local governor in Paktia, which sparked a violent factional struggle, Chairman Karzai enunciated a policy of appointing governors from the provinces themselves where adequate consensus exists and governors from elsewhere only where local parties are in dispute. This in effect establishes a system of at least consultative provincial self-government, with a mechanism for centrally sponsored conflict resolution. Such a system could be further institutionalized without violating the current constitutional arrangement by, for instance, requiring consultation with local councils. The Bonn Agreement also provides for a Civil Service Commission to nominate candidates for governor and uluswal, among others. The CSC could eventually establish provincial offices to solicit local candidates for such positions.

Participants noted that under the Republic of President Muhammad Daoud (1973-1978) the government had carried out considerable work on reform of the administration. While rejecting federalism, it had considered a number of proposals for better

management of the relation of various central ministries at the provincial and district levels. A consensus appeared to emerge for keeping an adequate degree of centralization to preserve the unity of the country, while expanding the powers of local levels of government. There was strong support for elected councils at every level combined with effective power of the central government. Participants suggested a search for and review of the Daoud-era studies and legislation, in which several present had participated, with a view to adapting them to present conditions.

Nationality and Citizenship

The discussion and brief text presented focused primarily on the issue of dual citizenship or nationality, reflecting the concerns of several hundreds of thousands of Afghans who have acquired citizenship of other states. The discussion also touched on the problem of Afghans whose citizenship or proof thereof was in question owing to various circumstances surrounding their residence as refugees or otherwise in various foreign countries. These situations pose a host of challenges, many of which can only be resolved over time and through agreements between Afghanistan and other states. During these discussions the participants benefited from the contributions of an observer from UNHCR, who is that organization's principal expert on statelessness.

The participants noted that, unlike some other states, Afghanistan has never distinguished between nationality and citizenship. At some periods identity cards (never held by the entire population) listed ethnic group (*qawm*), but this was not considered a nationality. Muhammad Ismail Qasimyar noted that at the 1964 Loya Jirga, the participants (including him) debated the meaning of the term "Afghan": some argued it referred only to Pashtuns, but ultimately the Constitution adopted in 1964 defined "Afghan" as any citizen of Afghanistan (as had the Constitution of 1924).

The participants generally agreed that under the Constitution of 1964 Afghans who accepted the citizenship of other countries did not thereby lose their Afghan nationality, as far as the Afghan state was concerned. The laws of the country of second nationality, of course, could contain various provisions, which might be in contradiction with provisions of Afghan law, unless regulated by bilateral agreement. In addition to very basic provisions in the constitution, however, there appear to be a number of laws and regulations dating from different periods placing various restrictions on Afghans with second nationalities. One participant claimed that under at least one such law, an Afghan who took another nationality lost Afghan citizenship, but others disagreed.

Participants noted that Chairman Karzai had called on Afghans living abroad to return home and serve their country, and that he had not made any distinction with regard to whether or not they were citizens of another country. The Bonn Agreement installed a number of citizens of other countries as members of the interim administration but did so implicitly without stating a principle or establishing a law or regulation. The participants agreed that a variety of laws regulations had previously prohibited Afghans with foreign spouses (actually "wives," in view of past gender roles in Afghanistan) from serving in certain positions in the government, in particular in the Ministry of Defense or Foreign Affairs, but they were not sure of the specific provisions that remained in force. (There

was such a provision in the Constitution of 1977, which is not now in force, but some argued that there were statutory provisions as well.) The question of Afghans with dual nationality serving in official positions seems not to have been considered in the past, but clearly if Afghans with foreign spouses were prohibited from such service so might those with foreign citizenship themselves.

Gul Rahman Qazi, chairman of the Working Group for forming a civil service commission, noted that the CSC would require clarification of rules regarding public service by foreign citizens and those married to foreign citizens in order to carry out its job. The SIC had also decided on its own to invite Afghans living abroad, without respect for citizenship, to elect delegations to the Emergency Loya Jirga. One suggestion that appeared to enjoy broad support was that the interim administration issue a decree clarifying these points regarding public service and participation in the Loya Jirga and elections thereto for the interim and transitional administrations. This group at least seemed to prefer that as a provisional measure, until the establishment of more permanent constitutional government and the return of a larger number of Afghan refugees and expatriates, the government suspend all limitations on the roles of Afghans with an additional nationality (or married to foreigners) and suspend all regulations rescinding nationality for such reasons, if such exist. Of course the transitional administration could revise any decree of the interim administration, and the Constitutional Loya Jirga and constitutional government would make more permanent decisions that would reflect more stable nationhood, rather than today's situation of emergency and transition. One participant with considerable experience of Loya Jirgas argued that in the emotional and often nationalist atmosphere of such gatherings dual citizenship might not be accepted.

The establishment of constitutional government and return of Afghans from abroad would pose a large number of questions regarding citizenship. The representative of UNHCR noted that the agency had helped 146 countries draft citizenship laws, all of them in situations less complex than that of Afghanistan, and that all of these laws were different. An official of UNCTAD noted that there were over 900 bilateral agreements regulating dual taxation. Other questions, in addition to those mentioned above, would include those regarding military service, the status of children of Afghan citizens born abroad (*jus sanguinis* versus *jus solis*), economic rights such as the right to own property (the 1964 Constitution restricts the property rights of non-Afghans), participation in the census, and political rights, such as the right to vote.

The situation of refugees in Iran and especially Pakistan will be particularly complicated. Children with one Iranian parent are considered Iranian citizens by Iran, for instance. In the past governments of Afghanistan implicitly or explicitly (by royal or presidential decree?) conferred certain citizenship rights on the residents of the tribal territories in Pakistan, recruiting them into military academies and service, for instance. Did such residents require any naturalization process to gain Afghan citizenship? Nomads also require particular attention. One participant in the Bonn conference (now an influential member of the administration) questioned the Afghan citizenship of the largely Pashtun nomads, claiming many were Pakistanis. Nomads are also likely to possess few documents attesting to their citizenship. Since these, as well as related issues (the

citizenship of children with both Afghan and Pakistani parents born in Pakistan, inter alia) are related to the explosive political issue of the ethnic balance of the population, great care will be needed in regulating these questions.

Other matters

In addition to these, the meeting discussed proposed approaches to the regulation of non-governmental organizations (NGOs); foreign direct investment; corruption; the return of refugees; and constitutional issues including drafts of a new preamble, of a chapter on fundamental rights and duties, the rights of women, and the relation of Islam to the constitution. These can be summarized briefly.

NGOs. NGOs organized by Afghans are protected by the provision of the Constitution of 1964 providing for freedom of association and may be regulated under an existing law on social organizations and associations, which provides for registration. International NGOs are not protected by the freedom of association of Afghan citizens. There also exists a regulatory framework for international NGOs from the period of the Islamic State of Afghanistan (Rabbani), providing for registration with the Ministry of Planning, as well as a stricter law passed by the Taliban. One participant presented a draft model form for registration of foreign NGOs based on two principles: encouragement of NGOs and responsibility of NGOs. Some efforts are going on in Kabul to redraft or improve the implementation of these regulations. The International Center for Non-Profit Law is also offering to help draft a more comprehensive law and train Afghans in its drafting and administration. There was some difference of opinion concerning how desirable or possible it would be for the interim and transitional administration to attempt intrusive regulation of NGOs. One view argued that such efforts would be ineffective and counter-productive, while another held that in the current bazaar-like atmosphere in Kabul, with numerous donors and organizations competing for links to an overwhelmed administration, stronger regulation was imperative. Currently the Afghan Assistance Coordination Authority has established a working group with NGOs to fix criteria for a new law.

Corruption. One participant presented a framework for a law prohibiting bribery and embezzlement, based on existing international standards. The proposals provided criminal penalties for those corrupted, except (as in many poor countries) for small offenses involving “routine governmental action.” Participants noted that the Afghan criminal and civil code, including the Civil Service Act of 1342 HS (1963-64) outlaw the same forms of corruption, as well as nepotism to the third degree of kinship. The problem has been the utter lack of implementation of these laws, given existing conditions, rather than the nature of the laws. It would be useful to conduct a systematic review of these laws, in light of the provision of the Bonn Agreement for a Code for Conduct for officials. Do existing laws meet international standards?

Refugees. One participant presented a paper proposing a joint commission of Afghan and international experts to assist the Ministry of Refugees and Repatriation as well as UNHCR. She also proposed measures, such as those under consideration in the EU, to assure Afghan refugees on temporary visit to Afghanistan that they could return to their

country of asylum. The return of refugees would also require a new law on property with a conflict resolution mechanism. One participant who lives in Afghanistan described the hardships of refugees and displaced persons whose homes and villages had been completely laid waste, as in the Shamali plain. The UNHCR representative clarified that organization's role, assuring all that it would endure for the long term.

Foreign Direct Investment

Participants expressed different views on this subject. Two participants presented proposals for systems to encourage FDI in Afghanistan. Others argued that in the current conditions what was needed were temporary measures to assure that unscrupulous international companies in the fields of telecommunications or extractive industries did not exploit the interim and transitional governments' need for immediate cash to obtain long-term contracts without adequate provision for regulation or taxation to benefit the Afghan people. Participants noted that Afghanistan had existing laws on FDI dating back to 1964 and updated several times since then, and that these laws were available. Others argued that these previous laws were inapplicable in today's context of emergency in Afghanistan on the one hand and globalization on the other. Hence they argued for a more open "one-window" system for investors. In a transitional period it might be better to promulgate a relatively simple policy framework for investment, replacing past laws that the government no longer has the capacity to implement (due to loss of technical personnel) and work gradually toward a more comprehensive law. Such a law would also reflect today's more open-market approach to capital flows.

Fundamental Constitutional Issues

The meeting spent a relatively small amount of time discussing a number of large issues that will confront the Constitutional Commission due to convene in August: principles of a preamble, fundamental rights and duties, the rights of women, and the role of Islam. On all issues of rights a major issue common to most constitutional drafting processes was how explicit and detailed to be. For instance, one participant urged modification of the 1964 Constitution's text on fundamental rights to explicitly mention women repeatedly. Another, however, argued that the definition of the word "Afghan" should clearly state that it included men and women equally, and that thereafter the word should be used without qualification. In this way no presumption could arise that women were exempted from any right or duty of Afghans simply because they were not mentioned explicitly.

With regard to religion, the meeting noted a variety of ways that the constitution could link Islam and sharia in particular to the system of law and government, ranging from stating that Islam is the sole basis of the law to making Islamic jurisprudence a residual reference point in the absence of specific legislation. The role of the Hanafi School of Jurisprudence was debated. Several participants argued that it was the most widely practiced school in Afghanistan and throughout the Muslim world, and that the majority view should prevail, at least in maintaining the provision of the 1964 Constitution (in the chapter on the judiciary) that, in the absence of explicit law, the Hanafi interpretation prevails. Others opposed inclusion of any particular school or sect in a privileged

position. This issue, like many others discussed in the meeting, is political, though jurists will have to draft texts expressing the political agreement.