HPCR CENTRAL ASIA

AFGHAN LEGAL REFORM:

CHALLENGES AND OPPORTUNITIES

HPCR POLICY BRIEF

JANUARY 2003

Harvard Program on Humanitarian Policy and Conflict Research
- Conflict Prevention Initiative -
http://www.preventconflict.org

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I. Executive Summary

The purpose of this brief is to summarize a series of observations on the current status of legal reform in Afghanistan gathered during a research mission undertaken by the Harvard Program on Humanitarian Policy and Conflict Research (HPCR) in November 2002, identify a key set of challenges to the reform process, and suggest strategies for addressing these challenges. The HPCR mission sought to go beyond the prevailing assumption that assistance to legal reform must focus primarily on quick impact material and technical assistance projects, urging rapid action by domestic players. Based on numerous interviews with legal actors and analyses from the field, this brief suggests that international assistance to legal reform should devote pressing attention to the political and religious environment of the legal reform process in order to ensure the viability of the efforts of the Transitional Administration in this area.

Legal reform is a critical foundation of reconstruction in post conflict situations. In Afghanistan, where decades of international and civil war have devastated formal legal mechanisms, and depleted much of the country's class of legal professionals, legal reform is vital to the success of other areas of development and reconstruction. In addition to the general obstacles facing legal reform in post-conflict situations, Afghan legal reform must face major barriers such as the lack of a network of legal professionals, a weakened system of formal legal education, the existence of parallel and fragmented judiciary systems in the regions that have, over the years, replaced the state structure and some of its laws. Moreover, the Afghan situation is made more complex by the historic and ongoing role of Islam in the Afghan society that has had a significant and disputed influence on its legal framework.

International donors and the UN, recognizing the significance of law reform in post conflict environments, have emphasized the urgency of legal reform in Afghanistan, and have developed strategies to address this sector of assistance. To date, these actors and the Transitional Administration have focused on one track of legal reform assistance: material and technical. Explaining this inordinate focus on material and technical assistance is not difficult: for the international community, these needs are easy to identify, and relatively simple to address. For the administration, such needs are immediate, critical, and politically uncontroversial. However, the HPCR mission observed that a series of significant policy and doctrinal issues linger beneath the surface, and threaten to undermine the fruits of this assistance, and the very process of legal reform in Afghanistan.

Unlike material and technical needs, policy and doctrinal challenges are complex, politically charged, and suggest no obvious 'quick impact' interventions. Most actors seem paralyzed by the substantive complexity of these issues as well as a lack of strategies for engagement. At the same time, many in the donor community as well as in the domestic arena recognize that these issues are both urgent and weighty and that, if ignored, could resurface to instigate stringent political opposition to legal reform efforts.

II. The Role and Scope of Islamic Law in the Afghan Legal System

The Afghan legal system is understood by Afghans to be Islamic. As in the majority of modern Islamic legal systems, classical Islamic doctrine is combined to a greater or lesser degree with other legal sources such as legislation, case law, or Constitutional text. Most of the currently applicable laws are Islamic in origin, either citing Islamic sources or asking the judge or lawmaker to look to Islamic texts. In this context, much of Afghan law, including the Civil, and Penal Codes, is Islamic, and - equally importantly - is *perceived* as Islamic.

This perception has serious implications regarding the openness to reforms, the elaboration of new laws, and the criteria for modernization of existing laws. The Afghan Civil Code for example is based largely on the Ottoman Majallah, one of the most comprehensive efforts at Islamic codification, undertaken in the 19th century.

In understanding the spectrum of perspectives on the role of Islamic law in the future of the legal system, it is critical to grasp both the existing power of Islamic law, as well as the boundaries of the concept of Islamic law itself. Afghan legal authorities are faced with three distinct questions on this issue: when speaking of Islamic law as a source for lawmaking, what is the standard of Islamic law? Who will decide whether this standard is met (judges, elected legislators, ulema)? When there are conflicts between Islamic law and other sources of law, what is the appropriate response by those engaged in legal reform? HPCR researchers found that these questions raised a set of deep concerns with many interlocutors, demonstrating that there is currently no shared understanding of the shape that Islamic law should take as a source for legal reform and lawmaking. While the answers to these three questions will determine the influence of Islamic law in the future legal system, HPCR found that there is little debate or thinking currently taking place on how these decisions should be made.

Islamic law can take many forms, and interviewees shared a widely differing understanding of what the standard for conformity with Islamic law should be in Afghanistan. The determination of this question will significantly impact the shape of the new legal order, and the degree to which Islam will affect the laws. It is significant to note that- across the spectrum of individuals interviewed in Afghanistan- there was a unanimous assumption that the new system would be Islamic. The notion of a secular legal system is not considered a serious option for the future, and any suggestion of a secular system is presumed ignorant of the realities of Afghan history and culture. The question is not if, but how Islam will be expressed legally in the new order. HPCR researchers identified three distinct standards for determining conformity of laws with Islam deemed appropriate by interlocutors. The first, *nusus qat`iyya*, signifies those textually rooted legal rulings which are certain in both their origin and meaning. The second standard advocated was *asasiyat dini*, which does not have a technical meaning in Islamic law, but was used by some interviewees to describe a legal standard which would focus on general concepts of Islam. Some interlocutors suggested a third standard for repugnancy, *al-qawa'id*: a series of axioms of jurisprudence which are seen as universally

agreed upon across all schools of thought, and which are said to contain the essence or logic behind the laws of the divine texts.

III. The Major Challenges to Legal Reform

The current applicable legal framework in Afghanistan is laid out by the Bonn Agreement, for the duration of the transitional period. The legal infrastructure is rooted in the 1964 Constitution (so far as it is consistent with Bonn) and all existing law and regulations in place in so far as they are not inconsistent with Bonn, international legal commitments entered into by Afghanistan, or the 1964 Constitution. A number of codes are currently applicable, such as the Civil, Penal, Commercial, Criminal, and Criminal Procedure Codes. It is significant to note that Article 102 of the 1964 Constitution also authorizes an independent source of law, directing the courts to turn to the "basic principles of the Hanafi jurisprudence of the Shariaat of Islam" where there is no applicable law for a case under consideration.

In this section, the report lays out HPCR's preliminary findings as to those critical issues which - if left unaddressed- threaten to undercut efforts on legal reform. In in-depth interviews with a diverse spectrum of legal experts, observers, and government officials, the issues listed below were those that solicited the most wide-ranging or conflicting responses; or those issues which were flagged by interlocutors as posing the greatest threats to the legitimacy of the future legal system. These issues include: the articulation of minority rights in constitutional text; the recognition of customary and tribal law in the regions; the power and independence of the judiciary; and the inclusion of foreign law in the new Afghan legal system.

- Minority Rights and the Constitutional Text: The tension between Hanafi and Ja'fari legal doctrines

The Afghan legal system is solidly anchored in the Islamic legal tradition, particularly in all civil matters such as family law. There are four main schools in classical Sunni legal thought: Hanbali, Shafi'i, Maliki, and Hanafi. The schools, named after their main contributing thinkers, were developed largely in order to provide rigor, predictability, and hierarchical structure to Islamic lawmaking (or *Fiqh)* at an early point in the Islamic empire's history. While there are few major theological or ideological differences remaining between the four schools today, they continue to hold geographic dominance in particular parts of the Muslim world, and do create subtle differences in codified texts, marriage and family law, and some criminal punishments.

The Hanafi school has historically predominated in Afghanistan and informs the text of the Civil Code, the Criminal Code, and the 1964 Constitution. Specifically, Article 2 of the 1964 Constitution states that

> *"Islam is the sacred religion of Afghanistan. Religious rites performed by the state shall be according to the provisions of the Hanafi doctrine."*

Moreover, Article 102 states that

> *"Whenever no provision exists in the Constitution or the laws for a case under consideration, the court shall, by following the basic principles of the Hanafi jurisprudence of the Shariaat of Islam and within the provisions set for in this Constitution, render a decision that in their opinion secures justice in the best possible way."*

Were there only Sunnis in Afghanistan, the choice of school (*madhab*) would be a relatively uncontroversial matter. However, approximately 20% of the population of the country is Shi'a (a majority are Hazara, but there are also Shi'as of other ethnicities). The main school of thought in the Shi'a school is the *Ja'fari* school. Legal doctrinal differences between the Ja'fari and Hanafi schools are mostly of the same order as those between the Hanafi school and other Sunni schools, with the chief exception of constitutional and inheritance law.

This issue solicited some of the most divergent opinions in the interviews, even on the most fundamental issues regarding the reference to a particular school in the Constitution. Historically, Shi'a populations have felt that Shiism has not been officially recognized as equal to Sunnism: several past leaders have explicitly stated in public documents that Shi'as were not considered state-recognized Muslims. Therefore, the use of the term 'Hanafi' in the Constitution, and as a source for law in the Codes seems to have taken on political significance as an issue of identity; it represents an official sanction for many Shi'as. Many Shi'a individuals interviewed, who insisted that Ja'afari fiqh should be recognized in the Constitution at every mention of Hanafi fiqh, acknowledged that such an alteration would have little legal significance in practice. However, they stated that it was critical that the new Constitution recognizes the *law* of the Shi'a (Ja'afari fiqh): legal recognition was perceived as going hand in hand with state recognition of the significant Shi'a minority and their political presence in Afghanistan.

On the other hand, some Sunni interlocutors stated that only Hanafi fiqh should be recognized in the new legal system because 80% of the country is Hanafi, and because it would be impractical to oblige judges to know more than one school wherever Shi'as happen to live. Some claimed that, if the system were to represent the democratic desires of the people, then the Hanafi school would be the demand of the majority of Afghans. Several who were proponents of this view stated that there would be no other politically viable alternative: that it would simply be impossible to put forward any legal text that did not solely recognize Hanafi jurisprudence as the source of Islamic law and religious rites. A third perspective on this issue emerged: several key interlocutors suggested that the preferable solution to this dilemma would be to remove any reference to a specific school of thought in the Constitution. That is, that the text should only address 'Islamic principles' without referring to Hanafi *or* Ja'afari jurisprudence. In such a system, some

suggested that Shi'as could be allowed to utilize their own personal law in the courts (such as in Pakistan), or that this solution would allow the message to be sent that in the new Afghanistan, minority rights would be protected. Other interlocutors suggested that the one practical way to address this issue would be by strengthening the provisions in the new Constitution referring to minority rights, covering both religious and ethnic minorities.

In conclusion, this issue may surface at the Constitutional Loya Jirga, especially because it lends itself to group-based political lobbying and pressure on government bodies and Commissions. However, it is an issue that may benefit from information and dialogue: many interlocutors were not aware of the overwhelming similarities between the schools of jurisprudence, others were not aware of ways in which minority rights may be dealt with more directly or straightforwardly than engaging on applicable legal doctrine.

- Recognition of Customary and Tribal law in the regions

Customary and tribal laws in Afghanistan are multiple and of varying degrees of formality. Some tribal practices of the Pashtun of the south, such as Pashtunwali and jirgas, have served as alternative sources of dispute resolution and tribal negotiation for centuries, parallel to official state legal structures. Other community-based mechanisms in the North were developed during the years of fighting, when central legal infrastructures broke down or were not considered reliable. In the area of customary and tribal law (or "Afghan legal traditions," following Bonn language) the most significant issue facing legal reform efforts is whether, and to what extent, these practices will be officially recognized by the new legal system. Will customary or tribal dispute settlement mechanisms be incorporated into the work of regional courts? Should tribal norms be given the imprimatur of the state with acknowledgement as a source of law in the Constitution? Alternatively, does this moment of reestablishing a legal system provide the state with an opportunity to modernize and do away with centuries-old tribal procedures by insisting on a strong new law from the center?

The implications of this issue- the treatment of customary and tribal law in the new legal system- reach to the core of Afghan politics, internal power balances, and the legitimacy of the national legal order outside of Kabul. Historically, the central law and enforcement institutions have had varied authority in the regions. In many areas of legal dispute, rural citizens have avoided official court mechanisms and turned to community leaders, tribal councils, and mediators to resolve conflicts.

Interviews with legal actors in Afghanistan uncovered a very divergent set of perspectives on the appropriate role of customary law in the future legal system. The opinions articulated-even among top government officials - ranged from utilizing the current momentum for legal reform to do away with as much customary law as possible to a contention that if customary or tribal laws were not recognized in the new legal texts, they would have little authority outside Kabul.

For those who argued that customary law should be removed or overwhelmed by central authority, there were several main lines of reasoning identified. Some interlocutors argued that many customary practices (particularly some Pashtunwali inter-tribal dispute settlement methods) have been violative of basic women's and girls' rights, and that these tribal codes should not be shielded from progressive central reforms by claims of authenticity and efficiency. Several women's rights activists and human rights activists argued that they would urge the government to take advantage of the current transformation of legal norms to convey to tribal leaders that their laws and codes would have to be modernized in the new Afghanistan. One interlocutor, a national Islamic leader, noted that many customary practices, while perceived by their adherents as synonymous with Islamic law, were in fact contrary to Islamic law and that for this reason they should not be recognized by the new legal order. Using the example of women's hijab, he noted that in many tribal areas, women were required to wear the burqa, whereas Islamic law only required women to cover their hair and bodies. Finally, some interlocutors suggested that only general standards of custom (*`urf `amm*) should be considered as a source in drafting the new laws, but that any customary practices that fell into the realm of particular legal mechanisms should not be recognized as legal sources. In this conception, the level of generality of the custom would serve as the criterion for its recognition under the new legal order.

On the other end of the spectrum of perspectives, those who argued that customary or tribal law should be recognized or incorporated (to some degree) in the new Afghan legal system supported this contention in a number of ways. One group made a pragmatic argument: noting that any system that did not recognize customary law and tribal practices would have no hope of enforceability beyond the borders of Kabul Province, and that this was a basic necessity of any national legal system. This argument holds that if the system is to be perceived as democratic or responsive to the needs of the population outside of Kabul, it must include references to alternative legal authorities within the country (which will continue to influence the lives of large portions of the population regardless of official sanction). Another group of interlocutors from this perspective noted that a great deal of research on customary and tribal law should be carried out by government officials responsible for legal reform, and that this research would likely uncover many customary processes (if not substantive rules) that could be useful and conducive to rights protection or progressive visions of law. This view suggests that there are areas of customary and tribal law that, if analyzed with an eye to inclusion in the new legal order, would serve as a rich indigenous source of legal innovation.

In conclusion, the appropriate role of customary and tribal law in the future Afghan legal system was one of the most contentious and complex issues discussed with official and expert interlocutors in Kabul. While there were many individual perspectives, with a wide array of implications for Constitutional drafting and reform of existing legal texts, they ranged from the extreme of using central law to overwhelm and excise any customary or tribal practices from the country to incorporating specific tribal dispute settlement mechanisms in the national law. Preliminary findings suggest that this issue will only grow in significance and depth as the process of legal reform continues; and that it promises to be a major issue at the Constitutional Loya Jirga.

- Power and Independence of the Judiciary System

To date, few international or domestic legal reform initiatives have focused on the judiciary, choosing to look instead to the Commissions and Ministry of Justice as loci for assistance and development. According to the preliminary results of the interviews conducted by the HPCR mission, this posture fails to appreciate the current, growing strength of the judicial establishment as a political and a legal entity with vested interests in Afghan legal reform.

The legal position of the courts vis-à-vis other organs of government, as well as the political reality of the current judicial establishment, combine to create a potentially significant site for future tensions. Detailed discussions with court officials, government representatives, UN officials, and legal experts demonstrate there is increasing recognition of this latent tension, and that all sides need strategies for developing a common vocabulary and vision.

For the duration of the transitional period, the Bonn Agreement states that the "judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court of Afghanistan, and such other courts as may be established by the Interim Administration." If read with the relevant articles of the 1964 Constitution, the current legal order provides a vast amount of power and independence to the judicial establishment. Control over the judicial branch is centered in the Supreme Court, led by the Chief Justice. The 1964 Constitution not only ensures the independence of the judiciary as a separate organ of government, but further provides (per Article 107) that the Supreme Court shall have decision making power over the judiciary's administrative, budgetary, appointment, and dismissal functions. In the current system, the Supreme Court is exercising these powers to their fullest, and it appears that the courts are operating as an entirely independent organ of government. The Supreme Court, answers directly to the executive, seemingly without any accountability to or coordination with the Ministry of Justice.

The Supreme Court has been actively appointing new judges, filling in the ranks of country's judicial apparatus: the Supreme Court itself has swelled to 137 Justices (it is Constitutionally directed to have nine members), and the lower courts throughout the provinces are also receiving new judges regularly. Thus far, it appears that the Supreme Court has been responsible for training and monitoring of all judges. As with all major legal players in Afghanistan, the court plays a role as a legal *and* political entity. In October 2002, the Supreme Court called a meeting of all the country's court chiefs in Kabul, resulting in a unanimous resolution stating (among other things) that "Judicial affairs will be carried out in Afghanistan based on the commands of Islamic Law and Hanafi religious jurisprudence, and currently effective law" and that the "Judiciary is an independent power in Afghanistan…All Judges of Afghanistan should be appointed through the Supreme Court, verdicts of those judges who are not approved by the Supreme Court and central Government are not valid."

Some interlocutors interpreted this large meeting, and its resolution, as a move by the Supreme Court to demonstrate and consolidate its political power. It should be noted that it is central to the Judicial Reform Commission's mandate to "take into consideration" the appropriate methods of selection of judges (and other legal professionals), as well as to design and implement training programs for these professionals. This could be an area of future conflict if a shared ground for dialogue and discussion between the judiciary and other legal bodies (particularly the Commission and the Ministry of Justice) is not fostered by all involved parties.

HPCR interlocutors in the court system noted that there has been little attention paid to the judiciary by donors, and that many basic material and technical needs of the courts were not being met. Their perception seemed to be that the needs of other sectors of the justice system were taking priority over the judiciary. Several members of the judiciary insisted on the complete independence of the courts, and noted that they served a critical function in the process of legal reform. Other interlocutors, in the UN and other areas of the legal system, perceived a growing conservatism and an increasingly distinct sphere of influence at the Supreme Court. It is significant to note that some legal experts and government officials, aware of the political realities of a powerful and independent judiciary, recognize that one critical decision in this area will be how much of this power and independence should be maintained in the emerging legal system.

In crafting the standard of judicial review for constitutionality of legislation, the Constitutional Commission will determine how much power the courts will have in order to check new legislation against whatever constitution's standard for conformity with Islamic law is included in the Constitution. For example, if the standard of Islamic law is that no laws shall be repugnant to the *asasiyat dini*, and the Supreme Court is given the power of judicial review for repugnancy (the current standard of repugnancy is found in Art. 64 of the 1964 Constitution), the Court will have the power to strike down legislation as repugnant to vague Islamic principles. HPCR research demonstrated that many experts and legal observers were unclear as to the current status of judicial review, and noted that this was not an issue that had been explored at great depth. However, most recognized that any Constitutional provision relating to judicial review will critically impact the way in which Islamic law is interpreted in the new legal order.

Some suggested that the new Constitution and laws relating to the administration of the judiciary should bring the courts under the control of the executive or legislative organs, a solution ordinarily considered anathema to the rule of law. Others suggested that the Judicial Reform Commission would have to develop better links with the judicial leadership in order to carry out any meaningful reforms.

This tension may suggest a deeper division between reformists located within the Transition Administration executive bodies and the more traditionally or religiously trained members of the judiciary establishment. This divide will need to be addressed in the coming months. HPCR researchers found that many conservative or religiously trained actors demonstrated a willingness to engage with the legal reform process, and to discuss different perspectives on the appropriate role of the judiciary.

- The inclusion of foreign law in the new Afghan legal system

Foreign laws, and the work of foreign drafters, will almost certainly be a key factor of the legal reform. The paucity of local legal thinkers and legal drafting experts alone necessitates involvement by non-Afghan experts. Already, legal professionals from the American Bar Association and other organizations are involved in developing the commercial law and other areas where existing legal structures are weak. As with many issues of legal reform, the question of perception may play as important a part as substance. Some observers noted that there was a concern that if legal reforms were perceived, or could be characterized as initiating with foreign experts and foreign legal systems, they would be easy to discredit and undermine. When faced with the question of the role of foreign laws and foreign legal expertise, observers and government officials provided a range of perspectives. On one end of the spectrum was the position that foreign law would be unacceptable and unenforceable in Afghanistan, and on the other was a welcoming of any foreign laws as necessary and virtually unproblematic.

One conservative leader noted that the mixing of law was "like mixing water and dirt: the result is neither water nor dirt." Others who shared the view that foreign laws would be problematic if incorporated into the new legal order specified that western laws were the most difficult to include, because of the difference in culture and tradition between Afghanistan and the West. For example, one high-level interlocutor noted that Western laws relating to women should not influence Afghan legal reforms due to the extreme level of freedom granted women in the West that would disrupt traditional structures in Afghanistan.

Conversely, some interlocutors noted that many foreign laws would be included in the new legal system, and seemed to believe that this was a natural outcome of the involvement of so many foreign countries in Afghan reconstruction. Several observers noted that Afghanistan was particularly in need of foreign laws on investment and banking: others stated that some human rights principles should be drawn from international texts. Several observers who advanced this viewpoint seemed concerned with the acceptability of such laws, and some argued that they would have to be checked against Islamic criteria in order to appear legitimate. However, others stated that there was no conflict between Islamic principles and any beneficial foreign laws (such as human rights standards, or commercial laws).

On the issue of conflicts between Islamic law and other legal sources, responses ranged from denying the potentiality for conflict to arguing which legal source should take precedence. Examples of such conflicts might include differences between certain international human rights standards and the Islamic law on divorce; or as between these standards and the criminal *hudud* punishments, most notable for its punishments for stealing and adultery. HPCR researchers identified three general perspectives among the legal actors interviewed:

- *Denying the existence of a conflict:* Many interlocutors argued that there was no conflict between Islamic law and international human rights, and that no conflict

was even theoretically possible. That is, they noted that any law that was rational could not possibly conflict with an Islamic ruling. Many who shared this perspective seemed to feel that Islamic law in Afghanistan had been depicted as contradictory to human rights, or that international observers focused on conflicts without understanding the principles of Islamic law.

- *Islamic law trumps.* A second group of interviewees acknowledged that conflicts might occur between some rulings of Islamic jurisprudence and international standards. This group noted that in the case of such a conflict, the Islamic principle would have to be followed. One interlocutor stated that "the values of Islam and international human rights will be embraced together in the Constitution. However, there may be specific aspects of international human rights law which cannot be included in Afghan law because they will not fit with Islamic law."
- *Islamic law must be reformed.* A very small third group noted that if there was a conflict between Islamic law and modern law, Islamic law would have to be reconsidered in light of the current Afghan environment. One interlocutor noted that "religious jurisprudence is man-made law just like any other law; if it conflicts with human rights principles, it must be reinterpreted."

In conclusion, while all interlocutors seemed to recognize the inevitability of incorporating foreign laws and the work of foreign legal experts in the new legal order, there were differing views on the acceptability of such laws and the strategies through which they should be included in existing Afghan structures.

IV. Strengthening the Role of the Commissions

The Bonn agreement lays out the bases for the work of two separate Commissions mandated with developing Afghanistan's new legal system: a judicial commission and a constitutional commission. This section provides an up-to-date presentation these two bodies, and provides recommendations directed towards government actors, UN bodies engaged in the legal sector, and donor countries assisting the two commissions.

The original Judicial Commission, which had been perceived as an attempt to present a body representative of different legal and political perspectives in Afghanistan, was dismissed in early fall 2002 amidst official statements that the Commissioners were not independent and had conflicting commitments. Unofficially, many stated that the reason for the breakdown of the Commission was the polarization of views between more reformist and conservative voices. In developing the second Commission, many thought that representativeness would have to be compromised for efficiency. It seems that there was some pressure on the Administration, particularly from donor countries, to select a more moderate group of nine, emboldened with a mandate to rapidly move the legal reform project forward. The new Judicial Reform Commission (JRC) began work on November 28th, with a slightly different mandate from its predecessor body. The Presidential decree creating the JRC deletes any reference to the Commission's independence, and further addresses the responsibilities of the Commission more specifically, directing them to begin work immediately. The composition of the JRC,

made up of moderates from either side of the perceived line between reformists and conservatives, came under intense scrutiny even before the Commission's official inauguration.

The Constitutional Commission, which was inaugurated on November 3rd, began its work with a more directed timeline than the JRC. The Drafting Committee, which is the current body of nine members, is mandated to develop a draft constitution within six months, which is to be handed over to a larger commission of approximately 35 members. This Committee would then prepare the draft for the Constitutional Loya Jirga- set to take place around December 2003[1]. This Commission, whose task focuses on drafting the central text for the new legal order, is charged with coordinating its work with the Judicial Reform Commission and the Afghan Independent Human Rights Commission.

The Commissions symbolize the work of legal reform: the creation of new law for the long term future, and the link between the international community and the Afghan people on legal matters. The JRC will carry out the immense task of reviewing all existing laws, identifying areas where law must rapidly be created, and architecting the country's overall judicial structure. The Constitutional Commission, within the next twelve months, must write the text that will shape Afghanistan's political structure, its legislative functions, and its formal transition from a country defined by war and desperation to a full-fledged member of the international community.

The Afghan public is aware of the weight of these duties, and the significance of the legal decisions that will be made before the next Loya Jirga. If the Commissions, and by extension the work that they produce, are not perceived as legitimate, or can easily be assailed by groups seeking to undermine the current process of nation-building, other efforts in the legal reform process may be rendered meaningless. It is critical to the integrity of legal reform, and the success of the next Loya Jirga, that the Commissions are accepted as legitimate, and seen as bodies that represent the needs and aspirations of all Afghans.

- The Need for Dialogue and Consultation

HPCR research and consultations suggest that there are identifiable strategies that may be taken by Commissioners, UNAMA, and donor countries engaged with the JRC and Constitutional Drafting Commission to address these concerns. The current climate of optimism and innovation surrounding the work of the Commissions should be harnessed in order to support both Commissions efforts to engage in dialogue and discussion with a wider spectrum of Afghan society. Both Commissions have recently recognized the need for public consultation, and have acknowledged the significance of reaching beyond their own membership to understand the perspectives of various stakeholders in the legal reform process. For example, in November 2002, the Drafting Committee of the

[1] Recent reports suggest that the date of the Constitutional Loya Jirga may be moved up to October 2003, but this remains unconfirmed.

Constitutional Commission placed solicitations for opinions and suggestions in local Kabul newspapers, and several members have noted that they would like to be able to offer an opportunity for the public to send mail-in comments and perspectives to the Commission.[2]

In addition to providing a forum for dialogue and broad information exchange with the commissions, public consultations have a significant symbolic and confidence building value. Many interviewees spoke approvingly of the consultative process undertaken in drafting the 1964 Constitution, which is often perceived as a case where the Constitution was 'shopped' around the country before it was presented to the Loya Jirga. Nearly fifty years later, in a context where peace seems achievable for the first time in a generation, many fundamental issues underlying legal reform (such as the appropriate role of tribal law) stand open for exploitation by forces who seek to undermine the creation of a stable legal order. Consultation and dialogue, and the *perception* that the legal reform process is open to the views and perspectives of all Afghan society, may decrease the potency of such issues as fault lines for conflict at the Constitutional Loya Jirga.

In the current Afghan environment, a consultative approach to engaging the policy and doctrinal issues underlying legal reform may diffuse conflict and highlight possible areas of agreement or cooperation. HPCR research demonstrates that there are significant political and legal actors, largely representing a more conservative position, who feel that they are being left out of the current legal reform process. Many such leaders command a large segment of public opinion, or are seen as respected religious scholars. If such segments of the spectrum are shut out of legal reform in the coming months- the critical time when decisions on policy and doctrinal issues will be made- their current desire to be engaged may transform into an effort to undermine the official process of reform.

The central recommendation of this brief, based on HPCR interviews and consultations, is that actors involved in Afghan legal reform should address the most critical policy challenges to the development of a new legal system (such as the role of Islamic law, the status of tribal law, whether to name a specific school of Islamic thought) through information rich dialogue, public consultations, and public debate engaging a broad spectrum of perspectives. As one interlocutor noted, "The Commissions have the destiny of the Afghan people in their hands, they must give the society an opportunity to share its views."

Such dialogue, carried out according to the needs and demands of Afghan legal actors, will enhance the legitimacy of the legal reform process, will ensure that this process is one that is perceived as authentically Afghan, and will lend to the sustainability of the new legal order. As many international actors, including donors, academic experts, comparative constitutionalists, and NGOs become engaged with the Judicial Reform and Constitutional Commissions, and seek to invest in the legal reform process, it is critical

[2] See, for example, Kabul Weekly, November 14, 2002, providing the views of assistant prosecutor Muhammad Zia Noorkhil : "The process [of Constitution drafting] is enhanced when religious figures along with lawyers, economists, journalists, intellectuals, public health officials and others voice their opinions and participate jointly in the commission."

that they are aware of the policy and doctrinal issues underlying legal reconstruction in Afghanistan. HPCR research suggests that such issues can only be understood by fostering dialogue and exchange with a broader group of actors and perspectives than are currently at the legal reform table.

Public consultations may take many forms in practice, and this brief suggests particular strategic focuses or criteria for such projects and activities.

Recommendations

1. While technical and material assistance remain central to the functioning of the legal reform process, the underlying policy and doctrinal choices which will be made in the coming year will determine the sustainability and impact of such assistance.

Those engaged in the legal reform process should identify strategies to increase awareness of policy and doctrinal issues, and foster dialogue among key actors on the key policy issues which inform the background for technical and material assistance projects.

2. Open dialogue occurring prior to the Constitutional Loya Jirga on key challenges facing the legal reform process may prevent such issues from being harnessed by elements seeking to undermine and destabilize the new legal order.

Actors engaged in the legal reform process should ensure that the critical challenges facing this process are discussed and debated both within governmental bodies such as the Commissions, as well as between such bodies and the wider public.

Given the current increase in international actors engaged with the legal sector, it is critical that public consultations are at all times directed by and towards the needs of Afghans.

3. Questions such as the role of Islamic law in the future system, the recognition of minority rights, the independence of the judiciary, the scope of judicial review, and the incorporation or recognition of tribal practices will be decided during the next year.

Such issues may determine the legitimacy and sustainability of the new legal system, and the perception of new legal texts in the eyes of Afghans. In order to ensure the legitimacy and acceptability of legal reform efforts, the current process should engage the participation of the spectrum of views on legal issues, and should broaden the current scope of focus to include critical actors presently left out of reform initiatives.

In order to ensure that the legal reforms established throughout the coming year are perceived as legitimate- and indeed respond to the demands of all Afghans- legal reform efforts should look outside of Kabul to the regions. Regional representatives, and those engaged with regional legal systems, should be included in Kabul based initiatives.

In order for the authority of the center to be enforceable and sustainable in the periphery, issues such as the role and recognition of tribal and customary law should be informed by those Afghans most affected by and engaged with informal legal systems: regional representatives, tribal leaders, and regional civil society actors.

The perspective of minorities, such as the large Shi'a community, should be engaged in consultations, drafting processes, and dialogues on issues of legal reform. Strategies for compromise, and paths to agreement may be identified in such exchanges now; while at the Loya Jirga groups may take polarized stances and question the enforceability of the new legal order.

4. On many issues which are currently perceived as overly political or 'sensitive' for open debate, such as the status of Islamic law in the Constitution, the power and independence of the courts, and the recognition of tribal law, there are areas of potential compromise or agreement which are presently overlooked.

Dialogue and consultation may allow for networks and connections to be created between actors who would otherwise see themselves as politically opposed.

Emphasis on dialogue and exchange on such issues will provide a vital outlet for different voices which currently feel unrepresented in the legal reform process. Information rich discussion on such issues may demonstrate that there are areas of commonality or compromise that can be worked through in the months of drafting and reviewing – as opposed to the moment of decisionmaking at the Loya Jirga.

There should be a focus on understanding the needs and views of different legal bodies within the Transitional Administration, in addition to the current emphasis on the two Commissions. The judiciary, the office of the Attorney General, regional courts, the Religious Ministry, the Ministry of Women's Affairs are invested in the legal reform process, and may be able to identify perspectives and strategies to address key challenges.

Cambridge, 9 January 2003

About this Brief

About this Brief: This brief seeks to summarize a series of observations on the current status of legal reform in Afghanistan gathered during a research mission undertaken by the Harvard Program on Humanitarian Policy and Conflict Research (HPCR) in November 2002. Further, it seeks to suggest strategies for addressing key challenges to legal reform with a focus on the policy and doctrinal issues underlying the current reform process. This report was written by Naz Modirzadeh, HPCR Program Associate. Those who contributed include Claude Bruderlein, HPCR Director, Khalil Shariff, Program Adviser, and Professor Frank Vogel, Director, Harvard Law School Islamic Legal Studies Program. The information contained herein is based primarily on in-depth interviews and consultations carried out over four weeks in Kabul in November 2002 with government officials, UNAMA staff, civil society leaders, legal professionals, and legal experts. Research for this brief was carried out in cooperation with the Harvard Law School Islamic Legal Studies Program, with the significant contribution of Professor Frank Vogel. In addition to the many people who availed themselves for interviews, HPCR would like to thank Hamid Saboory, Aziz Huq, and Vikram Parekh for their contributions.

The Program on Humanitarian Policy and Conflict Research is a research and policy program based at the Harvard School of Public Health in Cambridge, MA. The Program is engaged in research and advisory services on humanitarian operations and the protection of civilians in conflict areas. The Program advises organizations such as the United Nations, governments, and non-governmental actors and focuses on the protection of vulnerable groups, conflict prevention, strategic planning for human security, and the role of information technology 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.