

# Lessons from the 2004 Constitutional Process for the Intra-Afghan Peace Negotiations

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**Summary:** The Taliban have said that they do not recognize the legitimacy of the current constitution of Afghanistan, indicating that constitutional reform will be a key issue in peace talks with the Afghan government that began in Doha in September. The most recent precedent for Afghanistan is the Bonn process, which established a democratic framework for the state and created a process for drafting and ratifying a new constitution. The final document was ratified in 2004 by the Constitutional *Loya Jirga*, a diverse group of elected and appointed representatives from around the country. Lessons from the 2004 process, including the need for ample time for public consultations, the need to balance political and technical issues in the drafting process, and the need for a well-staffed and organized secretariat to oversee such a complex and important process, may be instructive for current peace negotiations.

## **Introduction**

Shortly after the ouster of the Taliban government in November 2001, 25 prominent Afghan leaders were invited by the United Nations to Bonn, Germany, to create a political framework for a new, democratic government in Afghanistan. The group of leaders, representing mainly the “Rome Group” loyal to the former king, Mohammed Zahir Shah, and the Northern Alliance, which formed the armed opposition to the Taliban, did not include Taliban representation. The delegates faced difficult and divisive issues, the foremost of which was the structure and makeup of the government and the future legal framework of the country.

Prodded by the United Nations and several international actors, the delegates chose an interim authority made up of 30 members with Hamid Karzai as its chairman and agreed to a two-and-half-year

political transition period. A key building block of the Bonn Agreement was to create a constitutional drafting process that culminated in a Constitutional *Loya Jirga* (CLJ), which ratified the 2004 constitution. This, in turn, established the democratic system, as well as provisions for equal rights and freedoms, that Afghanistan has enjoyed, albeit imperfectly, since the Taliban government was ousted in a U.S.-led invasion in 2001.

This paper does not cover how the governance and rights issues were ultimately resolved, or whether the drafters reached the right conclusions; rather, its focus is on the process that unfolded. It is hoped that an examination of the issues and challenges that marked the constitutional process under the Bonn Agreement will help ensure that they are better handled during the ongoing Afghanistan peace negotiations (APN).

## Bonn Conference

After a week of deliberations, on December 5, 2001, the delegates of the Bonn Conference ratified the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (the Bonn Agreement). The Bonn Agreement set forth a basic framework for establishing democratic institutions in Afghanistan.

Under the Bonn Agreement, Afghanistan would initially be led by an interim authority for six months in order to fill the governance vacuum. The main responsibility of this interim authority was to hold the Emergency *Loya Jirga* no later than June 2002 to choose the transitional authority, which would have two years (i.e., until June 2004) to draft and adopt a new constitution and hold democratic elections in accordance with that constitution.

The Bonn Agreement did not provide much in the way of guidelines or a work plan for the interim and transitional authorities in meeting this ambitious schedule. It provided some broad guidelines such as adherence to “basic principles and provisions contained in international instruments on human rights and international humanitarian law to which Afghanistan is a party.” Specifically, that the interim authority shall “respect international law and maintain peaceful and friendly relations with neighboring countries and the rest of the international community” and “ensure the participation of women as well as the equitable representation of all ethnic and religious communities in the Interim Administration and the Emergency *Loya Jirga*.” Details of the constitutional process, however, were left to be decided later during the process.

The agreement that the country would move from interim authority to transitional authority to constitutional democracy within a two-and-half-year period was not based on an empirically grounded estimate of the time actually needed for such a complicated process. The ambitious timeline reflected the eagerness of delegates and the international community to maintain the momentum of a political process that would establish a democratic system after years of authoritarian rule and anarchy. The timeline obscured the many challenges and obstacles that the process would face in a country in which more than two decades of wars had destroyed much of the physical and social infrastructure. The delegates’ inexperience with democratic processes may also have led them to underestimate the burdens of the process.

Most importantly, perhaps, the timeline reflected a sense of euphoria, both Afghan and Western, that prevented the delegates from reassessing the ground conditions and making adjustments along the way, such as enlarging the circle of political actors involved, including the remnants of the Taliban. In 2003, a non-paper prepared by Lakhdar Brahimi, the special representative of the United Nations secretary-general, advocated for holding a Bonn II Conference for a “systematic review of the Bonn Agenda.” The non-paper explicitly recognized:

“Afghan delegates who met in Bonn in November/December 2001 were not fully representative of the diversity of the Afghan population. The Interim Administration hastily assembled at the end of that Conference was more the reflection of the ground realities suddenly created by the U.S. military campaign than that of the deeper and more lasting ethnic and social realities of the country. Furthermore, the Emergency *Loya Jirga*, in June 2002, was a disappointment to many in so far as it failed to improve significantly the ethnic and social balance inside the Government.”

The recommendation for a Bonn II Conference, however, was rejected by the transitional administration and its key international supporters. It was probably the first major missed opportunity to address the shortcomings of the Bonn process. As a result, the agreement and the proposed process therein reflected the reality that this state-building project unfolded as the first campaign in the so-called Global War on Terror, which would continue to define its parameters until the present day.

## **Constitution Drafting Commission and First Draft**

### ***Emergency Loya Jirga***

In January 2002, Karzai, the chairman of the interim authority, established a commission for the formation of the Emergency *Loya Jirga*. The members of the Emergency *Loya Jirga* were generally selected through a two-tiered process of district-level selection followed by provincial-level elections with some seats reserved for women, refugees, nomads, and members of the interim administration and the commission. The selection process was nothing short of remarkable given the poor communications infrastructure at the time, as well as the ongoing fighting outside Kabul. In June 2002, more than 1,500 members of the Emergency *Loya Jirga* met to select the president of the transitional government.

The Emergency *Loya Jirga* had a narrow mandate: to decide on a “Transitional Authority, including a broad-based transitional administration” that would oversee the constitutional drafting process and the implementation of general elections under the new constitution. There were heated debates and tense political maneuvering as many of the delegates favored a realignment of political forces and major changes in the administration. But the large number of delegates, the dominance of powerful groups and individuals and the lack of established procedural rules created an atmosphere of much debate but few decisions. Still, Karzai was overwhelmingly elected chairman of the transitional administration. He announced some changes in his administration, but they were not as extensive as many expected. The Emergency *Loya Jirga* proved to be an opportunity for elite consolidation rather than a major step toward democratization.

By most accounts, the Emergency *Loya Jirga* was overly consumptive of time and resources in relation to its fairly meager accomplishments, except perhaps adding an element of public approval to the arrangement under the Bonn Agreement.

### ***Creation of the Constitution Drafting Commission***

Afghanistan has had a rich tradition of constitution making since its independence in 1919. The 1964 constitution was perhaps its most well-known and respected one, having restricted the absolute rights of the monarch and enshrined basic individual rights. It was, therefore, convenient for the delegates of the Bonn Conference to declare major parts of it as the law of the land. Karzai favored the adoption of a new constitution similar to the 1964 constitution and launched a process that first established an experts' commission of drafters, whose draft was then reviewed by a larger commission and then debated and adopted through a CLJ.

In October 2002, a nine-member Constitution Drafting Commission (CDC) was established through a decree following weeks of consultations with various groups by the Office of the President of Afghanistan and the United Nations Assistance Mission in Afghanistan (UNAMA), which was playing a guiding role early on in light of the low capacity of Afghan institutions. The consultations were mainly, although not exclusively, with the groups represented at the Bonn Conference. Notably, the CDC was populated with members of the transitional government, including a vice president, a legal adviser and a deputy minister. The president selected the CDC members from both the Sharia Faculty, which focuses on Islamic jurisprudence, and the Law Faculty of Kabul University, several of whom had law-drafting experience. It was thought that this mixture would help the committee members to consider both Islamic principles and traditional legal mores.

Karzai accurately referred to the CDC as a “technical body” since it was the group that would build the constitution. In hindsight, the CDC may have been too “technical” in the sense that its expertise was limited to general legal and Sharia principles. Few CDC members had experience in drafting a constitution or were specialists in constitutional law. They also did not have expertise in economics, political science, post-conflict nation-building or backgrounds in planning and staging elections—obviously a central pillar of a democratic constitution. Most were not known for having a political philosophy; they were deemed to be safe choices by the government.

Once the CDC was established, the international community, in coordination with UNAMA, offered expert assistance. While consulting with foreign experts, the CDC was often wary about receiving international technical assistance, seeking to avoid the perception of foreign influence. At the same time, a number of Afghan specialists and groups, such as lawyers' associations, shared their views with the commission.

The most relevant lesson from this early commission for a possible constitutional review process today is the importance of diverse expertise and political perspectives. Nearly two decades later, Afghanistan is not the isolated country it was in 2002 and has an extensive network of legal scholars and legislators who are extremely well-versed in constitutional issues and debates and can be a great asset to any constitutional reform process. They are also accustomed to the globalized exchange of information and understand the benefits of international technical assistance. While Afghans must hold the pen in any constitutional process, there is also a benefit to including international expertise.

The political affiliation of constitutional reform committee members is another point for consideration with respect to the CDC. The Karzai government asserted a degree of influence over the CDC by including members of the administration in the commission, and it was purposely not called independent. Such an arrangement may raise objections within the framework of the APN because the Taliban have so far rejected the legitimacy of Afghan government officials. The best solution may be for the parties to the conflict to create a commission that is independent, but which represents the views of the key political groups and includes scholars from various fields and civil society members to ensure broader representation and technical know-how. The Taliban would also need to have representation on such a commission.

### ***The First Draft of the Constitution***

The Bonn Agreement made no mention of a CDC, or any other mechanism for accomplishing the constitutional drafting process. While the creation of the CDC was considered a logical first step, there was little or no guidance on how it should go about its work—it had been tasked to prepare the first draft without further guidance. It had to develop its own rules of procedure, protocols for interacting with other entities and reporting structure, which were time-consuming and not transparent to the larger community of stakeholders and the public at large. In the future, the rules of procedures, protocols and reporting structure may be developed by the establishing authority in consultation with other stakeholders, including representatives from civil society and constitutional experts. The constitutional process, however, would also need input from the public as well as experts to ensure transparency, openness and broad support for the process.

Details of the constitutional process required extensive consultations with political leaders as well as constitutional experts, especially those experienced in post-conflict environments. UNAMA assisted in this regard, working closely with the Secretariat of the CDC. But, absent core U.N. funds, the structure of international assistance was slow to move. To commit support, donors wanted clarity about an unclear process, leaving the CDC without basic support, from supplies and equipment to salaries and communications capacity. Budget and resource questions are, therefore, essential to answer in parallel with questions about a constitution drafting commission's mandate.

Hasty preparation and lack of relevant experience led to a problematic first draft of the constitution. Amid this chaos, the CDC was expected to draft a constitution that addressed fundamental and controversial topics such as the structure of the government (presidential, parliamentary or mixed system), the legal role of Islam, personal freedoms, the role of the judiciary and the degree of power to be exercised by the central government vis-à-vis local government. Karzai initially directed the CDC to produce a draft within two months of its formation. It is apparent now (and, arguably, should have been apparent then) that this timeline was wholly unrealistic given both the practical and substantive challenges the commission faced.

The first draft was in fact not submitted until early April 2003, six months later. It was not released to the public, and its circulation among the stakeholders was limited. The draft was largely based on the 1964 constitution, remained vague on some of the key issues and was criticized as being rather rough absent a careful technical review.

# Constitution Review Commission and Second Draft

## ***Creation of the Constitution Review Commission***

On April 23, 2003, Karzai established the Constitution Review Commission (CRC) by a decree. Its mandate was to review and finalize the draft constitution and submit it to the CLJ for adoption. The CRC had 35 members, seven of whom were former members of the CDC. UNAMA also invited three foreign constitutional experts to advise the CRC: Guy Carcassonne from France, Yash Pal Ghai from Kenya and Barnett Rubin from the United States. Although concern persisted about the constitution being viewed as the product of foreign intervention, these scholars provided input on a number of issues.

Karzai had assembled the CDC in consultation with UNAMA and some key political actors. However, when it came time to appoint the CRC members, the Karzai government was under intense pressure from regional, ethnic, religious and other interest groups to include representatives who would protect their interests. While the CDC may be viewed as a “technical” legal committee, the CRC was a much more diverse body that included not only legal experts, but also journalists, politicians, tribal leaders, religious scholars and other experts.

The CRC proceeded in a somewhat more organized fashion than the CDC, operating under rules of procedure that led to a more structured approach. The commission was divided into four groups whose members were selected to ensure a diversity of backgrounds and ideologies to facilitate a balanced debate. The CRC also had an executive committee, elected by the CRC members. The executive committee was responsible for adjudicating the group’s views and finalizing the draft. Karzai had declared that a CLJ would be held in October 2003, giving the CRC a clear window within which to produce a second draft.

Despite its clearer direction, the CRC’s process again proved rushed. The consideration and synthesis of so many different views, in a period of five to six months, presented an enormous challenge on its own. However, the CRC was also tasked with carrying out a comprehensive, nationwide public consultation campaign at the same time.

## ***Public Consultation***

Although it was originally envisaged that the CDC would begin a public consultation process, the budget for this phase was not released until March 2003, just as the CDC was preparing to submit its draft. Thus, public engagement got off to a late start and largely fell to the CRC to execute.

On March 10, 2003, the Secretariat of the CRC issued an outline of the public consultation process. The plan called for the members of the CRC to travel in teams to meet with the public in as many districts and villages as feasible. Arrangements were also made to reach large Afghan refugee communities in Iran and Pakistan. Eight regional and four foreign offices were established to support the process. The delegates were instructed, particularly, to include community and tribal elders, ulema, women, members of the Emergency *Loya Jirga*, businessmen, professors, professionals, youth, NGOs and intergovernmental agencies in their consultations.

A total of 555 public gatherings were conducted in all 32 provinces (at that time) of the country. While the CRC members did a commendable job in reaching a large segment of the public, the effectiveness of

the program merits some questioning. First, the public consultation took place without a shared draft of the constitution for fear of disrupting the larger process on account of key, polarizing issues.

Second, the content of the consultation materials was hard to understand by those engaged given the low literacy rate in the country and the lack of familiarity of the general population with constitutional concepts and structures. While many issues came up during the consultations, the focus of the consultations often revolved around the role of Islam in the state, the protection of human rights, the structure of the executive branch and the relationship between the central and local government. However, many people struggled with these concepts. After years of war and poor living conditions, they were more interested in how their situation would be improved by the government than with the particulars of its structure. This may also be the case today but with the critical difference that the public and the political elites are more familiar with the constitutional and state structure issues and more likely to understand the impact of the constitutional framework on their lives.

Third, the public outreach program tried to reach the maximum number of people and relied heavily on the distribution of questionnaires. The questionnaire prepared by the CRC was too complicated for the public to understand. It inevitably included difficult and specialized terminology and offered multiple choice questions.

Despite many challenges, the public consultation process was unprecedented and met the laudable goal of bringing the public into the process—more than 500 meetings were held and more than 10,000 comments were recorded. The views gathered were collated and then discussed in meetings of the CRC and did help improve the draft. That said, if the duration of the public education and consultations was longer (for example, six months), the process more creative in reaching various sectors of society, the concepts better communicated, and in-depth views recorded then their impact would likely have been greater.

One obvious opportunity for improvement in a new constitutional review process is to engage experts on the design of any public engagement process. Consultation tools must be carefully designed to reach the intended audience and to elicit useful responses. While questionnaires certainly may have a place in a public education campaign, they have value only when carefully crafted with respondents in mind. Television, the internet and social media are now available and widespread today to advance a robust educational campaign that involves in-person and virtual engagement. Similarly, the growth of community-based development and civil society organizations, as well as the establishment of provincial councils and the National Assembly, provide other fora for more in-depth consultations at local and national levels.

Finally, any attempt to conduct a public education campaign without releasing drafts of the proposed constitution will subject the process to intense criticism. In 2002 and 2003, there were valid concerns regarding the fragile nature of the country and the religious, ethnic and other divisions that threatened the fledgling nation-building project. In today's environment, marked by a more politically aware public, highly engaged civil society organizations and a free media, a lack of transparency in any drafting process will prove harder to justify.

### ***Finalizing the Draft***

After two months of public consultations, the CRC teams returned to Kabul to discuss their findings and to continue their deliberations on a second draft. Submission of a second draft was delayed until late September 2003, which, in turn, necessitated a delay of the CLJ from October to December.

Before sending the new draft to the CLJ, the CRC had a series of consultations with international experts, political actors and the government; some criticized the government's involvement as contrary to the rule of transparency as the meetings were not publicized and subjected the CRC to undue political influence. Some key revisions in the draft were made during this period, including on issues such as the Constitutional Court and the nature of the executive. Soon thereafter, before the start of the CLJ, the draft constitution was released to the public.

The process certainly would have benefitted from clearer guidelines in terms of the authority different entities had or did not have to intervene in the process. Any future drafting and review process should be set forth with clearer guidelines.

## **Constitutional *Loya Jirga***

The CLJ was convened on December 13, 2003, with 502 indirectly elected members. The members were selected through a time-honored process where each district chose in open meetings a number of delegates based on the population of the district. The delegates traveled to the provincial seat where the provincial representatives were then selected through secret votes. The election procedure allowed refugees living in Pakistan and Iran, as well as the Hindu and Sikh communities in Afghanistan, to elect 42 representatives. The presidential appointment of 50 delegates met criticism for interfering in the process, but nothing within the loose framework agreed in Bonn prohibited that.

Following the opening ceremonies, Karzai nominated (and received open support from nearly all CLJ members) Sibghatullah Mujadedi, a former president and a spiritual figure, as the chairman of the CLJ. The CLJ was then divided into 10 working groups composed of 50 members each, all of which were tasked with studying the entire draft. The division of the CLJ into groups, a presumed first in any CLJ, made it possible for each member to consider and express his or her views on the entire draft constitution. A Reconciliation Committee was then created, composed of the heads of the 10 working groups plus the executive staff of the CLJ, to synthesize the different views and incorporate them into the draft constitution. By most accounts, the Reconciliation Committee did an admirable job, given the challenge of harmonizing such a diverse set of opinions.

On December 30, 2003, the committee promulgated a draft, but some factions claimed it had not properly reflected their views and threatened to leave the meeting. Clarifications to the members and discussions among key leading figures calmed the situation. On January 3, 2004, the leadership of the CLJ announced that the next day, January 4, would be the *jirga's* last day. On January 4, the delegates were asked to show support for the new constitution by standing up: almost all delegates did so, resulting in the ratification of the constitution.

The CLJ had a viable structure, rules of procedure and allowed for an open exchange of views. However, it lacked a clear mechanism for the constitution's adoption. Moreover, the failure of support and logistic mechanisms (e.g., printing of updated drafts) proved a cause for some controversy. Both limitations should be addressed in any future process.



## Conclusions and Recommendations

### ***Ensure Adequate Time and an Enabling Environment for the Constitutional Process***

In hindsight, one of the key failings of the Bonn process was that the stakeholders agreed to adopt a new constitution—a project of enormous complexity—within a tight, preset time period. Furthermore, the emphasis on the part of the international community and the government was to keep the Bonn process “on track” even when preconditions for the process, such as disarmament of militias and the establishment of national forces, were lagging far behind. Without a suitable enabling environment for an open and free debate of issues, the constitutional process remained restricted and lacked the transparency on account of concerns that the process might be dominated by armed groups, in particular in the rural areas. While the constitution was eventually ratified with a delay of about six months, it was done so through a rushed and sometimes nontransparent process, including the failure to share the draft constitution during consultations. That process was driven more by a deadline at the expense of broad involvement of the public and satisfaction with the final product. Any future constitutional process should provide adequate time for public engagement and extensive debate, and create the suitable enabling environment, such as security, to conduct consultations across the country.

### ***Create a More Effective Support System***

Because the Bonn process provided only a high-level framework, the initial working process and internal coordination among the various stakeholders proved weak. Funding was uncertain and technical leadership was missing. Any future process should begin with clearly defined roles for all of the stakeholders, as well as efficient funding and technical mechanisms. Special attention must be given to the early establishment of a technically sound and resourceful secretariat that can quickly lift the project off the ground and manage the necessary resources for thorough and extensive public education and consultation campaigns. The secretariat’s role and authorities should be well-defined and made public.

### ***Develop a More Inclusive and Transparent Process***

In 2002-03, legitimate debate arose about the degree to which details about the drafting process should be shared with the public. While the state-building process is ongoing, in 2020, the Afghan state is not as fragile as it was in 2002; stronger institutions are now in place as is the collective experience of almost of two decades of democratic, even if weak, governance. The country has sustained almost two decades of open and (mostly) peaceful debate over key issues of concern (then and now): the role of Islam in government; the power of the central government vis-à-vis the provinces; the respective merits of presidential, parliamentary and mixed systems; women’s rights; and so on. Since the core issues are known and the space is relatively open for various groups to express their views, there is less reason for concern that the process will be dominated by any one group at the expense of others. There is, in other words, good reason to make any draft constitution open for public debate with the aim of promoting national unity, reconciliation and trust between the government and citizens.

### ***Provide More Effective Public Education/Consultation***

Even as the CRC worked hard to reach every province in Afghanistan, as well as refugee communities abroad, the effectiveness of the approach may be questioned, from the heavy reliance on complicated surveys to the larger mismatch between the educational materials and the public’s knowledge at the time. Improved research and consultation instruments, paired with social and other forms of media, will

enable more effective forms of information exchange. Adequate time and resources should be devoted to ensure that the public is fully informed about the constitutional process and issues and can properly provide their input.

The widespread use of internet and mobile phones in the country allows increased participation of the public in the process and the perceived legitimacy of any constitutional process. These technologies should be used to educate Afghans about the process issues and to seek their views and concerns, keeping in mind the limitations and different impact of the technologies on diverse groups. Similarly, the drafters should take advantage of the technological advances to engage scholars from around the world on specific constitutional issues.

### ***Draw from Diverse Experience for a Drafting Commission***

The original CDC was made up exclusively of persons with legal backgrounds, roughly divided between those with expertise in traditional and Islamic law. Whatever their qualifications, a group of lawyers alone should not be responsible for drafting a constitution. Any drafting or review commissions should include members from diverse backgrounds and disciplines, and with expertise in subjects like political science, economics, human rights and elections. While the drafting process should necessarily be led by Afghans—and there are many Afghans now trained in constitutional issues—drafting-related efforts should include the advice and input of international experts.

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