**The Dangers of Deemphasizing Individual and Group Interests in Constitution-Making: Afghanistan and Beyond**

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Abstract

Constitution-making is usually considered as a deliberatively higher form of lawmaking and that constitutions should represent expressions of broader, longer-term public interest and far-sighted institutional design. This conception of constitutional politics associated with theorists like Carl Schmitt, Emmanuel Sieyes, Bruce Ackerman and Jon Elster, deemphasizes the role of short-term political interests in constitution writing. Elster, today the most influential of these thinkers, argues that because constitutions are written for the indefinite future and for the future generations, constitution-makers should look beyond their own horizons and interests. Elster believes that short-term notions of individual, group-based or institutional interests always hang over any political process including constitution-making like a Sword of Damocles, playing a key role in these processes. Elster and like-minded scholars do point out though that constitution- making is no place for self-interested political bargaining, “horse-trading” and “logrolling.” Therefore, those who draft democratic constitutions (most favorably members of a specially convened constituent assembly) should be driven by conceptions of a broader, longer-term public interest, reason and rationality.

Building on the history of constitution-making processes in Afghanistan, specifically the history of the drafting of the 1993 mujahidin constitution, this paper argues that individual and group-based interests and shortsighted political bargaining in constitution-making during turbulent political change cannot be wholly disregarded. Successful constitution-making procedures in unstable political environments are usually designed in a way that ensures all powerful groups realize some, if not all, of their short-term political goals. Furthermore, recent constitution-making and unmaking episodes in Central Asian countries like Azerbaijan, Tajikistan, Turkmenistan and Kyrgyzstan suggest that constitutions are essentially products of the same kinds of political maneuverings and shortsighted reasoning that make up ordinary politics, and the decision by a powerful actor to respect or disrespect a recently drafted or amended constitution seems to be the product of the same calculus that leads them to obey or disobey ordinary legislation. Most constitution-making processes during dramatic political change, like the making of the 1993 mujahidin constitution, failed not because of too much passion, interest and shortsighted political bargaining but because of too little attempts on the part of constitution makers to directly engage and incorporate them. It is thus hard to separate constitution-making from the blade of self-interested political bargaining and short-sighted reasoning among powerful actors. In short, constitution-making during volatile political transition will be successful, stable and just if they reflect the existing power structure and directly engage the interests of powerful actors – actors who have the ability to credibly threaten any constitutional order.

This paper makes two major contributions to the growing body of scholarship on constitution-making processes. First, it adds a number of crucial case studies – Afghanistan and countries of Central Asia – to the literature on constitution-making process. Second, it examines

how Afghanistan’s understudied constitutional history and insights from the recent episodes of making and amending constitutions in Central Asia can help us understand, and arguably revisit, some of the common claims that comparative constitutional theorists have made about successful constitution-making and amending processes.

**Key Words**: Constitution-making, Constitutional Amendment, Public Interest, Reason, Short- term Interest,