

# **Forms of Government and Electoral Systems**

## **Summary of Briefing Papers for the Constitutional Drafting Commission of Afghanistan**

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This paper is designed to be read in conjunction with papers on these subjects by Yash Pal Ghai, Bereket Selassie, Donald Horowitz, William Maley, Jose Cheibub, and Benjamin Reilly. It draws on all of them but does not fully reflect all of their views.

During the thirty years since Afghanistan's monarchy was overthrown, the country has been unable to reestablish a legitimate form of government. The monarchy remains a divisive issue, and His Majesty Muhammad Zahir, the former king of Afghanistan and Father of the Nation, has stated that he does not support its restoration. Hence, we consider here only republican alternatives.

Islam unifies the people of Afghanistan, but Islam prescribes basic principles of government, not a particular form. These principles include shura, or consultation. This idea, that the ruler must consult with the ruled, can be realized in the modern age through a form of elected republican government, combined with public freedoms and respect for Islamic principles as part of the constitution. Interpreting and implementing these principles is the right and duty of the entire Muslim nation, not of any particular group.

The years of armed conflict and foreign intervention have on the one hand left Afghans with fragmented, weak, and ineffective institutions of government, have divided Afghans from one another, and have mobilized many parts of the population, who now have higher expectations from government. Hence, a new constitution must balance the sometimes-conflicting goals of building strong institutions that can govern Afghanistan effectively and providing mechanisms for both reconciliation and broad participation. Afghanistan, which is receiving international aid and scrutiny, now also seeks full membership in the international community, and the new institutions must therefore conform to the extent possible to international standards of governance.

The form of government includes two different though related aspects:

- The structure of the national government, especially the executive: this mainly poses the choice of parliamentary or presidential forms of government, including different versions or combinations of the two; and
- The division of powers between central government on the one hand, and provincial and lower levels of government on the other; sometimes this is depicted as a choice between a unitary and federal state, though some unitary states allow considerable decentralization and some federal states grant most powers to the center.

The papers summarized here deal with the first question; other papers, summarized separately, deal with the second. The role of the judiciary, and in particular the power of judicial review, is also dealt with separately, in connection with the proposal for a constitutional court.

### **Institutional Needs of Afghanistan**

Institutions must also take into account realities of Afghanistan, including:

- The need for national reconciliation due to the country's recent emergence from violent conflict;
- The strength of regional, ethnic, and sectarian loyalties, so that different regions of the country are associated with different political perspectives and leaders, but few regions are homogeneous;
- The desire of the population for a uniform administration based on legal rights, rather than arbitrary rule by the gun;
- The weakness of the administration;
- The lack of a census and the intense controversy over the relative population of different regions and ethnic groups of the country;
- The scattered distribution of the population and poor transport and communications;
- Low levels of literacy and numeracy;
- Respect for elders, religious figures, and other local leaders; and
- The weakness of political parties.

### **Executive**

According to some widespread but overly simplistic analysis, presidential government and a unitary state provide for a stronger central government and more stability, while parliamentarism and federalism provide for more participation and recognition of diversity. Parliamentarism seems to provide more institutional mechanisms for power sharing. Many therefore favor it for states emerging from conflict. Parliamentarism, however, is more effective when political parties that share power are strong.

Presidentialism provides for more concentration of power and stability, since the term of the executive is fixed, not subject to votes of confidence. This makes this system seemingly attractive for effective governance, but it increases the danger of abuse of power, since in parliamentary systems the prime minister can be removed by a vote. The rules for such a vote vary, making it easier or more difficult to remove a prime minister.

The biggest danger of a presidential system is that one group would win an office with tremendous power, while all others consider themselves losers. In a society where one historically dominant group includes from 40 to 50 percent of the population, a presidential election could constitute a referendum on whether or not that group should rule. A member of that group might win with almost no support from others; or that group might be divided, leading to victory by a member of a smaller group without a national constituency. In any case, especially because the conduct of the election will inevitably be flawed, the losers might not accept the results, throwing the country back into war.

In countries emerging from conflict, power sharing may be necessary as a transitional measure, as in the interim and Islamic transitional administrations of Afghanistan. A constitution may require executive power sharing for a period of time as a transitional measure, but this is easier to implement in a parliamentary system. Otherwise it is left to the political realm.

In practice, both systems can be structured to compensate for their weaknesses. Afghanistan's predominant political traditions favor presidentialism (previously monarchy) and a unitary state, though important minorities champion federalism. In view of these predilections, it may be most useful to devote efforts to creating a presidential system and a relatively decentralized unitary state that provide for effective governance, national unity, inclusiveness, reconciliation, and local participation in ways that recognize the concerns of advocates of parliamentarism and federalism.

The combined system including both a president and prime minister with different duties compensates for some of the shortfalls of both systems. It also leaves one executive official in place in case one dies or is incapacitated. This system, however, risks creating two competing centers of power, which is probably not healthy for a polarized society emerging from conflict. If the president is reduced to a figurehead, such a system approximates a pure parliamentary regime.

**Presidential elections.** If Afghanistan chooses a presidential system, presidential elections should not take place by simple majority or plurality. Elections for the president should be designed to assure that the president has a truly national constituency, rather than a regional or factional one. One method, used in different versions in Nigeria, Kenya, and Indonesia, requires that a successful presidential candidate receive a majority or plurality of the national vote, plus a reasonable distribution of votes among the provinces. In Nigeria the winning candidate must receive a plurality of the national popular vote plus at least 25 percent of the vote in two thirds of the provinces. This system must provide for another mechanism in case no candidate meets these criteria, such as a vote by the legislature among the top vote getters.

Another system asks voters to rank the candidates, indicating at least their first and second choices. The candidate with the lowest number of first choices is eliminated and the second choices counted as first, and so on, until one candidate obtains a majority of the valid votes. This system is more difficult to implement with a largely illiterate

electorate, but there are ways to compensate for this difficulty through design of the ballot and polling system.

In Eritrea, the legislature elects the president from among its members. Once elected, the president leaves parliament and appoints a replacement for himself and becomes an executive president. His term coincides with that of the legislature. This allows for negotiation over the presidential election and also provides for a simple method of succession in case the president dies or is incapacitated in office.

Presidential elections may coincide with legislative elections, in which case the legislature will be more favorable to the president, and governance will be more stable, or be held separately, in which case the chances are higher for a legislature controlled by the president's opponents, which may increase accountability.

**Powers of the president.** These must be designed as part of a package with the powers of the legislature, as well as the mode of election of the latter. They should assure stable and effective government without creating arbitrary power or excluding diverse opinions.

The president should have the powers to declare war if the country is attacked, carry out foreign relations, declare a state of emergency under specified conditions subject to legislative approval (see paper on that subject), issue currency, and conclude public debt, subject to law. Other powers need to be designed carefully:

- **Introducing legislation.** This important power can provide for governance that is more coherent. The president and his government could have exclusive right to propose a budget as well as legislation in some other areas. The president may also have the right to declare certain bills urgent, requiring a vote in a specified period of time (30-45 days).
- **Veto.** The president may have a veto over legislation; the partial veto (known in the United States as the line-item veto), the ability to reject specific paragraphs of legislation, rather than having to approve or reject an entire bill, makes the president more powerful. An alternative as a check on presidential power is to deny the president a veto but empower him to forward a bill to the constitutional court, if such an institution exists, to determine its constitutionality.
- **Decree power.** Especially as the Afghan parliament will probably not sit throughout the year, and as it will be difficult and time-consuming to convene an extraordinary session, the president will probably have to have the power to issue decrees. All presidents can issue executive orders implementing legislation. The president could also be empowered to make law by decree when the parliament is not in session or even on urgent matters when parliament is in session. Such laws should lapse after a certain time (90 days?) unless approved by parliament. One alternative is to retain a standing committee of the legislature during recess in order to review decrees.

- **Judicial review.** If the judiciary, constitutional court, or human rights commission have rights to review legislation or government action for violation of fundamental rights (see paper on this subject), this should also apply to presidential decrees and other actions.
- **Control over security forces.** Civilian control over the various armed groups in the country is the central issue in governance. The constitution should make it clear that civilian authorities have full power over all military appointments, supply agreements, budgets, and deployments. The civilian authority in question could be either the president, or, to reduce the danger of concentration of power, a civilian Higher Council on Defense. The constitution might provide for harsh sanctions against any security officials defying such regulations.
- **Combinations.** The combination of exclusive right to introduce the budget, power to declare bills urgent, partial veto, and broad decree power has created stable governance under strong presidents in Brazil and Chile. But these countries do not have the same degree of internal conflict and division as Afghanistan.

**Term limits and succession.** The constitution will also have to determine the length of presidential terms and whether there will be a limit on the number of terms a president can serve. Executive presidents in poor countries often become presidents for life ruling by patronage and corruption. Term limits prevent incumbents from retaining the office indefinitely and abusing its powers but also remove the sanction of possibly losing the next election.

In an unstable country like Afghanistan, the constitution must pay particular attention to what happens if the president dies or is incapacitated in office. He might have a single vice president or multiple vice presidents, elected with him on the same ticket. The current system, under which four vice presidents are chosen from different factions or regions as a power-sharing mechanism, carries the risk that presidential death or incapacitation could result in a significant political shift, which is dangerous, as many realized after the assassination attempt against President Karzai. A new president could be elected for a specified period of time by the legislature, pending a new national election. The mechanism of succession must be absolutely clear down to four or five degrees, so as to avoid succession crises.

### **Legislature**

For Afghanistan's government to be effective, the legislature should not be excessively factionalized, but it must allow opportunities for the representation and expression of minority viewpoints. These concerns should be addressed through a combination of structure, electoral systems, powers, and rules of procedure. A legislature in a parliamentary system must be able to produce effective majorities and agreement on programs in order to govern. A legislature in a presidential system can express diversity more, provided that the rules for initiating and approving legislation are apportioned

between the legislature and the executive in such a way as to provide for coherent policy making.

**Structure.** The 1964 constitution provided for a bicameral legislature, and there are strong reasons to retain it. Afghans want the democratic representation of a lower house, but the tradition of representation by elders and dignitaries, as well as the need to assure representation of women and minorities, calls for an upper house chosen through some combination of direct election, indirect election, and appointment. The upper house may have the power to delay, but not initiate or overturn legislation. Given Afghanistan's traditions and history, it would be appropriate to retain the Loya Jirga as the highest, but extraordinary, representative body of the state.

**Legislative elections.** Given the weakness of parties and the importance of regional and local interests and identities, the legislative electoral system must provide for territorial representation. To promote national reconciliation, the electoral system should provide incentives for candidates to form broad coalitions of support. Constituencies should be delimited to minimize conflict over how fair representation is.

The best-known systems for legislative elections are the "first past the post" system used in the U.S. and U.K. and the closed list proportional representation system. Neither is suitable for Afghanistan. In the U.S.-U.K. system, each constituency has an approximately equal population and elects one candidate. The winner is the individual who wins a plurality of votes. Without a reliable census, the delimitation of such constituencies in Afghanistan will cause conflict. This system also does not provide for representation of minority opinions. Under the simplest form of proportional representation, the whole country is a single constituency where voters cast their ballots for parties, not candidates. Each party presents a ranked list of candidates, and seats are allocated to parties according to their percentage of votes. This system requires strong political parties and does not provide for geographical representation. "Open-list" proportional representation, in which voters can choose names from lists presented by parties, would be difficult to implement in a country with such a low rate of literacy.

Once a census whose results are widely accepted has been carried out, constituencies could be delimited based on population. These constituencies could elect either single or multiple members. Until that time, William Maley has suggested another alternative. Each province (or other territorial unit) could be considered a constituency. The electoral commission will allocate seats to each province after the election in proportion to the total number of valid votes cast in that province. If the legislature contains 320 seats (an average of ten per province), then a province that casts 15 percent of the ballots in the country would receive 48 seats (15 percent). This system creates incentives for local elites both to encourage voter turnout (including by women) and to commit certain types of fraud (underage balloting, ballot box stuffing, repeat voting), which would have to be guarded against.

This system requires multi-member constituencies. Given the heterogeneity of the population in many areas of Afghanistan, it may be advisable to maintain multi-member districts in the future to assure representation of local minorities. The full papers describe

numerous voting systems that could be considered for such constituencies, some more appropriate than others for the conditions of Afghanistan.

If the transitional election in June 2004 uses the multi-member constituencies suggested above, several electoral systems can be used. Maley suggests a combination of proportional representation based on provincial party lists (which could be feasible at the provincial level) and approval voting. In the latter system, voters simply mark all the candidates they approve. If the province has the right to elect five voters by approval voting, the five candidates with the highest totals are elected.

Another alternative is the single non-transferable vote system, which the Independent Commission for Convening the Emergency Loya Jirga used for second-stage elections, at least in Jalalabad, where I observed them. Each voter cast a ballot for one candidate. If there were four seats from one uluswali, the top four vote getters were elected. Ties were resolved by casting lots, but ties would be much less common in a general election with thousands of voters than in an electoral college of about sixty voters. This system does not encourage coalitions, but it is relatively simple to participate in and administer.

**Legislative powers and procedures.** If the electoral system creates a legislature whose lower house provides broad representation of Afghanistan's diversity, and parties that might discipline the legislature remain weak, the legislature will be unlikely to work in a disciplined and focused manner. Hence, the president's sole power to initiate legislation in certain areas, to issue decrees, and to designate legislation as urgent may be needed to foster more efficient governance, even as the parliament articulates a wide range of views and serves as a check on presidential power. A key issue will be whether parliament will have the power to amend, as opposed to approve or reject, the government's budget. In a society like Afghanistan, power to amend the budget or to originate budgetary or fiscal legislation may create an endless series of patronage demands and detract from the ability of legislators to debate a national agenda.

The legislature should have the right to question members of the government, and particularly members of the security forces, perhaps in committee hearings. The legislature should not have the right to amend the constitution, which might be reserved to a super-majority (60 percent or higher) in the Loya Jirga.

The lower house (wulusi jirga) should elect a chairman or speaker to preside over the work of the house. The speaker should have the power to establish committees and to hire staff. The chairman should have the power to promulgate rules for the work of the house. These rules, while probably not specified in the constitution, will be extremely important to the functioning of the institutions and should receive serious attention in the light of international experience.

### **Statutory Offices**

The constitution could also provide for a number of independent office-holders not directly beholden to any of the branches of government. These could be appointed by the

president and approved by the legislature for relatively long terms that do not coincide with those of elected officials.

Statutory officials could include: solicitor general (muda'i-yi 'umumi); director of public prosecutions or attorney general (loya saranwal); director of the Central Bank (Da Afghanistan Bank); chair and members of the human rights commission, to investigate human rights violations and refer cases to court; chair and members of the civil service commission, to review appointments to upper levels of the administration in order to minimize patronage, nepotism, and corruption; chair and members of the judicial commission, to review and propose candidates for the judiciary; an ombudsman for citizens' complaints against the government, including a separate division for women's complaints; an auditor general to monitor budget and expenditures of the government; and the chair and members of the electoral commission.