

Evolution of the Executive Branch in Afghanistan:

A Look Back and Recommendations on the Way Forward

Kawun Kakar, Thomas Kraemer and Homayoun Raofi

August 2017



15 YEARS
OF HIGH-QUALITY
RESEARCH



Afghanistan Research and Evaluation Unit

Issues Paper

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The information and views set out in this publication are those of the authors and do not necessarily reflect the official opinion of AREU.

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About the Afghanistan Research and Evaluation Unit

The Afghanistan Research and Evaluation Unit (AREU) is an independent research institute based in Kabul. AREU's mission is to inform and influence policy and practice by conducting high-quality, policy-relevant research and actively disseminating the results, and by promoting a culture of research and learning. To achieve its mission AREU engages with policymakers, civil society, researchers and students to promote their use of AREU's research and its library, to strengthen their research capacity, and to create opportunities for analysis, reflection, and debate.

AREU was established in 2002 by the assistance community in Afghanistan and has a Board of Directors comprised of representatives from donor organisations, the United Nations and other multilateral agencies, and non-governmental organisations.

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About the United States Institute of Peace

The United States Institute of Peace works with the Afghan government and civil society organizations to address underlying causes of instability by strengthening the rule of law, countering violent extremism, expanding peace education, and promoting better governance and anti-corruption efforts. USIP also supports policy-relevant research on current causes of conflict in Afghanistan.

Acknowledgements

Dedicated to the memory of Naqib Khpulwak, the young legal scholar and professor, whose life was cut short in a terrorist attack on August 24, 2016, at the American University of Afghanistan. Naqib managed Rule of Law projects for the United States Institute for Peace, including this research paper, on behalf of the people of Afghanistan.

Foreword

The Afghanistan Research and Evaluation is proud to present you with the second phase of its work under the thematic area of Constitutional Research in partnership and with generous financial support from the United States Institute for Peace (USIP). In the first phase, the research focused on overall constitutional reform topics. However, over the course of this process, it became clear there was a need for further expansion on research of the 2004 Constitution. As a result, in this current phase, the two papers presented are the result of a rigorous process of field research, stakeholder consultations through open dialogue, peer-review and quality assurance processes that are AREU's built-in system to produce high quality results.

In this phase, AREU in collaboration with USIP, have brought in a diverse team of researchers and open dialogue participants including scholars, politicians, government officials and civil society leaders in order to produce knowledge through interactive discussions and discursive debates to further enrich the findings of this paper.

The Evolution of the Executive Branch in Afghanistan is one of the two papers for the second phase of Constitutional Research, which was prepared by authors and Afghan Constitution experts Kawun Kakar, Thomas Kraemer and Homayoun Raouf from Kakar Associates Law Firm. The paper highlights the issues with legitimate change into the Afghan political system such as the convening of the Loya Jirga based on the Article 111 of the Constitution.

As a leading think tank on the Constitutional Research, AREU is grateful to open up this space with evidence-based research for further dialogue and discussion on issues related to the implementation of the Constitution.

It is my desire that this publication will contribute to knowledge production as well as support overall constitutional reform processes.



Dr. Orzala Nemat

Director, AREU

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1. Introduction

Constitutional government—the form of government adopted by virtually every country in the world today—is the embodiment of philosopher John Locke’s “social contract.” Locke posited that people will willingly accept abridgment of their absolute freedom in exchange for a government that promotes the common good. While this principle seems simple enough, there are many variations of constitutional government that have been implemented, and centuries later countries such as Afghanistan still struggle to decide upon a format that suits their needs.

Most constitutions rely on the concept of separation of powers to prevent the concentration of political authority in the hands of a few people, and thereby promote a democracy. A key component of a democratic form of government is the executive branch, which implements the policies of the government and the laws passed by the legislature. However, the executive branch may take various forms, and it is imperative that the chosen structure be appropriate to the needs of the country.

Although Afghanistan has had a constitutional government, at least in name, since 1923, the concept of true separation of powers in its present form was first introduced in the 1964 Constitution of Afghanistan. Although Afghanistan underwent decades of turmoil, and adopted several more constitutions, the 1964 Constitution is considered the model for democratic government in Afghanistan, and served as the foundation for the current Constitution.

The current Constitution of Afghanistan was ratified in 2004. The ratification process, which took place with significant international assistance, resulted in the adoption of an Executive Branch with authority concentrated in a directly-elected President with broad powers. This type of government was deemed more suitable than other structures given Afghanistan’s status as a post-conflict country, relatively short history of democratic government, and lack of strong political parties.

After the 2014 Presidential election ended in controversy, Afghanistan adopted a “National Unity Government” (NUG) as a compromise measure. Under the agreement that created the NUG, the position of Chief Executive Officer was created by presidential decree. Thus, Afghanistan’s Executive Branch arguably was transformed into some sort of a dual executive structure—a format that was considered and rejected during the 2004 Constitutional drafting and ratification process.

Both the validity and the effectiveness of the NUG have been questioned by the Experts interviewed for this paper. These problems are also discussed in numerous books, articles and research papers reviewed during desk research. These texts, in addition debating the constitutionality of the NUG, generally highlight problems such as the system of Vice Presidents, the poorly-defined role of Chief Executive Officer, the no-confidence votes from Parliament directed to individual ministers, and the question of the appropriate body to interpret the Constitution.

Some studies have been conducted recently regarding the amendment of the current (2004) Constitution of Afghanistan. One of these studies produced a paper by AREU under the title of “Afghanistan’s Constitution Ten Years On: What Are the Issues?” This paper was published in August 2014 as part of the “status and evolution of constitutional and legal debates ten years after the adoption of the Afghan Constitution²”.

In August 2016, the Afghanistan Institute for Strategic Studies (AISS) published a paper under the title of “Afghanistan’s Constitution and the Society in Transition.”³ The major objective of this paper was to assess the public level of awareness of the Constitution and to suggest amendments.

1 Afghanistan Research and Evaluation Unit, *Afghanistan’s Constitution Ten Years On: What Are the Issues?* August 2014, 1416E, available at: <http://www.refworld.org/docid/53fc4dd34.html> (accessed 2 Aug. 2017).

2 Afghanistan Research and Evaluation Unit, *Afghanistan’s Constitution Ten Years On*, available at: <http://www.refworld.org/docid/53fc4dd34.html> (accessed 2 Aug. 2017).

3 http://www.aiss.af/assets/aiss_news/4deda9ab7003ca61b0fc82fd02f50b8c.pdf.

This research builds on previous studies by specifically analysing the role of the Executive Branch in the Afghan governmental structure. Therefore, this paper attempts to synthesize Afghanistan's unique context with the existing constitutional models in order to suggest a way forward.

1.1 Importance of the Executive Branch

In any constitutional model—indeed in any government—there typically is an executive that serves as the head of state. The Executive may be an absolute ruler, purely a figurehead or, often, somewhere in between; however, under modern theories of governance, the Executive exercises authority in and holds responsibility for the state through enforcing the laws passed by the Legislature and the policies of the government. “For post-conflict states in transition, the executive branch is especially important because it is the primary component in shaping the government.”⁴ Thus, an ineffective executive is the death knell for a post-conflict governmental system.

1.2 Afghanistan's Current Constitutional Model

The current Constitution of Afghanistan, adopted in 2004 provides for a presidential system in which the Executive Branch is headed by a President, and includes independent Legislative and Judicial Branches. Since 2014, Afghanistan has operated under the politically-brokered NUG, which includes not only a President, but also a Chief Executive Officer (CEO), perhaps equivalent to a post of Executive Prime Minister. The National Unity Government Agreement, a signed copy of which is not publically available, provides that the CEO shall preside over the weekly meetings of the Council of Ministers, which is stated to be responsible for implementation of executive affairs of the government. The Agreement also indicates that the CEO shall have other unspecified powers, such as implementing the reform program of the NUG. The Agreement requires that the CEO be answerable to the President and that the CEO's powers be defined through a Presidential Decree.

Further, the Agreement requires the establishment of a Commission to draft an amendment to the Constitution and convening of a Loya Jirga within two years to consider the post of an Executive Prime Minister.

1.3 Purpose of this Study

Thirteen years after the adoption of the 2004 Constitution, it is appropriate to assess how Afghanistan has fared under its adopted system of government and, specifically, whether the Executive Branch is suited to meet the needs of the country. To put this in context, this paper first reviews the role of the executive branch under classic forms of government, then provides a brief history of various Afghan constitutions, beginning with the version adopted, post-independence, in 1923. The paper then analyses how and why Afghanistan adopted its current Constitution and how that model has served the country. Finally, this paper presents conclusions and recommendations on the way forward.

⁴ The Public International Law & Policy Group, “Post-Conflict Constitution Drafter's Handbook” (Nepal: National Democratic Institute for International Affairs, 2008), 4.

2. Methodology

This study sought to objectively explore both first- and second-hand sources pertinent to understanding the executive branch in the Afghan context. First, an extensive literature review was conducted. Information from the desk research then informed qualitative research designed by the authors, which primarily utilised Key Expert Interviews (KEIs).

2.1 Desk Research

The research included a comprehensive review of available public sources in print and electronic form, and reviewed all of Afghanistan's Constitutions, as well as available commentaries on them; reference materials on various constitutional theories and models, from classical through contemporary sources; studies and analyses on the concept of separation of powers, with particular emphasis on the role of the executive branch; and criticism and commentary on the 2004 Constitution of Afghanistan vis-à-vis presidential effectiveness and the NUG.

2.2 Primary Sources

Qualitative data were gathered through KEIs. Each Expert was selected based on his or her experience and knowledge with respect to the Executive Branch of Afghanistan and comparative constitutional law. They were selected to represent the multitude of political orientations and ethnic backgrounds found in Afghanistan and reflected in the Afghan government. Each Expert has been either closely involved in high level government positions or is teaching constitutional and comparative law at the university level. A total of eleven interviews were conducted with statesmen, university professors, politicians, scholars and political analysts, to gain their perspective and insights. The interviews were conducted in Kabul city. However, the knowledge and experiences of Experts are not limited to the situation within the central government; they are also informed regarding the situation of local governments across Afghanistan. We are extremely grateful to all the Key Experts for sharing their views with us.

3. Findings and Discussion

The findings of this paper show that legitimate change in the political system of Afghanistan will require an amended Constitution. The authority to amend the Constitution of Afghanistan has been given to the Loya Jirga in Article 111 of the Constitution. The majority of experts interviewed recognized that in the present situation, there are significant obstacles to convening a Loya Jirga. As a legal matter, it is unlikely that a Loya Jirga could be convened under the Constitution, because (1) Afghanistan has not held District Council elections; and (2) as some of the Experts point out, the legitimacy of the current Parliament is also in question. All but one of the Experts also considered the social, political and security obstacles to convening a Loya Jirga. In particular, some Experts fear that ethnic issues may predominate, leading to the Loya Jirga spending more time debating identity and language issues than it would addressing the structure of the government.

If a Loya Jirga is convened, there are three models of executive branch that may be considered for Afghanistan. All interviewed Experts believe that in the current situation of Afghanistan, the parliamentary model is not viable since, among other things, it typically requires a strong system of political parties. The interviewees uniformly believe that we do not have strong political parties in Afghanistan; rather, the parties in Afghanistan are often little more than armed groups with ties to ethnic concerns or strong local leaders.

Some of the Experts believe that a dual executive model is also not a proper system, since it has been proven as a good model only in democracies with established and independent legal and political institutions, not in relatively new democracies such as Afghanistan. One of the Experts suggested that Afghanistan could follow the Russian or Turkish government structure, with a Prime Minister who has clear responsibilities appointed by the President. However, a majority of the interviewees are against such a system, citing the example of Afghanistan's NUG, which was an interim solution to a political crisis and not deemed to be a feasible long-term structure.

As a result, the view of most of the Experts, and the conclusion of this paper, is that an improved presidential system in Afghanistan is the most suitable, given current conditions. The modifications suggested by the Experts include: adding a third Vice-President, limiting Parliament's power to issue no-confidence votes, clarifying the process of Constitutional interpretation, and improving the local government administrative system.

A unique modification has been suggested by one of the Experts: increasing the number of Vice Presidents to three, with specific, definite, institutionalized positions, and with clear scopes of authority. It was also suggested that the Vice Presidents should be appointed by the President, after the election, to avoid Vice Presidential candidates making promises during the election, in order to engender support for themselves.

Some of the Experts believe that allowing secret and individual votes of no-confidence by Parliament opens the door for corruption and instability. Therefore, some of the interviewees believe that there should be an amendment to the Constitution making the Cabinet as a single entity, not individual ministers, responsible to the Parliament.

All Experts suggested that the organ which has the authority to interpret the constitution should be singular, and clearly defined under the Constitution; all are dissatisfied with the current confusion between the Supreme Court and the Independent Commission for Overseeing the Implementation of the Constitution. Some suggested that a special Constitutional Court should be created, although most were satisfied with vesting power solely in the Supreme Court.

A majority of the Experts interviewed are in favor of the presidential system, with some reforms to delegate more authority and autonomy on administrative affairs to local government. In particular, the Experts believe that local governments are more suited to handle taxation and financial issues, because they are intimately aware of the situation in their area and are better equipped to implement local programs. While the interviewees still support a strong Central Afghan Government, it is recognized that empowering local government, including facilitating local elections, will further good government.

3.1 Separation of Powers

Separation of Powers refers to the division of government responsibilities into different branches to limit each branch from exercising the essential functions of another branch. The purpose of this separation is to prevent the concentration of power and provide for checks and balances.⁵ The background of political theory of separation of powers goes back to thousands of years, where lots of well-known philosophers had different theories about it, among them Aristotle, Aquinas, Machiavelli, Locke, and Montesquieu.

Nearly all of these philosophers were living under non-democratic governments or those with limited democracy. Therefore, much of their writing is either normative or applied to non-democratic governing structures. Thus, much of the development of the philosophy ignored the practical problems of establishing a separation of powers democracy, and by the time of the American Revolution the framers were left long on theory but short on practical advice.

The concept of separation of powers dates back to the ancient Greeks. Aristotle, in particular, was well-known for articulating the idea of government as divided into three basic functions, which he categorised “deliberative,” “magisterial” and “judicial.” The modern tripartite government structure is generally attributed to 17th- and 18th-century Western political thinkers, most notably John Locke, Jean-Jacques Rousseau, and the Baron de Montesquieu. Locke, in his classic *Second Treatise on Government*⁶, argued that a separation of executive and legislative functions is necessary for the preservation of personal liberty; to put the powers of both branches of government in the hands of one person or a small group of people is to invite despotism.

Montesquieu further defined the social contract espoused by Locke and Rousseau by proposing that the administrative functions of the government should consist of executive, legislative, and judicial functions. In *The Spirit of Laws*⁷, Montesquieu held that the three branches should be interdependent, but separate so that the power and influence of any one branch could not exceed that of the other two. Montesquieu theorized that this form of government would result in four benefits to the people:

- If each branch is restrained by the other two, there is less chance that laws will be passed for benefit of one person;
- Individual rights are protected because the system of checks and balances prevents the majority from disenfranchising the minority;
- Each branch focusing on its particular responsibilities increases efficiency; and
- Each branch is accountable to the other two.⁸

3.1.1 Historical Background of Separation of Power in Afghanistan

Afghanistan, from its establishment in 1747 by Ahmad Shah Durrani until 1923, did not have a system of separation of powers and the country did not have a constitution. The power of the Amir, or king, was dependent upon the consent of tribal leaders or Jirgas. Absolute monarchy was dominant during this period and the country was governed by edict. The Amir was the highest religious and civil authority. He signed international treaties, was Chief of the Army, and appointed ministers and the Prime Minister. Administration of justice was the responsibility of religious scholars, who administered justice based on their interpretation of Islamic principles.⁹

5 National Conference of State Legislatures, “Separation of Powers—An Overview,” <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx> (accessed 28 March 2017).

6 Rasoli, Mohammad Ashraf, *Critique and Evaluation of the Afghanistan Constitution, Vol. 2* (Kabul: Sayed Publications, 2010), 47-51.

7 Rasoli, *Critique and Evaluation of the Afghanistan Constitution*, 51.

8 Glassman, Matthew E., “Separation of Powers: An Overview,” (Washington: Congressional Research Service, Jan. 8, 2016), 3.

9 Moschtaghi, Ramin, *Max Planck Manual on Afghan Constitutional Law, Volume 1: Structure and Principles of the State*, (Heidelberg: Max Planck Institute for Comparative Public Law, 2009), 13.

Afghanistan adopted its first Constitution in 1923 during the monarchy of Amir Amanullah Khan. The first Constitution did not have any concept of separation of powers; however, it provided for a State Council with both elected and appointed members. This Council, and lower councils, had only advisory functions¹⁰. It was not until the 1964 Constitution combined the Afghan-Islamic tradition with some core principles of modern western constitutionalism that the concept of separation of powers was introduced.¹¹ Since then, the separation of powers has been embodied in each subsequent Constitution of Afghanistan.¹²

3.2 The Executive Branch

“The executive branch of government plays an important role in any stable democratic state, as many constitutions grant the president/prime minister political, economic, military, and social policy decision-making powers.¹³” Political systems based on the separation of powers distribute authority among several branches (executive, legislative, judicial) to prevent its concentration in the hands of a person or a small group of people. In such a system, the Executive implements, supports and enforces the law as written by the legislature and interpreted by the judiciary.

Constitutions set executive branch powers, which vary from system to system. One of the fundamental decisions for any constitutional framers is to what degree the authority of the executive branch should be limited by the legislature. Implicit in this is the issue of whether the Executive should serve for a fixed period of time, or may be removed by the legislature.

3.3 Functions of the Executive Branch

Depending on the particular powers delegated to it, the executive branch may have wide policy-making, law-making and financial responsibilities. Typically, the Chief Executive, as head of state, has authority to appoint cabinet heads, ambassadors, Supreme Court justices, and other high offices. The executive branch sets and implements both domestic and foreign policy, and often has the authority to declare war.

Although the legislature passes laws, in many systems the executive branch sponsors or drafts proposed legislation, and the President has veto power over laws passed by the legislature. The executive branch may have the right to bring questions of legal interpretation, and represent the administration in cases before the courts. It may have the responsibility to prepare the budget, and typically has broad powers with respect to economic policy, the imposition and collection of taxes and customs duties, and government spending.¹⁴

3.4 Characteristics of a Strong Executive Branch

There is no standard set of criteria for evaluating a system of government. However, given the good governance rules and the executive branch’s role as the center of policy, law enforcement, and finance, it is reasonable to consider the characteristics below. No one characteristic is paramount, but the absence of any one of them may render the government more likely to fail

3.4.1 Legitimacy: The government must be perceived, both by other countries and by its own population, as legitimate, with a legal basis (such as being the result of free and fair elections), and dedicated to the public good rather than its own ends.

¹⁰ Moshtaghi, *Afghan Constitutional Law*, 15.

¹¹ Grote, Rainer, “Separation of Power in New Afghan Constitution,” (Heidelberg: Max Planck Institute, 2004), 897.

¹² The various Constitutions of Afghanistan are examined in Section 5.

¹³ The Public International Law & Policy Group, “Post-Conflict Constitution Drafter’s Handbook”, 24.

¹⁴ YourArticleLibrary.com, “The Next Generation Library, Executive: Definition, Functions and Types of Executive,” retrieved from: <http://www.yourarticlelibrary.com/political-science/execute-definition-functions-and-types-of-executive/40360>, May 17, 2014 (accessed 28 March 2017).

- 3.4.2 Flexibility:** The government must be able to adapt and adjust to changing circumstances. If an executive structure is too rigid, the government may not be able to move quickly and decisively in times of emergency.
- 3.4.3 Accountability:** It is imperative that the government, especially the executive branch, be accountable to the other branches; specifically, to the legislature.
- 3.4.4 Effectiveness:** In order to be effective, the government must be able not only to set policy, but also to implement it, enforce laws, and serve people.
- 3.4.5 Stability:** Governments subject to being second-guessed, or even dissolved, at every turn may lack the fortitude to push through reforms or controversial policies.

3.5 Types of Executive Branch

The following are various forms which the Executive Branch may assume:

3.5.1 Nominal and Real Executive

A parliamentary system employs both nominal and real executives. In this system, the head of the state (either a President or a monarch) is the nominal executive, and the Council of Ministers headed by Prime Minister is the real executive. The nominal executive is a ceremonial head of state and the real executive holds the political power.¹⁵

3.5.2 Hereditary and Elected Executives

A hereditary executive takes office by the law of hereditary succession, while an elected executive is directly or indirectly elected by people for a specific period or even for life. For example, in Great Britain, Japan and Malaysia, the heads of state take office through hereditary succession. In the United States, India, and Germany, the head of state is directly or indirectly elected by the people.¹⁶

3.5.3 Single and Plural Executive

In a single executive system, a single leader holds all executive power. For example, in India, the United States Australia, France, and many other states, a single person holds all executive power. On the other hand, when the executive powers are vested within a group of people, such as a committee, council, or commission, and the group collectively exercises power, this is referred to as a plural executive system. For example, in Switzerland all the executive powers are given to the Federal Council; the Council has seven members who collectively exercise executive power.¹⁷

3.5.4 Parliamentary and Presidential Executive

The differences between presidential and parliamentary executives are based on the relationship between the executive and legislative branches. In a parliamentary executive system, there is a close relationship between the Executive and the Legislature, as the members of the executive branch are also the members of legislature. The members of a parliamentary executive are individually or collectively responsible to the Legislature. Moreover, in a parliamentary executive, the tenure of the Chief Executive is not specified and he or she can be removed at any time by the legislature.

¹⁵ YourArticleLibrary.com, "The Next Generation Library, Executive."

¹⁶ YourArticleLibrary.com, "The Next Generation Library, Executive."

¹⁷ YourArticleLibrary.com, "The Next Generation Library, Executive."

In a presidential executive system, there is an absolute separation of power between the Executive and the Legislature--a member of executive branch cannot also be a member of legislature. Moreover, the executive and legislative leaderships do not have influence over the other's respective tenure; the Legislature cannot be dissolved by the Executive, nor can the Executive be removed by the Legislature except in extraordinary circumstances.¹⁸

18 YourArticleLibrary.com, "The Next Generation Library, Executive."

4. Presidential and Parliamentary Systems of Government

Deciding whether to establish a presidential system or a parliamentary system, or some hybrid of the two, will impact the degree of separation between the executive and legislative branches, and profoundly affect the role of the head of the government.

4.1 The Presidential System

The presidential system embodies complete separation of powers. The executive and legislative branches are independent of each other, with the President being elected by direct popular vote, and serving for a fixed term. The legislative body (Parliament or Congress) is elected separately. The President is not a member of the Legislature, nor can the Legislature call for a vote of no-confidence or remove the President from office before the end of his or her term. Ministers or department heads are appointed, and can be dismissed, by the President, usually with some type of consent from the legislative body.¹⁹

The United States is usually cited as the primary model of a single executive system, where the President, as both head of government and head of state, as well as the Commander-in-Chief of the Armed Forces, has sweeping powers. The American President is elected for a term of four years, which cannot be shortened by the Legislative Branch except in extraordinary circumstances. Fifteen members of the Cabinet, as well as key administrative positions, are appointed by the President with the consent of the Senate. The President also appoints heads of more than 50 Commissions, in addition to federal judges and ambassadors. The President can sign a bill passed by Congress into law, or veto it and send it back to Congress. He or she has the right to negotiate and sign treaties with other nations, subject to ratification by the Senate. The President has power to issue pardons for federal crimes.²⁰

4.1.1 Advantages of a Presidential System

The presidential system has several advantages, such as:

- The President is elected directly by the people. Assuming the election process is deemed fair and open, the President assumes office with an air of legitimacy.
- The separation of powers provides a degree of accountability. This factor can vary, depending upon whether the President's political party also enjoys majority representation in the Legislature and to what degree the Legislature scrutinizes the President's actions.
- A strong executive branch rewards capable leadership. The presidential system grants the Chief Executive broad powers to shape the direction of the country in key areas such as the economy, domestic and foreign policy and the budget.
- Since the President may introduce controversial or unpopular policies without fear of immediate reprisal, the presidential system is among the more stable systems available.
- Potency and speed of decision-making tends to be higher in a presidential system.
- Lack of contention and tension between executive and legislative branches, and no ground for that in presidential system.

¹⁹ Niaz, Abdul Wahid, *Comparative Constitutional Law* (Kabul: Farhang Publications, 2009), 169-70; Rasoli, *Critique and Evaluation of the Afghanistan Constitution*, 57-58.

²⁰ The White House, "The Executive Branch," <https://www.whitehouse.gov/1600/executive-branch> (accessed 15 Sept. 2016).

4.1.2 Disadvantages of a Presidential System

The disadvantages of a presidential system include:

- There is a lack of flexibility in a system where the chief executive cannot be removed from office, no matter how unpopular he becomes, except under very limited circumstances. For example, a president elected for military experience may be wholly unqualified to handle an economic crisis or natural disaster; nonetheless, that president is entitled to serve until the end of his or her term.
- If the President and the Cabinet prove to be ineffective, the presidential system locks them in for a full term. Incompetent or unpopular leaders, or presidents who cannot accomplish their goals, because of absolute separation of power, and the limited ability of the Legislature to curb the Chief Executive's action, are protected from removal.

4.2 The Parliamentary System

Parliamentary systems are characterized by a relative separation of powers, where the Legislature has more direct influence over decisions and actions of the executive branch than in the presidential system. In a parliamentary system, members of the Parliament or another legislative body are elected by popular vote, and the Executive Branch in turn derives its legitimacy from the legislature.²¹ The head of the executive is politically responsible to the Parliament and is subject to a vote of no-confidence. Although different models are possible, the parliamentary system typically has dual executives that consist of a head of state and head of government. The head of state is more of a ceremonial role (such as the monarch in a constitutional monarchy), and the head of government holds executive power.²²

The United Kingdom is a leading model of a parliamentary system. The United Kingdom has a dual executive government, with the Queen serving a ceremonial role, and the Prime Minister acting as the head of government. Parliament has two chambers, consisting of the House of Commons, and the mostly ceremonial House of Lords. Members of the House of Commons are chosen by direct election every five years, and Members of the House of Lords are appointed indefinitely by the acting Prime Minister. The main duties of Parliament are to oversee government operations and maintain the public interest. Parliament has the power to make laws and levy taxes.

The Executive Branch in the United Kingdom is divided into three parts: the Prime Minister, the Cabinet and the other ministers. The political party occupying the highest number of seats in Parliament selects the Prime Minister. The Prime Minister then appoints other members of his or her government from the House of Commons and the House of Lords. The Council of Ministers is responsible to the Parliament in making and implementing decisions about public services.²³ The Queen (or King) has a ceremonial role and no decision-making authority.²⁴

Due to the need for a prime minister to maintain a constant level of support in the legislature, the parliamentary system typically works most effectively in countries with strong national political parties, to avoid inter-branch tension. Where a political system is marked by many small political parties, appointing a Prime Minister may become a difficult exercise in coalition building, and the resulting government may fail if a party withdraws its support. The more collegial nature of a parliamentary government also makes it attractive to nations with deep ethnic or religious divisions as power may be shared more equitably than in a system where all executive authority is vested in a President who is a member of one of the competing factions.

21 Niaz, *Comparative Constitutional Law*, 41.

22 Rasoli, *Critique and Evaluation of Afghan Constitution*, 60-61.

23 How Government Works.Gov, "How Government Works," <https://www.gov.uk/government/how-government-works> (accessed 15 Sept. 2016).

24 Niaz, *Comparative Constitutional Law*, 89-93.

4.2.1 Advantages of a Parliamentary System

The parliamentary system has many favorable points, including:

- The parliamentary system is seen as more flexible and efficient since the Prime Minister and the legislative majority should, in theory, share common political goals. Thus, consensus on national policy and legislation should be achieved more quickly.
- For the same reason, a parliamentary system of government can be very effective where the Prime Minister enjoys strong support in the Parliament.
- Although the executive and legislative branches work together more closely than they do in a presidential system, parliamentary systems still maintain a degree of separation of powers due to the existence of an independent judiciary.

4.2.2 Disadvantages of the Parliamentary System

While the parliamentary system has many advantages, its disadvantages are significant:

- Because the Prime Minister serves at the pleasure of the Parliament, and the government can be dissolved at any time, it lacks the stability of the presidential system.
- The need to maintain the support of a majority of the Parliament may discourage the Executive Branch from pursuing necessary but politically unpopular policies.
- The parliamentary system can also be profoundly ineffective where there is no clear majority party in the Parliament. In this situation, the selection of a Prime Minister relies upon a coalition of two or more parties, any of whom can withdraw support and cause a government to fail at any time.
- Where there is a multiplicity of political groups, the Parliament may come to a standstill due to debates and disputes.
- Danger of reciprocal dissolution by the Executive and Legislative Branches could be a ground for instability.

4.3 A Mixed Presidential and Parliamentary System

A mixed or hybrid system such as the French model has dual Executives, with both being vested with some real authority. France uses a semi-parliamentary system where the people elect the President who is the head of state; the second executive is a Prime Minister, who is appointed by the President. The Prime Minister and other Ministers and Secretaries must be appointed from among members of the majority party in the Parliament, even if the President is a member of a different party.

The President serves a five-year term and cannot be removed from office by Parliament except under extraordinary circumstances. However, although the President has extensive powers—including the power to appoint the Prime Minister and other ministers and chair the Council of Ministers—the government itself is responsible to Parliament, not the President. Separation of powers is further found in an independent judiciary.

5. History of the Modern Executive Branch in Afghanistan

Afghanistan was established as a nation in 1747 by Ahmad Shah Durrani, but did not have a constitution until 1923. The country was under an absolute monarchy, with the power of the Amir (King) dependent on the support of tribal leaders, or councils known as Jirgas. The Amir was the highest religious and civil authority; he signed international treaties, was chief of the army, and appointed ministers. Religious scholars, acting as representatives of the King, administered justice based on their interpretation of Islamic principles.²⁵

Afghanistan adopted its first Constitution in 1923 during the monarchy of Amir Amanullah Khan. The first Constitution lacked any concept of separation of powers, but did create a State Council with advisory functions.²⁶ It was not until the 1964 Constitution that the notion of separate Legislative and Executive Branches began to take hold.²⁷ Since then, the separation of powers has been a main principle of each Constitution of Afghanistan (at least on paper), although the successive governments have taken quite different forms.

5.1 The Executive Branch under the 1923 Constitution

The 1923 Constitution is significant in that it was Afghanistan's first, and it established an important precedent. Although Afghanistan would continue to be ruled by monarchs for many more decades with limited constitutional interference, just the concession that the government's power could be limited by a constitution was a major step forward.

5.1.1 Historical Context of the 1923 Constitution

King Amanullah Khan took power in 1919 following Afghanistan's independence. At the beginning of his reign a movement to convert the country "into a constitutional monarchy began to gain ground among the intelligentsia, who were largely drawn from the old bureaucracy and aristocracy and educated either in traditional centers of learning or in the modern secondary schools that were opened in Afghanistan" during his father Habibullah Khan's reign.²⁸

Amanullah was considered a progressive—even revolutionary—leader; as part of his plan to modernise Afghan society, he began to implement unprecedented, sweeping social, economic and governmental reforms.²⁹ The first Constitution of Afghanistan, adopted in 1923, was heavily influenced by the French and Turkish models, among others,³⁰ and provided a range of social protections, including freedom of the press, the right to private enterprise, the right to own property, the right to education, and freedom from torture and involuntary servitude.

However progressive the 1923 Constitution may have been, it did not introduce any form of power sharing or separation of powers.³¹ All authority was vested in the King, greatly curtailing the traditional influence of tribal elders and religious leaders. No provision was made for a legislative body, and all courts except for state-sponsored tribunals were prohibited.

25 27 Moshtaghi, *Afghan Constitutional Law, Vol. 1*, 63-64.

26 Moshtaghi, *Afghan Constitutional Law, Vol. 1*, 63-64.

27 Grote, Rainer, "Separation of Power in the New Afghan Constitution".

28 Kakar, M. Hassan, "Constitutional History of Afghanistan", available at <http://www.iranicaonline.org/articles/constitutional-history-of-afghanistan> (accessed 3 Aug. 2017).

29 Ghubar, Meer Ghulam Mohammad, *Afghanistan in the Course of History* (Kabul: Mohsin Publications, 2012), 794.

30 Ehler, Rose Leda, et al., "An Introduction to Constitutional Law of Afghanistan" (Stanford: Afghanistan Legal Education Project: Stanford University, 2015), 11.

31 Key Informant Interview #12, (MAH, Male, Kabul).

Many of the reforms—such as broader rights for women, universal education, and the reduced role of religious figures—were met with strong resistance from multiple quarters. Traditional leaders also resented the consolidation of all authority in the King. As a result, when Amanullah convened a 1,000-member Loya Jirga³² to ratify his constitution, it was rejected. The 1923 Constitution was adopted only after the King re-convened a much smaller, hand-picked group of approximately 100 delegates who were more pliant.

5.1.2 Content and General Rules of the 1923 Constitution

Although the modern theory of separation of powers was not reflected in the 1923 Constitution, the state administration was divided into three general organs: the Cabinet Panel (*Haiat Wuzara*), the State Council (*Shorai Dawlat*), and the Courts (*Mahakem*).³³ The Cabinet Panel was chaired by the King and, during his absence, the Prime Minister (a role that remained unfilled during Amanullah's reign).³⁴ The Cabinet Panel and the Prime Minister were to be appointed by, and only accountable to, the King.³⁵

The State Council was nominally responsible for scrutiny of laws and treaties, although in practice it acted in a purely advisory role. There was no elected assembly and no system of checks and balances; the King was not responsible to anyone and his authority was limited only by the Constitution and Sharia law. The King was Commander-in-Chief of the Armed Forces and had the right to declare peace and war, and sign treaties. He could also extend clemencies and pardons.³⁶

Despite good intentions, Amanullah's disregard for traditional centers of power—tribal elders and religious leaders—proved to be his downfall. He faced a popular uprising in 1925 that forced him to amend the Constitution, elevating the status of Islam in Afghanistan. Even that concession did not quell the unrest, and Amanullah fled the country in 1929.

5.1.3 Legacy of the 1923 Constitution

The 1923 Constitution is considered an effective move toward establishing a strong Central Government and formalizing its relationship with the provinces; in this sense, it represented great progress toward national unity.³⁷ Amanullah also hinted at the possibility of ceding some degree of power, as he told the Loya Jirga that the only reason he had not appointed a Prime Minister was the absence of a suitable candidate.³⁸

The 1923 Constitution also serves as a cautionary tale. The reforms introduced by the Constitution were not accepted by the people or their traditional leaders—reforms that included radical changes such as forcing people to wear western clothing, banning veils on women in certain public places and changing the weekly holiday from Friday to Thursday. Amanullah's government was further marred by widespread corruption, ultimately bringing it to an end.³⁹

5.2 The Executive Branch under the 1931 Constitution

The 1931 Constitution scaled back the reforms of its predecessor, and solidified the role of Islam as the public religion. A national Legislature, however ineffective, was introduced for the first time, and a Judiciary, although far from independent, was established.

32 Loya Jirga—Pashto for “grand council”—is a unique feature of Afghan politics. A Loya Jirga is traditionally convened to decide upon matters of great national consequence. Its members may include social, political and military leaders, scholars, tribal elders, minority representatives and other stakeholders. This informal tradition is formalized in the current Constitution.

33 Ghubar, *Afghanistan in the Course of History*, 794.

34 Constitution of Afghanistan, 1923 (SY 1302), Article 25.

35 Constitution of Afghanistan, 1923, Articles 26, 31.

36 Constitution of Afghanistan, 1923, Article 7.

37 Ghubar, *Afghanistan in the Course of History*, 795.

38 Danish, Mohammad Sarwar, *Collection of Afghan Constitutions* (Kabul: Abni Sina Publications, 2015), 2-4.

39 Ghubar, *Afghanistan in the Course of History*, 801-02.

5.2.1 Historical Context of the 1931 Constitution

Perhaps the most profound influence of the 1923 Constitution is that Amanullah's successor, Nadir Shah, felt the need to propose his own in order to legitimise his leadership. The 1931 Constitution was influenced by and based on many sources, including the Turkish, Iranian and French Constitutions, as well as the 1923 Constitution of Afghanistan, plus many aspects of Hanafi Sharia law and local custom. Cognizant of the mistakes of his predecessor, Nadir Shah consulted with religious leaders to ensure that his Constitution was not out of touch with the will of the people.⁴⁰ Not surprisingly, the 1931 Constitution formalized Sunni Islam as the state religion and required the King to follow Sharia law.⁴¹

5.2.2 Content and General Rules of the 1931 Constitution

The most lasting innovation of the 1931 Constitution was the creation of a Legislative Branch that consisted of a National Assembly and an Upper House. Although the King appointed the Upper House, members of National Assembly were elected directly by the people for a term of three years.⁴² The King retained authority, including the right to approve and promulgate laws recommended by Parliament, issue laws and administrative orders, declare peace and war, sign treaties, and extend pardons and clemencies.⁴³ The Judicial Branch was not an independent organ, as it depended on the Executive Branch;⁴⁴ Courts were obliged to enforce Sharia law based on Hanafi jurisprudence.⁴⁵

The 1931 Constitution represented separation of powers in name only. In practice, the considerably superior legislative and executive authority of the King, and inability of Parliament to adopt meaningful changes, made the government more of a religious aristocracy than a true constitutional monarchy.⁴⁶ Moreover, although the Constitution lasted 33 years—by far the longest of any Afghan constitution—its provisions were largely circumvented or ignored by successive rulers.

5.3 The Executive Branch under the 1964 Constitution

The 1964 Constitution is often viewed as the direct precursor to the current Constitution. In addition to limiting the power of the King, the 1964 Constitution granted modern rights such as equality between men and women, equality among tribes, the right to own property, freedom of expression, and the allowance of political parties. Separation of powers was introduced for the first time.

5.3.1 Historical Context of the 1964 Constitution

In sharp contrast to the earlier Constitutions, the 1964 Constitution was a result of wide consideration, discussion and consultation. King Zahir first appointed a seven-member Commission to write a new liberalized constitution. This Commission in turn sought opinions from a much larger Review Commission drawn from a cross-section of Afghan society. The Review Commission also held wider consultation with other experts and socially and politically influential figures. Following that approximately one-year process, the draft was reviewed by a second Commission of 29 members. Afterwards, the King called a Loya Jirga for ratification.⁴⁷

The 1964 Constitution ushered in what is commonly referred to as the “The Liberal Age” of Afghan politics by, for the first time, separating powers and limiting the authority of the King. Sweeping social reforms were introduced.

40 Ehler, *An Introduction to Constitutional Law*, 12-13.

41 Constitution of Afghanistan, 1931, Article 5.

42 Ehler, *An Introduction to Constitutional Law*, 13.

43 Ghubar, *Afghanistan in the Course of History*, 44.

44 Ghubar, *Afghanistan in the Course of History*, 44.

45 Constitution of Afghanistan, 1931, Article 88.

46 Ghubar, *Afghanistan in the Course of History*, 44.

47 Ehler, *An Introduction to Constitutional Law*, 212-13.

5.3.2 Content and General Rules of the 1964 Constitution

The 1964 Constitution established a constitutional monarchy with a dual executive system that split power between the King and Prime Minister. The King was the most powerful figure, who chose the Prime Minister, and the Prime Minister in turn recommended other Ministers to the King for appointment.⁴⁸ The Government as a whole, including the Prime Minister and other Ministers, were responsible to the King and to the National Assembly.⁴⁹ The King was commander-in-chief of the armed forces and had the power to declare peace and war, approve laws and international treaties, issue legislative decrees⁵⁰, appoint the Prime Minister and other Ministers (after a vote of confidence by the Parliament) as well as the Chief Justice and members of the Supreme Court,⁵¹ and issue clemencies and pardons.⁵²

Parliament consisted of two houses: the Lower House (Wolesi Jirga) and the Senate or Upper House (Mishrano Jirga).⁵³ Members of the Lower House were elected through direct elections. One-third of the Senate members were elected directly by the people, one-third were appointed by Provincial Councils, and one-third were appointed by the King.⁵⁴ The responsibilities of the Legislative Branch included law making, attesting international treaties, sending troops to foreign countries, and overseeing government functions.⁵⁵ The Constitution made the Judicial Branch a separate branch of state headed by the Supreme Court,⁵⁶ with the highest authority to adjudicate cases, including those against the government.

As the Constitution also established three relatively independent branches, there was a modern checks and balances system. The Ministers were responsible to the National Assembly, which could impeach or question Ministers, the Prime Minister or the whole of the government.⁵⁷ It could also dissolve the government through a vote of no-confidence. The appointment of Ministers and their policies were subject to approval by the Lower House, which also had the power to investigate and observe government operations.⁵⁸ The King, as head of state, had the power to dissolve Parliament, and the Executive Branch could propose laws to the National Assembly.⁵⁹

5.3.3 The Legacy of the 1964 Constitution

The Constitution of 1964 is often hailed as one of the Islamic world's most progressive at the time, as it divided power among different branches, and changed the system from aristocracy to democracy.

The powers of the King were considerably curtailed, and a genuine effort was made to place political power in the hands of the people. Members of the royal family were not allowed to participate in government. However, the National Assembly was generally ineffective, except perhaps in voting down successive governments—in nine years Afghanistan had five governments. Thus, this transition to democracy for a segmented and fragile society needed more time to consolidate.⁶⁰

48 Constitution of Afghanistan (Official Gazette no. 12), 1964 (SY 1343), Article 89.

49 Constitution of Afghanistan, 1964, Article 96.

50 Constitution of Afghanistan, 1964, Article 9.

51 Constitution of Afghanistan, 1964, Article 105.

52 Constitution of Afghanistan, 1964, Article 9.

53 Constitution of Afghanistan, 1964, Article 42.

54 Constitution of Afghanistan, 1964, Article 45.

55 Constitution of Afghanistan, 1964, Article 64.

56 Constitution of Afghanistan, 1964, Article 97.

57 Constitution of Afghanistan, 1964, Articles 65-67.

58 Constitution of Afghanistan, 1964, Article 89.

59 Constitution of Afghanistan, 1964, Articles 63, 70.

60

5.4 The Executive Branch under the 1977 Constitution

In 1973, King Zahir was overthrown in a bloodless coup orchestrated by his brother-in-law Sardar Mohammad Daoud Khan. Daoud Khan, backed by Marxist elements, promoted a new Constitution that allowed for land reform, provided equal rights to women, and instituted universal suffrage. The Constitution was ratified by the Loya Jirga in 1977, but was never implemented as Daoud Khan himself was overthrown in a bloody coup in April 1978.

The 1977 Constitution of Afghanistan provided a single-party presidential system. The Constitution distributed three main duties of state to three branches: the Executive, Legislative (Milli Jirga or National Assembly), and Judiciary. The National Assembly consisted of a single chamber whose members were nominated by the Revolutionary Party and elected by the people for four years. Fifty percent of the elected individuals were required to be workers or farmers. The authorities of the Legislative branch included lawmaking, attesting international treaties, sending Afghan troops to foreign countries, approving the budget and impeachment of government members.⁶¹

Unlike other Constitutions of Afghanistan with separation of powers, the 1977 Constitution did not establish the Judiciary as an independent branch of state. Members of the Supreme Court were appointed by the President and the Supreme Court was the only responsible entity to interpret the Constitution.⁶²

There were checks and balances, yet also a cooperation between branches, where the President had the power to dissolve Parliament and to endorse laws. Members of government were not subject to a vote of confidence by Parliament in their appointment, and the National Assembly could not terminate them. Members of government were responsible to the President.

The Constitution established the President as head of state, head of government, and head of the political party. The President was nominated by the party and was elected by two-thirds of the Grand Assembly or Loya Jirga for six years.⁶³

As Commander-in-Chief, the President was obliged to promote national unity and support public interests. Other duties and authorities of the President included convening the Loya Jirga, dissolving the National Assembly, mandating new elections, leading and coordinating national and international policies, appointing the Vice President, Ministers, members of the Supreme Court, ambassadors, permanent representatives of Afghanistan to international organizations, and appointing judges. In addition, he had the power to endorse laws, grant pardons, issue honors, declare peace, war, and state of emergency.⁶⁴

The 1977 Constitution provided a single executive system where the Executive Branch was the supreme administrative organ of the state. The government consisted of the President, Vice President, and Ministers led by the President. The Executive Branch could pass regulations and laws and sign treaties with international organizations and other countries.⁶⁵

5.5 The Executive Branch under the 1980 Constitution

The coup headed by Noor Mohammad Taraki brought the People's Democratic Republic of Afghanistan into power. In 1978, Taraki established a new communist single-party government, copying the Soviet system of government. Taraki repealed the 1977 Constitution and transferred power to the Revolutionary Council, over which he presided. However, in 1979 the Soviet Union invaded Afghanistan and installed Babrak Karmel as President. In 1980, the Revolutionary Council adopted a provisional Constitution that gave some deference to Islam, but otherwise instituted Soviet-style reforms.

61 Constitution of Afghanistan, 1977 (SY 1355), Articles 49, 55, 62.

62 Moschtaghi, *Afghan Constitutional Law*, 18.

63 Constitution of Afghanistan, 1977, Articles 75-76.

64 Constitution of Afghanistan, 1977, Article 78.

65 Constitution of Afghanistan, 1977, Articles 88 and 91.

The 1980 Constitution provided for a Revolutionary Council acting as the supreme state power. Members of the Revolutionary Council were elected and appointed by a Presidential Panel, and the Council worked as a legislature. Its authorities included approving laws, decrees and development plans of government, appointing the Presidential Council, members of the Supreme Court and lower courts, members of government and the Council of Ministers, dismissing and replacing Ministers, and creating ministerial departments.⁶⁶ The Supreme Court was the highest judicial organization of the state and reported to the Revolutionary Council on a regular basis.⁶⁷

The 1980 Constitution gave authorities to the Presidential Panel, including interpretation of laws, supervising implementation of laws and decrees, granting pardons and issuing honors, approving appointments of high ranking officials of the armed forces, governmental officials, and permanent representatives, and declaring war and state of emergency.⁶⁸

Article 46 of the Constitution provided a dual executive system where the Prime Minister was head of government. The Council of Ministers was the supreme executive organ of state.

Local Executive Committees were established to implement state power. Authorities of the local Committees included ensuring implementation of laws, decrees, approvals and decisions of high ranking officials, taking security measures, ensuring the rights and freedoms of citizens, implementing social, economic, and cultural development programs, and leading coordination of organizations under their authority.⁶⁹

5.6 The Executive Branch under the 1987 Constitution

In January 1987, Dr. Najibullah formed a commission for national reconciliation in Afghanistan. Dr. Najibullah, during his speech at the opening ceremony of the Commission, addressed the drafting of a new constitution. In November 1987, a Loya Jirga was convened in Kabul and drafted the new Constitution of Afghanistan.⁷⁰ The Constitution provided a system for people to represent themselves through indirect votes in the Loya Jirga and Parliament.⁷¹ The system provided by the Constitution was more democratic and liberal system than a traditional communist system. People elected members of provincial councils and members of the Loya Jirga. The Loya Jirga elected the President by a majority of votes.⁷²

The government was responsible to the National Assembly. Members of the government were subject to a vote of confidence in appointment and policies, and the National Assembly had the power to dismiss the government through a vote of no-confidence. Furthermore, it could impeach and question members of government, create and revoke ministerial departments⁷³. The President could dissolve Parliament after consulting with the President of the National Assembly, the President of Senate, the Attorney General, and the Chief Justice.⁷⁴

The President was elected by majority vote of the Loya Jirga for a period of seven years and could run only for two consecutive terms. The President recommended appointment of his deputies to the National Assembly for approval. Deputies assisted the President and carried out his responsibilities when he was unable to perform his duties, and were responsible for convening the Loya Jirga in case of the President's death. The President was the Commander-in-Chief of the armed forces. The authorities and duties of the President included endorsement of laws passed by Parliament,

66 Constitution of Afghanistan, 1980, Articles 36-37.

67 Constitution of Afghanistan, 1980, Article 55.

68 Constitution of Afghanistan, 1980, Article 43.

69 Constitution of Afghanistan, 1980, Article 52.

70 Tarzi, Amin, "Islam and Constitutionalism in Afghanistan." (*Quantico: Marine Corps University: Journal of Persianate Studies*, 2012), 229.

71 Constitution of Afghanistan, 1987 (SY 1366), Article 1.

72 Constitution of Afghanistan, 1987, Article 72.

73 Constitution of Afghanistan, 1987, Article 82.

74 Constitution of Afghanistan, 1987, Article 97.

appointment of the Prime Minister, appointment of representatives of Afghanistan to foreign countries and international organizations, and appointment of the Attorney General and members of the Constitutional Council. In addition, the President approved the appointment of members of the Council of Ministers and credentials for heads of foreign diplomatic agencies in Afghanistan, and declared peace and war after approval of the Loya Jirga.⁷⁵

The 1987 Constitution separated the duties of state into three branches: Executive, Legislative (Parliament) and Judiciary (headed by the Supreme Court). The legislature consisted of two chambers, the National Assembly (Wolesi Jirga) and the Senate (Mishrano Jirga). Members of the National Assembly were directly elected by the people. The Legislative Branch was responsible for making and approving laws and international treaties, and overseeing the government.⁷⁶

The Judicial Branch was responsible for adjudicating cases according to laws. The Judicial Branch was headed by the Supreme Court, which supervised the affairs of other courts. Members of the Supreme Court were appointed by the President for a term of six years.⁷⁷

The Council of Ministers was the highest executive organ and consisted of the Prime Minister, his deputy ministers, and the heads of central departments. The Constitutional Council was responsible for reporting to the President about constitutionality of proposed laws. This Constitution was amended in 1990 with some minor changes and was very much like the Constitutions of 1964 and 1977.

The 1987 Constitution provided for a democratic system of government, national sovereignty, and separation of powers. It identified the responsibilities and duties of each branch and had a transparent and appropriate structure. However, the government was not able to gather popular support and the trust of the people due to opposition groups attacking this new regime. All rural areas were militarized and opposed the government.⁷⁸

5.7 Historical Lessons Learned Regarding the Executive Branch in Afghanistan:

- Afghanistan is a multi-ethnic country and that diversity is expected to be reflected in state institutions.
- Throughout the history of Afghanistan's Constitutions, a system where one person had all the authority did not work and paved the ground for violence, and invited the interference of foreigners.
- Separation of powers—through transparent checks and balances, and a transparent and inclusive system for transition of power—is a primary requirement of a strong system of government.
- Complete separation of powers, where the executive branch was not responsible to the parliament, did not provide adequate representation to the people, and led to aristocratism. It would have been more effective to have an organization observing activities of the executive arm that was able to dismiss the government in case of unconstitutional practices.
- In Afghanistan, a dual executive system where both executives share power has not worked well, and typically not lasted long.
- Except in a few instances where the heads of the Executive led their political parties, all other heads of the Executive did not rise to power through a political party system. Further in those instances where the head of the Executive was also the leader of the party (e.g. the communist era), the outcome proved to be disastrous for the country, contributing to a general distrust of political parties.

75 Constitution of Afghanistan, 1987, Articles 72, 75 and 76.

76 Constitution of Afghanistan, 1987, Articles 78, 79, and 81.

77 Constitution of Afghanistan, 1987, Articles 109-111.

78 Danish, "Collection of Afghan Constitutions", 249.

6. The Executive Branch under the 2004 Constitution

Afghanistan's 2004 Constitution, which provides the legal framework for the government today, was conceived in the aftermath of the fall of the Taliban, and was formulated at a pivotal time in the country's history. Afghanistan had endured decades of war, from years of resistance against Soviet-backed regimes, through a period of anarchy and bloodshed, until the final offensive that drove the Taliban from power.⁷⁹ These years of strife left the country divided into numerous factions: regional, ethnic, military, political and personal. Under these circumstances, it was imperative that the political system unify the divided people.⁸⁰

6.1 The Bonn Agreement and the 2004 Constitution

The fall of the Taliban left a power vacuum in Afghanistan. To fill it, several prominent Afghans came together under the auspices of the United Nations in Bonn, Germany, to shape a new state based on democratic principles. The Bonn Agreement, signed in December 2001, anticipated a three-phase process to establish a new government:

- The first phase was a six-month Interim Administration, chaired by Hamid Karzai and operating under a modified version of the 1964 Constitution.
- The second phase was a Transitional Administration formed in June 2002 and established by an Emergency Loya Jirga that elected Mr. Karzai as President. The primary task of the Transitional Administration was the drafting and ratification, via a Loya Jirga, of a new Constitution; it was given 18 months under the Bonn Agreement to do so.
- The third and final phase was the period between the approval of the new Constitution in January 2004 and the national election that was held in October 2004. The Constitution was adopted within the time set by the Bonn Conference, although the election was delayed from June until October 2004. As a result of the election, Hamid Karzai became the first elected President of Afghanistan.

6.1.1 Context of the 2004 Constitution

With the Taliban gone, Afghanistan faced the colossal task of rebuilding its government. The Taliban had ruled primarily through edicts, which were passed and posted in public places. The legal system, such as it was, was based on a radical interpretation of Islamic law. Persons accused of violating the law were tried before a Taliban-sponsored court (whose proceedings were rarely public), and punishment was immediate with no right of appeal. Thus, the Transitional Administration was presented with the task of introducing constitutional government to a country that not only lacked a strong history of democracy, but also was emerging from a particularly repressive period in its history.

Because rebuilding an administration is critical in countries recovering from civil war and insurgency,⁸¹ a post-conflict government must enjoy both legitimacy and popular support. To have legitimacy, the system must perform in a way that makes the people feel that they have a voice in the decision-making process. A democratic system where there is a clear separation of powers, and accountability, will increase trust in public institutions.⁸² "Therefore, post-conflict states usually exercise great care in selecting the president/prime minister and granting him/her powers, by enshrining clear and detailed provisions on such matters in their constitutions."⁸³

79 Prohl, Werner, "Promoting Democracy in Post-Conflict Societies" (Sankt Augustin: Konrad Adenauer Foundation, 2004), 2.

80 Secretariat of Constitutional Review Commission, "Analytic Report of People's Views and Recommendations for the Drafting of New Constitution" (Kabul: Secretariat of Constitutional Review Commission, 2003), 24-25.

81 Rondinelli, Dennis A., et al., "Reforming Public Administration in Post Conflict Societies: Implications for International Assistance" (Washington: USAID, 2006), 1.

82 Prohl, *Promoting Democracy in Post Conflict Societies*, 5.

83 Public International Law & Policy Group, *Post-Conflict Constitution Drafter's Handbook*, 24.

6.1.2 Drafting and Ratification of the 2004 Constitution

The process established by the Transitional Administration for drafting a new constitution—one that was taking place under intense international support and scrutiny—was extensive, thorough and intended to be mindful of the interests of all stakeholders. The Constitution-making process had three phases: (1) a Technical Commission of nine members (seven male and two female) was tasked with preparing a draft; (2) that draft would then be reviewed and revised by a larger Review Commission; and (3) the final draft would be debated and adopted by a Constitutional Loya Jirga.⁸⁴

The process was structured with an aim of ensuring that it was viewed as transparent and legitimate. Provision was made both for consultation with local and international experts, and for a public awareness and consultation process. It was anticipated that a draft would be released for public comment before it was finalised. The process was balanced and provided an opportunity for all interest groups to participate and be heard.⁸⁵

6.1.2.1 *The Constitutional Drafting Commission The Constitutional Review Commission*

In the second phase, a Constitutional Review Commission (CRC) was created through Presidential Decree to review and comment upon the draft. The CRC was composed of 35 members, seven of whom were female, and included key CDC members. The members included lawyers, scholars, experts, politicians, economists, religious scholars and others.⁸⁶ The CRC was also tasked with raising awareness and assessing public opinion.

During the internal discussions, issues such as national language, national anthem, form of government, creation of a constitutional court and many others were debated, and extensive revisions were made to the original draft. The two most divisive issues were the prime minister and the constitutional court. With respect to the prime minister, there was general agreement that the position should exist, though with wide dissension as to how he or she should be selected. Four different drafts were forwarded to the President's Office for discussion. However, due in part to resistance from the President and other key members of the government, the dual executive system was dropped.⁸⁷

6.1.2.3 *The Public Consultation Period*

A public consultation period of approximately two months was opened in June 2003. The Bonn Agreement anticipated that a draft constitution would be circulated to facilitate the discussion. However, no draft of the constitution was made public. While some experts favored disclosing a draft to provide transparency and legitimacy to the process, the prevailing view was that controversial issues would endanger a delicate balancing of modern reforms and traditional Afghan values. There was also serious concern that if the draft were made public, the consultation process could be dominated by organized groups and political parties, some of whom were still armed and thus had the power to intimidate others to force specific agenda items. As a result, the public consultation amounted to little more than discussions of general principles.

Nevertheless, the event was historic, in that it marked the first time in Afghanistan's history in which the opinions of the common people were considered in drafting a constitution. The CRC did a remarkable job of reaching the masses, holding hundreds of public meetings and logging tens of thousands of comments from the populace. To manage this enormous task, the country was divided into 10 zones, with a dedicated team assigned to each: central, northern, eastern, southern, western, northeastern, southwestern, Kabul, Pakistan and Iran.⁸⁸ A total of 555 public meetings were conducted in these zones.⁸⁹

84 International Crisis Group, "Afghanistan's Flawed Constitution Process." (ICG Asia Report No. 56, June 2003), 13.

85 International Crisis Group, "Afghanistan's Flawed Constitution Process," 13.

86 Danish, *Afghan Constitutional Law*, 267.

87 Danish, *Afghan Constitutional Law*, 293-97.

88 Secretariat of Constitutional Commission, *The Afghanistan New Constitution*, 387-91.

89 Secretariat of Constitutional Commission, *The Afghanistan New Constitution*, 500.

There were different views regarding the form of government expressed during this consultation phase, but overall the public view favored a presidential system based on Islamic principles. For example, many from the eastern provinces favoured a centralized presidential system with a parliament—centralized for fear that a looser federal system would exacerbate regional and ethnic tensions. Some from the southern provinces favored a constitutional monarchy while others favored a presidential system. In the northern provinces, support was found particularly in Mazar-i-Sharif for a presidential system, while other areas supported either a monarchy or a parliamentary system. People from the central provinces favored a presidential system, and groups from the western and southwestern provinces also supported a centralized presidential system, believing that a federalized government would cause instability and possibly lead to the division of Afghanistan.⁹⁰

In addition to the public meetings and discussions held throughout the country, the new constitutional system was also the subject of intense debate in the media. *Anees* national newspaper opined that the “best system for our country, which has passed decades of war, is a presidential system.”⁹¹ On the other hand, *Kabul Weekly* newspaper endorsed the view of former President Burhanuddin Rabbani, who stated that a “presidential system will not work for Afghanistan and the reason is that it will cause dictatorship.”⁹²

Reporting former Finance Minister Ashraf Ghani’s thoughts regarding the presidential system in Afghanistan, *Anees* stated “the people of Afghanistan want a strong and responsible government, which will be able to meet the current needs of the country. Therefore, if we do not have central power, as a result, we won’t be able to have a strong government.” Mr Ghani also stated that the authority vested in the president based on the draft constitution was in fact the authority of government as a whole, and should not be misinterpreted as the authority of one person.⁹³

The consensus that emerged from the public comments was that the new constitution should provide for a government led by a president, directly elected by the people, with strong control over the executive branch. The recommendations also suggested the ideal characteristics for the president: he or she should be an Afghan, Muslim follower of the Hanifi sect, over 40 years of age, should govern in accordance with Islamic teachings and practices and should not have a criminal record.⁹⁴

The CRC submitted its draft to President Karzai in September 2003. The draft reflected the input of several distinguished jurists and constitutional scholars, including Guy Carcassonne of France, Yash Pal Ghai of Kenya and Barnett Rubin of the United States. There was also considerable consultation with the Transitional Administration.

6.1.2.4 Ratification of the 2004 Constitution

The Constitutional Loya Jirga first met on 13 December 2003, pursuant to a Presidential Decree.⁹⁵ There were a total of 502 members, with the great majority (approximately 450) selected directly by former members of the Emergency Loya Jirga, who were themselves elected through a traditional mechanism from districts across the country. Fifty-three members were appointed by the President, and a total of 100 (approximately 20 percent) were female. By all accounts,⁹⁶ the group was fairly representative of Afghan society, and well-organized, particularly in contrast to previous Loya Jirgas; debates among its members were intense.

90 Secretariat of Constitutional Commission, *The Afghanistan New Constitution*, 402, 412, 422, 432, 441, 455, 504.

91 Secretariat of Constitutional Commission, *The Afghanistan New Constitution*, 526-27.

92 Secretariat of Constitutional Commission, *The Afghanistan New Constitution*, 527.

93 Secretariat of Constitutional Commission, *The Afghanistan New Constitution*, 527.

94 Secretariat of Constitutional Commission, *The Afghanistan New Constitution*, 24.

95 Danish, *Afghan Constitutional Law*, 297.

96 Danish, *Afghan Constitutional Law*, 301.

Many of the articles in the final 2004 Constitution can be traced back to the 1964 Constitution. However, in getting to that point, there were heated debates involving various factions on issues from women's rights to human rights, the number of vice presidents, and the number of official languages. Not surprisingly, there were also heated debates about the structure and role of the executive branch. The Transitional Administration pushed hard for a strong central government led by a president that controlled a cabinet. Some members of the minority ethnic groups argued in favour of a parliamentary system that would require cooperation among various parties and interest groups to form a government; this faction raised the spectre of a government dominated by factional leaders, special interest groups, or even criminal elements.⁹⁷

In the end, the Constitutional Loya Jirga decided to establish a full presidential system. A parliamentary government was rejected, at least in part, because Afghanistan lacked the strong political parties that were deemed necessary to make such a system work. Under the 2004 Constitution, the state is divided into Executive, Legislative and Judicial Branches, and the President is the head of all three branches of the government.⁹⁸ The new Constitution was almost unanimously approved by the Loya Jirga on 4 January 2004, and signed by President Karzai on 26 January 2004.⁹⁹ During the closing ceremony, President Karzai stated that the new Constitution, with a strong central administration, and an Islamic legal system protected by a Supreme Court with the power of judicial review, would meet the needs of Afghanistan.¹⁰⁰

6.2 Government Structure under the 2004 Constitution

The 2004 Constitution calls for a presidential system, which is generally considered suitable for a post-conflict country, and was favored by the majority of the population as a means of providing stability and security.¹⁰¹ Among the factors that are designed to bring stability is the separation of powers as a check on the President's authority.¹⁰² The new Constitution also promotes equality by allowing all Afghan citizens, regardless of gender or ethnicity, to vote and to run for office.¹⁰³ Since the Constitution also provides for one house of Parliament to be filled through direct elections, all ethnic groups are able to participate in the decision-making process.¹⁰⁴

6.2.1 The Executive Branch

Under Article 60 of the 2004 Constitution “[t]he President shall be the head of state of the Islamic Republic of Afghanistan, executing his authorities in the executive, legislative and judiciary fields in accordance with the provisions of this Constitution.” That same Article provides for a First and a Second Vice President. In the event of the absence, resignation or death of the President, then his or her office will be filled by the First Vice President or, in the absence of the First Vice President, the Second Vice President shall act in accordance with the provisions of the Constitution.

Article 64 of Constitution describes the authority of the President. Some of the more significant powers include:

- Determining national policy with the approval of the National Assembly;
- Monitoring implementation of the Constitution.
- Serving as Commander-in-Chief of the Armed Forces;

97 Rubin, “Crafting a Constitution for Afghanistan,” 12.

98 Key Expert Interview #8 (MAJ, Male, Kabul).

99 Key Expert Interview #8.

100 Key Expert Interview #8.

101 Prohl, *Promoting Democracy in Post Conflict Societies*, 6.

102 Moschtaghi, *Afghan Constitutional Law*, 24.

103 Constitution of Afghanistan, 2004 (SY 1382), Article 22.

104 Prohl, *Promoting Democracy in Post Conflict Societies*, 7.

- Declaring war and peace with the endorsement of the National Assembly;
- Convening the Loya Jirga;
- Inaugurating the sessions of the National Assembly and the Loya Jirga;
- Appointing Ministers, the Attorney General, the head of the Central Bank, the National Security Director and other officials with the endorsement of the Wolesi Jirga;
- Appointing the Chief Justice and other Justices of the Supreme Court with the endorsement of the Wolesi Jirga;
- Appointing ambassadors and accepting the credentials of foreign political representatives in Afghanistan;
- Endorsing Laws and Legislative Decrees;
- Signing international treaties; and
- Performing other authorities and duties enshrined in this Constitution.

The powers of the President are extensive and range from political, legislative, judicial, administrative to ceremonial functions.¹⁰⁵ However, many of the executive powers are limited by the fact that they must be undertaken with the endorsement or approval of the Legislative Branch.

The 2004 Constitution mandates that the President be elected by an absolute majority (i.e., more than 50 percent) of the popular vote,¹⁰⁶ which is difficult to achieve in Afghanistan due to ethnic, regional and other divisive factors.¹⁰⁷ Therefore, it was believed that requiring the successful candidate to claim more than 50 percent of the popular vote was a means of requiring the President to reach beyond any ethnic group and of bolstering his or her legitimacy.

6.2.1.1 *The Cabinet*

Under the new Constitution, the government is comprised of Ministers who perform under the chairmanship of the President;¹⁰⁸ Article 71 explicitly states that the President is the head of the Cabinet. The President appoints the Ministers, who are subject to Parliament's approval.¹⁰⁹ The Constitution mandates a full presidential system, but the approval of individual ministers by parliament is more a characteristic of a parliamentary system. The duties of the government are also prescribed by law and are as follows:

1. "Execute the provisions of this Constitution, other laws, and final orders of the courts.
2. Protect the independence, defend the territorial integrity, and safeguard the interests and dignity of Afghanistan in the international community.
3. Maintenance of public law and order and elimination of administrative corruption.
4. Prepare the budget, regulate financial affairs, and protect public wealth.
5. Devise and implement programs for social, cultural, economic, and technological progress.
6. Report to the National Assembly at the end of the fiscal year about the tasks accomplished and about the main plans for the new fiscal year.
7. Perform other duties as ¹¹⁰recognized by this Constitution and other laws to be duties of the government."

¹⁰⁵ Rasoli, *Critique and Evaluation of Afghan Constitution*, 94.

¹⁰⁶ Constitution of Afghanistan, 2004, Article 60.

¹⁰⁷ Key Expert Interview #4 (DDM, Male, Kabul).

¹⁰⁸ Constitution of Afghanistan, 2004, Article 71.

¹⁰⁹ Constitution of Afghanistan, 2004, Article 64(11).

¹¹⁰ Constitution of Afghanistan, 2004, Article 75.

6.2.1.2 Centralized System under the 2004 Constitution of Afghanistan

In post-conflict countries, the decision of which structure of state may be suitable to meet the needs of people involves several factors. These factors include the cause of conflict, current situation of the country, human rights and other important factors. However, a very important issue for a post-conflict country is the selection of either a federal (decentralized) system, or a unitary state.¹¹¹

With a unitary structure, there is a single, central source of authority and the administration exercises its authorities through the Central Government. Moreover, the political institutions may also receive their political authorities from the central government. In a federal system, the authorities and powers are divided among the Central Government and provincial administrations. Between these two systems, the unitary system is a common choice for post-conflict countries. Many post-conflict countries select this system and devolve power to meet their needs.¹¹²

Article 1 of the 2004 Constitution states that, “Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state.” This Article explicitly provides that Afghanistan is a unitary state, which principle is embodied in the Afghan Constitution. This principle leads Afghanistan to a fully centralized system, and rejects federalism. One characteristic of this system is the lack of original authority vested in local government and regional authorities. Local governments do not have the power to introduce laws and regulations; all legislation comes from the Central Government. On the other hand, in a federal system, each local government office has a degree of independence and autonomy. In this system, local governments may introduce laws and other regulation, such as in the systems in Germany and the US.¹¹³ The structure and authorities of central and local governments are described in Articles 136-42 of the 2004 Constitution of Afghanistan.

There was considerable debate during the drafting of the 2004 Constitution regarding whether Afghanistan should adopt a federal or unitary model. Supporters of a unitary system argued that a unitary structure would work for Afghanistan because the country is fragmented, local institutions are weak, and large portions of the countryside are not firmly under government control; therefore, a strong centralized government is needed. On the other hand, supporters of a federal system argued that because Afghanistan is a multiethnic country in which different regions desire autonomy, a unitary system would be contrary to national unity.¹¹⁴

Ultimately, the Loya Jirga adopted a unitary, centralized governmental system under the new Constitution. A centralized government was thought to have the following advantages:

- It is an effective structure from the point of view of decision-making and centralized power.
- There is a simple structure and organization.
- It is flexible to different situations and circumstances.
- There is no conflict of authority.
- There is strong internal and foreign policy as a result of centralized power.
- There is less expenditure due to fewer political institutions.
- It is well-suited for small countries.
- It does not create a conflict of interest for citizens between local and national interests.

111 Public International Law & Policy Group, *Post-Conflict Constitution Drafter's Handbook*, 12.

112 Public International Law & Policy Group, *Post-Conflict Constitution Drafter's Handbook*, 12-13.

113 Moschtaghi, *Afghan Constitutional Law*, 57-58.

114 Ghai, Yash, “An option paper for Constitution Commission Unitary and Federal: A false choice? Decentralization of state powers in Afghanistan” Retrieved from: Decentralization of state powers in Afghanistan, <http://www.bing.com/cr>: (accessed 2 Aug. 2017) , 1.

6.2.2 The Legislative Branch

Borrowing from the 1964 model, the 2004 Constitution established a bicameral legislative body consisting of a Lower House (Wolesi Jirga) and an Upper House (Mishrano Jirga). Parliament consists of a total of 352 seats. There are 250 members of the Wolesi Jirga, each of whom is elected directly by popular vote in provincial elections. Each province is assigned a proportional number of seats according to its population. At least 68 members must be female. The first elections under the new Constitution were held in September 2005, with members serving a five-year term. Subsequent elections were held as scheduled in 2010, but no elections have taken place since.

The Mishrano Jirga consists of 102 members. One-third of the members (34, of whom 17 must be female) are appointed by the President for five years. The Constitution calls for two-thirds of the members to be chosen via internal elections by members of District and Provincial Councils, as members from the District Councils (34 members) are chosen for three and members from the Provincial Councils (34 members) are chosen for four years¹¹⁵; however, district council elections have yet to be held. In practice, the one-third allocated to District Councils are currently chosen from Provincial Councils, which raises questions of constitutionality. Like the Wolesi Jirga, members of the Mishrano Jirga serve, as mentioned, for fixed terms.

Article 81 of the 2004 Constitution provides that Parliament, or the National Assembly, “as the highest legislative organ, is the manifestation of the will of its people and represents the whole nation.” The powers of Parliament include:

- Passing, modifying or revoking laws and legislative decrees;
- Approving social, cultural and economic programs;
- Approving the national budget;
- Creating or abrogating administrative units; and
- Ratifying international treaties and agreements¹¹⁶.

In addition, an issue that has proved particularly troublesome for the government under the 2004 Constitution is the Lower House needing to approve the Ministers. While legislative approval of Ministers is not an unusual constitutional feature, Articles 91 and 92 give the Lower House the right to question Ministers, and to issue a vote of no-confidence if their responses are not satisfactory.

There is some debate as to whether a confidence or no-confidence vote may be directed at individual Ministers, or should refer to the Cabinet as a whole. However, the accepted practice, with reference to Articles 77 and 92 of the Constitution, is that Parliament issues confidence or non-confidence votes for/against individual Ministers. Moreover, it has become common for confidence/no-confidence votes to be taken in secret. Thus:

- The Lower House’s action of calling individual Ministers for interpellation and then voting to remove them from office leads to a lack of stability;
- Ministers may worry about their popularity among members of Parliament, instead of devoting their energies to government policies;
- There is no accountability on the part of Lower House members, as even their constituents do not know how their representatives are voting; and
- The shroud of secrecy surrounding the confidence/no-confidence votes lends itself to corruption and loss of integrity.

These problems undermine both the authority and the effectiveness of the President.

¹¹⁵ Constitution of Afghanistan, 2004, Article 84.

¹¹⁶ Constitution of Afghanistan, 2004, Article 90.

6.2.3 The Judicial Branch

Article 116 of the 2004 Constitution declares the Afghan Judiciary to be an independent branch of the state. The Supreme Court is the highest judicial authority and the court of last resort; others include the primary courts (which have multiple branches) and the courts of appeals.

6.2.3.1 *The Supreme Court*

The Chief Justice of the Supreme Court and associate justices are appointed by the President, with the approval of Parliament, and serve a 10-year term. Among its other functions, Article 121 of the 2004 Constitution stipulates that upon the request of the government or the lower courts, the Supreme Court will review and interpret the laws, legislative decrees, international treaties and other international agreements for conformity with the Constitution of Afghanistan.

This power arguably establishes the Supreme Court as the ultimate judge of whether a provision is constitutional, and it has in fact issued decisions involving the interpretation of the 2004 Constitution. However, the Constitution also establishes the ICOIC, and the roles of the two bodies remain the subject of much controversy. For example, President Ghani has asked the Supreme Court to rule on the constitutionality of the Lower House dismissing individual Ministers; while that decision is still pending, many members of Parliament have expressed the view that they will not be bound by the ruling.

In addition to the somewhat ambiguous relationship to the ICOIC, the Supreme Court also suffers from a lack of accountability. A good deal of administrative authority resides in the Office of the Chief Justice, which could lead to lower court judges feeling pressured to keep the Supreme Court happy. The lack of a requirement for judges to publish their decisions leads to a perception that they may not be strictly applying the law. Increasing the independence and accountability of the Afghan Judiciary would likely lead to greater acceptance of the Supreme Court's authority.

6.2.3.2 *The Independent Commission for Overseeing the Implementation of the Constitution (ICOIC)*

Both the Constitutional Drafting Commission (CDC) and the Constitutional Review Commission (CRC) recommended the creation of a Court to be the final arbiter of constitutional issues. Reference to the Constitutional Court was removed from the final draft due to concerns of creating a dual-headed judicial branch, but the Constitutional Loya Jirga added Article 157, which created the ICOIC. The 2004 Constitution unfortunately does not clearly explain the role of the ICOIC and left it for the (future) supporting law to define it. On the other hand, the Constitution does not clearly spell out the Supreme Court's interpretative role.

In August 2008, Parliament proposed a law that would permit the ICOIC to interpret the Constitution at the request of the President, the Executive Branch, Parliament, or the Supreme Court. President Karzai vetoed the bill as being in conflict with Article 121 of the Constitution. However, Parliament quickly overrode the veto with a two-thirds majority, and the law came into effect. It remains unclear which body is the ultimate authority on the proper interpretation of the 2004 Constitution, which is an issue of grave concern and could pose a threat to political stability.

7. The 2014 Presidential Election and the NUG

Hamid Karzai served the maximum of two, five-year terms, as permitted by the 2004 Constitution. Elections were held in April 2014 to accomplish the first democratic transition of power in Afghanistan's history. However, the transition would not be without controversy. Amid a run-off election and allegations of voter fraud, a compromise was reached that resulted in the establishment of a dual executive system—although it remains to be seen whether that change will be temporary or permanent.

7.1 The 2014 Election

Originally, 27 candidates were slated to run as President Karzai's successor. However, in October 2013 the Independent Election Commission disqualified 16 of the candidates, and an additional three candidates withdrew before the election. The eight remaining candidates were: Abdullah Abdullah; Ashraf Ghani; Zalmay Rassoul; Abdul Rasul Sayyaf; Gul Agha Sherzai; Qutbuddin Hilal; Mohammad Daud Sultanzoy; and Hidayat Amin Arsala.

The election was held on 5 April 2014. The clear frontrunner was Abdullah Abdullah, who tallied 2,972,141 votes, or 45 percent of the total votes cast. Ashraf Ghani was second with 2,084,547 votes, approximately 31.5 percent of the total. Zalmay Rassoul was a distant third with approximately 11 percent of the vote, with the remaining candidates all well under 10 percent. Although Dr. Abdullah outpaced Mr. Ghani by more than 10 percent of the popular vote, he failed to establish an absolute majority, necessitating a run-off election.

The run-off was held on 14 June 2014, with results to be announced by 2 July, but there were widespread allegations of election fraud that delayed the announcement. On 12 July, United States Secretary of State John Kerry announced publicly that due to concern over the validity of the results, the United Nations would audit the balloting. The resulting controversy further delayed the announcement of the winner.

7.2 Creation of the Office of Chief Executive Officer

The standoff created by the election controversy threatened the fragile democracy established only a decade before. With the international community looking on, both internal and external forces attempted to broker a solution; in the interim, President Karzai remained the head of the government. Finally, on 19 September 2014, after the Initial Agreement between the Two Teams on Structure of the NUG, the Independent Election Commission named Ashraf Ghani the winner and next President of Afghanistan. Mr. Ghani received 56 percent of the vote, as opposed to 44 percent for Dr. Abdullah.

Within several hours after the winner of the election was made public, Mr. Ghani and Dr. Abdullah signed an agreement forming a NUG and naming Dr. Abdullah CEO of the government. Based on the NUG Agreement, the position of CEO was created by presidential decree, and the office includes the following (arguably vague) responsibilities:

- Participating, with the President, in bilateral decision-making meetings;
- Carrying out administrative and executive affairs of the government as determined by Presidential Decree;
- Proposing reforms and anti-corruption measures;
- Serving as a liaison with the Legislative and Judicial Branches;
- Implementing, supporting, and monitoring policies and programs;
- Providing proposals to the President on government affairs, including the appointment or dismissal of officials; and
- Representing the President at the international level as appropriate.

The CEO also chairs the regular weekly meetings of the Council of Ministers and any subcommittees of the Council of Ministers.

7.3 The 2004 Constitution and the Chief Executive Officer

The office of CEO is a product of the NUG Agreement and was officially established by Presidential Decree by reference to articles 5, 50, and 142 of the Constitution. Article 5 provides for a general duty of the state to implement the provisions of the Constitution and other laws, while article 50 enables the state to “adopt necessary measures to create a healthy administration and realize reforms in the administrative system of the country”. Similarly, Article 142 grants general powers to the state to “implement the provisions as well as attain values enshrined in this Constitution”.

However, it is axiomatic that creation of new offices and departments cannot contravene other articles of the Constitution. Article 60 provides for a President, a First Vice President and a Second Vice President; no other executive office is mentioned. Article 71 states that “[t]he government consists of Ministers who work under the Chairmanship of the President.” Thus, the appointment of a second executive office not only finds no support in the 2004 Constitution, but also arguably changes the structure of the Government of Afghanistan from a presidential model to a semi-presidential or dual executive model—something that was considered and explicitly rejected during the drafting and adoption of the Constitution.

7.4 Effectiveness of the 2004 Constitution

According to the Asia Foundation’s annual survey, support for and confidence in the Government of Afghanistan is at its lowest point of the post-Taliban era. According to the survey, the NUG’s “founding promise, to introduce electoral reforms and outline a long-term government structure within two years, remains stalled.” For the first time, less than 50 percent of Afghans surveyed reported believing that the government is doing a good job; the problem is more pronounced in urban areas, where the NUG’s approval rating is near 40 percent.¹¹⁷

Certainly, not all the NUG’s travails can be linked directly to the structure of the Executive Branch. Corruption remains a major problem: Afghanistan ranked 166 out of 168 on Transparency International’s annual Corruption Perceptions Index.¹¹⁸ Ethnic differences remain significant, as demonstrated by the NUG’s substantially stronger satisfaction rating (57 percent) among Pashtuns. The security situation continues to deteriorate countrywide.

However, there seems to be little doubt that the Executive Branch remains unable to operate effectively. Among the constitutional issues plaguing the current administration are:

1. The two-executive system lacks legitimacy and remains ineffective. Because the 2004 Constitution does not set aside any role for the CEO, Dr. Abdullah has been left with a set of poorly-defined responsibilities.
2. Chapter 8 of the 2004 Constitution sets forth a variety of provisions intended to promote governance on the local level. Despite the centralized administrative system, many of the provisions of that Chapter anticipate local Councils, constituted from directly-elected representatives of the people, to participate, cooperate and advise the local administration. The inability of the government to establish the elected components of the local governments anticipated by the Constitution has, among other things, impaired its ability to convene a Loya Jirga.
3. The seeming ability of the Lower House to dismiss Ministers at will has had a particularly destabilising effect on the government. Ministers who ideally would be answerable to the President instead must worry constantly about their relationship with Parliament. The Lower House undertaking no-confidence votes in secret exacerbates the situation. Allowing Parliament to disrupt the workings of the government to this degree is inconsistent with the concept of a strong President, who is under consistent pressure of losing members of the government.
4. The uncertain role of the Judiciary, and particularly the Supreme Court, adds to the instability of the system. The unambiguous accepted role of the Supreme Court to interpret the Constitution poses threat to the system.

117 Burbridge, Henry Duke. “A Survey of the Afghan People: Afghanistan in 2016.” (San Francisco: The Asia Foundation, 2016).

118 Burbridge, *A Survey of the Afghan People*, 103.

8. Re-Evaluating the Executive Branch

Thirteen years after the adoption of the 2004 Constitution, Afghanistan's democracy is suffering growing pains. During this period, Afghans have embraced democracy like never before in their history. For the first time, the head of state is elected directly by the popular vote. Although there were some tense moments, power transitioned peacefully from an incumbent to his successor. A National Assembly, with a Lower House directly answerable to the people, wields real law-making and oversight powers. An independent, if imperfect, Judiciary exists where people can seek redress for wrongs committed against them.

8.1 Should a Loya Jirga Be Convened?

To legitimately make structural changes to the Afghan political system, a Constitutional amendment is required. Most constitutions contain a mechanism by which the constitution may be amended; common procedures include action by the legislature or popular referendum.¹¹⁹ In Afghanistan, Article 111 of the 2004 Constitution gives amending authority to the Loya Jirga, which adds considerable legitimacy to the process, as a majority of the population supports it.¹²⁰ However, there are significant challenges to convening a Loya Jirga at the present time.

8.1.1 Legal Obstacles to a Loya Jirga

The Loya Jirga is a unique facet of Afghan political culture, and traditionally involves leaders and respected members of society coming together to make decisions in times of strife or peril. The participants historically have included tribal elders, military leaders, religious leaders, scholars and teachers, political figures, and other respected members of the community. The Loya Jirga was the key mechanism by which the 2004 Constitution was adopted.

The 2004 Constitution formalized the structure of the Loya Jirga, and arguably changed its nature to a more narrowly-centered official rather than traditional body through its membership. Under Article 111, the Loya Jirga is defined as including (1) the members of the National Assembly, and (2) the heads of the Provincial and District Councils. However, the last election for the Lower House of the National Assembly was held in 2010. Since Lower House members serve five-year terms, they currently hold their seats only by virtue of a Presidential Decree extending their tenures. Thus, their presence in a Loya Jirga would be of questionable validity.

Similarly, the Constitutional requirement that elections be held for District Councils has never been fulfilled; as a result, there are no properly elected heads of District Councils to participate in a Loya Jirga. Therefore, it would be seemingly impossible to convene a Loya Jirga, at least as mandated by the 2004 Constitution.¹²¹

8.1.2 Social and Political Obstacles to a Loya Jirga

Issues of legitimacy aside, there are other considerations that affect the decision to convene a Loya Jirga. One concern that must be accounted for is the unfavorable security situation in Afghanistan. Another is the question of whether elections, and therefore elected officials, are seen as legitimate. One view is that, particularly given the questions raised by the last presidential election, more transparency is needed before the situation is ready to convene the Loya Jirga.¹²²

It also should be remembered that once a Loya Jirga is convened, it will be impossible to control the results, or even to limit the scope of its action. The Loya Jirga not only may decline to amend the Constitution, but also it may focus on other matters. The possibility has been raised that a Loya Jirga today may fall prey to ethnic issues and spend more time debating identity and language issues than it would addressing the structure of the government.¹²³

119 Danish, *Afghan Constitutional Law*, 107-11.

120 Ahmadi, Mohammad Amin, et al., "Analysis of Views and General Suggestions for Amendment of Constitution" (Kabul: Afghan Institute for Strategic Studies, 2016), 52.

121 Key Expert Interview #9.

122 Key Expert Interview #8.

123 Key Expert Interview #6 (NS, Male, Kabul).

8.2 If a Loya Jirga Is Convened, What Changes Should It Make?

Assuming (1) legal obstacles are overcome and a Loya Jirga is convened that (2) addresses itself to issues of Executive Branch reform, it would need to decide among the three models for the Executive Branch. These models are the full presidential system, the parliamentary system, and the mixed (semi-presidential or dual-executive) system. Each are addressed below.

8.2.1 The Parliamentary System

The parliamentary system relies on the relative separation of power. Many constitutional experts believe that parliamentary systems—which rely on consensus-building—work best when a country has strong, organized political parties.¹²⁴ In Afghanistan, political parties exist, but the system is not mature. Parties are often formed along ethnic lines, or to support powerful figures with problematic pasts. In 2009, there were over 100 political parties registered with the Ministry of Justice. Moreover, many of Afghanistan’s major political parties are essentially ethnic armed militias, contrary to Afghanistan’s Law on Political Parties.¹²⁵ Despite being powerful in many regions, political parties in general are quite unpopular as shown by Parliament using a single, non-transferable vote system that does not aggregate votes for any particular group (although the Election Law allows candidates to disclose party affiliation, almost no candidate discloses it).

Given the chaotic nature of the political party system in Afghanistan, and the challenges of nation-building after years of war, a parliamentary system is ill-suited to the country’s present needs. A parliamentary system requires either strong parties, or multiple parties willing to work together to build coalitions. In a fractured society, particularly one in which candidates are reluctant to even disclose party affiliations, a system where an election can be called every time a coalition falls apart is doomed to fail. Afghanistan is currently struggling to stage elections every five years; it cannot afford a system where it is at the mercy of the whims of unstable coalitions. A parliamentary system remains an aspiration, and there are sometimes calls for it from among the political elites, but none of the interviewees or serious political contenders consider it a viable option for Afghanistan at this time.

8.2.2 The Dual Executive System

Although the 2004 Constitution establishes a presidential system of government, Afghanistan has been operating under a somewhat *de facto* dual executive system since 2014, when, pursuant to the NUG Agreement, the office of CEO was created by Presidential Decree.

The dual-executive system has been used with some success in countries such as France and Russia, but the political systems in those countries widely differ from that in Afghanistan and do not present workable models.

First, the dual-executive or mixed system is complicated and can properly function only in a democracy with strong legal foundations, where the roles and authorities of the executives have been properly defined and practiced, has precedents that guide the leaders, and there is a clear arbitrator in case of a dispute over powers. In those countries, the President is directly elected, and the Prime Minister is supported by at least a majority in the Parliament. The President in Russia, which can hardly be considered a developed democracy, has vast powers and can easily get the Duma, the Russian Parliament, to approve his choice for the Prime Minister. Among other powers, the President can dissolve Parliament if it rejects his choices for the Prime Minister three times in a row.

The French model is more applicable as a developed democracy, keeping in mind that critical for its relative success is that most often the President and the Prime Minister come from the same party. In 1986 when they were from rival parties—a period known as “cohabitation”—the system did not work well, according to many constitutional experts. Two years later, the situation was corrected when one

124 Key Expert Interview #8.

125 Key Expert Interview #8.

party was able to elect both the President and the Prime Minister. The dual-executive system seems to work well only where the Prime Minister, as the head of the government, strictly follows the policies of the President, who as the head of the state has the legitimacy of being elected by the people.¹²⁶

It has been suggested that, to make its Executive more inclusive, Afghanistan could follow the Russian or Turkish government structures, with a Prime Minister who has clear responsibilities appointed by the President.¹²⁷ This model is likely to be preferred by some as it is seen as paving the path to a dual-ethnic executive; under the current circumstances the two positions are expected to be filled by leaders from different ethnicities, as are the positions of the Vice Presidents and the President. The perceived benefits of this balance would be overshadowed by the potential serious defects of the system, in terms of government paralysis that may be created in the likely event of disputes between the two Executives, and which can readily take ethnic tones. For many, the experiences of over two years of the NUG only confirms the above-mentioned expectations and concerns.

Another fundamental barrier for a dual-executive system, as for the parliamentary system, is the lack of strong national political parties which may give legitimacy to the Prime Minister, and provide necessary political stability. Compounding the problems in Afghanistan, it remains debatable whether the Supreme Court or the ICOIC would resolve disputes regarding each office's authority.

Arguably, the dual executive system that was forced upon Mr. Ghani and Dr. Abdullah was doomed, given the circumstances; the NUG was contrived as an expedient means to resolve a controversial election dispute, and it is questionable whether much thought was given to how the President/CEO pairing would work going forward. However, it has been suggested that one way to improve the system would be for Presidential candidates to name their proposed CEO prior to the election. This suggested modification would allow the two Executives to decide in advance of taking office what role each would play in the administration, increasing the chance of the offices working in harmony.

Even if a Loya Jirga were convened to provide Constitutional legitimacy to the dual-executive system and turn the position of the CEO into a Prime Minister, which does not seem likely, Afghanistan's constitutional history suggests that the system may not work.

Many Afghan commentators, including a former minister, citing the inherent tensions that exist between the two Executives, argue for either a pure parliamentary or presidential system.¹²⁸ A pure parliamentary system, as argued above, is not practical in the current context. Thus, the conclusion is that Afghanistan has a better chance of attaining political stability, and a system seen as legitimate and efficient, if it focuses on refining the presidential system embodied in the 2004 Constitution.

8.2.3 The Presidential System with Modifications

The results of this study, and the views of most Experts interviewed, are consistent with the assessment that an improved presidential system is the most appropriate structure for Afghanistan for the foreseeable future.¹²⁹ There is recognition that the current structure needs to be modified, bearing in mind its successes and failures in application over the last decade. For example, one Key Expert stated "In the current situation of Afghanistan, I recommend a presidential form of government, but with certain reforms. I believe that the presidential form of government is not a problem. In Afghanistan, we cannot make a good future without considering the past."¹³⁰

"The Presidency is a symbol of the values and history of the people of Afghanistan," noted another Key Expert.¹³¹ That the Presidency should further strengthen the unity of the country needs to be emphasised.

126 Niaz, *Comparative Constitution Law*, 328.

127 Key Expert Interview #7 (AS, Male, Kabul).

128 Key Expert Interview #11 (DRDS, Male, Kabul).

129 Key Expert Interview #13 (SHMM, Male, Kabul); Key Expert Interviews # 4, 6, 8, 9.

130 Key Expert Interview #9.

131 Key Expert Interview #10 (HK, Male, Kabul).

Some of the reforms or amendments recommended by Experts include:

8.2.3.1 *Changing the Vice Presidential System*

Article 60 of the 2004 Constitution provides that there will be First and Second Vice Presidents. In addition, Presidential candidates are required to disclose the names of their proposed Vice Presidents when declaring their candidacy.

It has been suggested that the number of Vice Presidents could be increased from two to three to enfranchise more groups. Although not required by the constitution, political considerations have resulted in Vice Presidents and the President being from different ethnic groups. Adding an extra Vice Presidential executive position would allow the President to make the Executive Branch more ethnically representative without adding another Executive (such as a Prime Minister or CEO), which might undermine the President's authority.

A unique suggestion was presented by one Key Expert that the President choose his Vice Presidents after the elections. Currently, the Presidential candidate must choose his or her Vice Presidents based on their perceived ability to win votes, not on their qualifications for high government office. The system also invites negotiation between candidates, as a Vice Presidential candidate may ask for certain privileges in exchange for supporting a presidential candidate. By allowing the winning candidate to choose the Vice Presidents after the election, the President would be free to select more qualified people.¹³² This suggestion may pave the way for choosing Vice Presidents for their expertise—although that would be hard to guarantee as well—but more importantly it would transfer the status of Vice Presidents from directly elected or traditional leaders to appointed expert and qualified officials.

It has also been suggested that the roles of the Vice Presidents be more clearly defined.¹³³ For example, in a three-Vice President system, there could be one for International Affairs, one for Economic Affairs, and one for Defense. While this system has some merit, it also raises particular challenges. One of the primary reasons for multiple Vice Presidents is to allow the government to be more inclusive of group interests. Having to account for minority interests, and expertise in a particular field, adds a layer of complexity that may not be practical. It seems more suitable that the authority of each Vice President be shaped through agreement of the President consistent with their expertise and interests after coming to office.

8.2.3.2 *Changing Parliament's Power to Issue No Confidence Votes*

One of the destabilizing factors for any government under the 2004 Constitution is the power of the Lower House to require the removal of individual Ministers by passing vote of no-confidence against him or her on almost any issue—and that, too, through a secret vote. Though the Ministers are selected by the President, and are charged with carrying out the policies of the Executive Branch, the omnipresent threat of being impeached causes them to be individually responsible to Parliament, inviting cronyism, undue pressure, and corruption. That the vote is held in secret paves the way for backroom and corrupt deals, not to mention making Parliament members unaccountable to the voters. The removal of the Ministers through a vote of no-confidence also sometimes creates rifts within the government, where different blocks suspect that they have been betrayed by their colleagues. In short, the secret vote of no-confidence on individual ministers is unprecedented, and a cause for instability to any Afghan Government.¹³⁴

One obvious improvement would be to prohibit the Lower House from making no-confidence votes in secret. There is little or no justification for a system that allows elected officials to hide their votes from the public on a subject of national concern.

132 Key Expert Interview #9.

133 Key Expert Interview #9.

134 Key Expert Interview #8.

The more difficult question is whether to continue the practice of allowing the Lower House to issue no confidence votes against individual Ministers. One Key Expert has suggested that the Constitution be amended to make clear that the Cabinet as a single entity is responsible to Parliament, rather than each Minister individually.¹³⁵

The danger inherent in that proposed system is that a few particularly inept or corrupt Ministers would be effectively insulated against removal from office, or alternatively, they would endanger the entire Cabinet, as Parliament may vote to dismiss all the Ministers to remove the underperformers. Moreover, giving Parliament the ability to dismiss the entire Cabinet begs the question of what would happen next.

Another possibility is to continue to allow the Lower House to question individual Ministers, but increase the number of no-confidence votes needed to dismiss a Minister. Thus the appointment of a Minister could be ratified by merely a majority vote, but removal might require a vote of two-thirds or three-quarters. This change, along with a requirement that votes be made publicly, would allow Parliament to expel Ministers for good cause, but the removal process would be onerous enough that dismissal would not be a constant threat.

Another suggestion to limit the debilitating effect of Parliament's no-confidence votes is to move some of the key responsibilities out of the Ministries and place authority in the hands of Independent Commissions. These Commissions would be headed by qualified experts, who would be shielded to a large degree from the political tension between Parliament and the Cabinet. Policy would still be set by the relevant Ministry, but implementation, including the creation of detailed policies and procedures, would be overseen by independent bodies that do not directly answer to Parliament.

The creation of Independent Commissions would also relieve the burden on the Executive Branch to oversee all aspects of governmental functions. A common criticism of the current system is that the President and Ministers concern themselves with trivial matters, detracting from their ability to focus on larger issues. Placing responsibility on independent bodies for dealing with the necessary but more mundane functions of the government could alleviate this problem.

8.2.3.3 Clarifying the Process of Constitutional Interpretation

The current conflict between the roles of the Supreme Court and the ICOIC impairs the smooth functioning of the Afghan State. Article 121 of the 2004 Constitution gives the Supreme Court the right to interpret the Constitution, albeit with some ambiguity. However, some Parliamentarians and legal scholars argue that Article 157 seemingly gives a certain constitutional interpretation authority to the ICOIC.¹³⁶ The government sometimes refers an issue to the Supreme Court and sometimes to the ICOIC, which is problematic.¹³⁷ In addition to raising the possibility of conflicting Constitutional interpretations, the system undermines the legitimacy of both bodies.¹³⁸

Vis-à-vis the Supreme Court and the ICOIC, the drafters of the 2004 Constitution clearly envisioned that the Supreme Court would interpret the Constitution. The language of Article 121—the only article on Constitutional interpretation approved by the CDC and the CRC—specifies the power of the Supreme Court in this regard. Article 157, which purports to grant some authority to the ICOIC, was added later by the Constitutional Loya Jirga and was never contemplated by the drafters.

Moreover, the concept of having a Commission to interpret the constitution is outside of any accepted system. Constitutional interpretation is done by a court—either a Supreme Court or a Constitutional Court. Since the 2004 Constitution does not provide for a Constitutional Court, logically the duty to interpret it, as well as per article 121, should be accepted to be carried out by the Supreme Court. Amending the Constitution to add clarity on this point will be a major step in adding stability to the system.

135 Key Expert Interview #1 (DMQH, Male, Kabul).

136 Key Expert Interview #5 (GH, Female, Kabul).

137 Key Expert Interview #9.

138 Key Expert Interview #5.

8.2.3.4 *Improving Local Government Administrative System*

The final question is whether Afghanistan would benefit from keeping the presidential model, but delegate some of the President's authorities to other bodies in both the center and the provinces. Our research suggests that under the current system the President may get involved in both major national policy issues and minor matters such as low-level appointments in both Kabul and in the provinces. There is a concern regarding too much centralization of decision-making, and weakness and administrative paralysis at the lower levels of the government. The efficiency of the state would most likely improve if the decision-making processes were more streamlined, and if other institutions both at the center and the provinces were empowered. Hence, in our opinion, phased and careful delegation of some authorities of the Presidency and the strengthening of other institutions both at the center and the provinces would reinforce democracy in the country.

Putting more authority in the hands of provincial and district bodies and leaders may arguably suit well the needs of a country with weak infrastructure, as local government can act more quickly and efficiently with respect to local requirements. Local leaders are likely to be more familiar with local needs, and more capable of managing local projects and improving service delivery compared to a centralized government.

In particular, it has been proposed that the budgeting process should actually be prioritized at the local level. If local administrations prepare and publish their proposed budgets, including specific expenditures, local people will be able to review them and comment or lobby for changes. Not only will such a system help ensure that local needs are met, but that a sense of community ownership and investment in local projects is encouraged.

There are a number of concerns, however, with shifting authority to local government. There is strong opposition in the country to any changes that may be seen as a move towards federalism which will divide the country.¹³⁹ Another valid concern is that many local leaders have had violent pasts, and have a history of putting their own interests ahead of those of the community.¹⁴⁰ Some Experts have stated that we do not need to change from a centralized to a decentralized system, but we need some reforms, particularly with respect to financial issues and taxes.¹⁴¹

Obviously, the first step is the full implementation of the 2004 Constitution, which includes elements of local empowerment, such as holding district and provincial elections so that local governments would be seen as legitimate. However, beyond the elections themselves, enabling legislation would need to clearly define the powers and the responsibilities of Provincial and District Governors and Councils. Currently, Governors are acting as the representatives of the Central Government without clear mandate. Local governments also lack independent budgets, making them financially dependent on the Central Government, and unaccountable to the local populations.

At the present time, the effectiveness of local leadership depends greatly on the personal standing, power, and wealth of the Governors, and not from the political system and structure—obviously a model that is not effective. There needs to be an extension of at least some local budgetary powers, and local government must be institutionalized, so that the scope of its power is a function of well-defined rules and regulations, and not strength of personality.

Democracy is a work in progress. The above-mentioned recommendations are not exhaustive, but may be a starting point on how to reform the Executive Branch, ensure that democracy works in Afghanistan, and promote a system that is more legitimate and effective, with greater stability.

139 Key Expert Interview #9.

140 Key Expert Interview #8.

141 Key Expert Interview #1.

9. Conclusions

Having looked at the executive branch in a variety of different political systems, studied its structure in previous Afghan Constitutions, and closely examined Afghanistan's post-Taliban experience, what conclusions may be drawn? How has the 2004 Constitution, and in particular the Executive Branch structure, served Afghanistan and its people? Clearly the 2004 Constitution may best be viewed as a work in progress—there is much to build on, but work remains to be done.

It is our conclusion that there is no reason for a major overhaul of the system that has been in place for 13 years. Political actors, experts, local scholars and political commentators remain almost unanimous in their support for the presidential system of government, citing foremost its relative stability and effectiveness, and its ability to resist the influence of any particular group to make decisions on behalf of the people.

Any other system would require truly representative and national political parties, and a fully developed infrastructure as yet unavailable in Afghanistan. Yet it is widely believed, among both the authors and the Experts, that improvements can be made.

In Section 3.3, the characteristics of a strong executive branch were discussed: legitimacy, flexibility, accountability, effectiveness and stability. The 2004 Constitution receives varied marks in each category.

Legitimacy: The presidential system has worked well in that three national, democratic elections have been held, including one that resulted in a transition of power. Each election featured a variety of candidates representing different interest groups, leading to the conclusion that no group is excluded from the political process. Having two Vice Presidents allows more interest groups to feel included in the administration; adding a third could further improve representation.

On the negative side, the last two Presidential elections were marred by allegations of fraud, leading to contested results of the last election and to subsequent creation of the NUG, which features an Executive position not envisioned in the 2004 Constitution. The long delay in parliamentary elections and local elections—leading in turn to the inability to convene a Loya Jirga—has negatively affected the legitimacy of the Executive Branch. However, this last point is more an administrative failing than a systemic shortcoming.

Flexibility: That the impasse created after the run-off election between Mr. Ghani and Dr. Abdullah did not lead to violence or the collapse of the Government is a testament to the system's ability to adapt. Albeit with international support. While the constitutionality of the NUG is debatable, its adaptation was seen as a short-term solution to the political crisis and the Executive system has, for the most part, remained intact.

On the other hand, the reason that the position of Chief Executive Officer has not been formalized is that amending the Constitution is delegated to the Loya Jirga. A Loya Jirga cannot currently be convened, although, again, this is due to the many technical, and logistical challenges that the country faces rather than a lack of systemic flexibility.

Accountability: Certainly the Cabinet Members are accountable to Parliament, as evidenced by the Lower House's questioning and proclivity for issuing votes of no-confidence on individual Ministers. There is some lack of accountability on the part of the Lower House, due to its members being elected from relatively large constituencies in the provinces, without feeling answerable to any particular district or constituency, as well as casting their votes on important issues, such as no-confidence votes, in secret. As a result, voters cannot ascertain how their representatives voted on many critical issues and are not in a strong position to hold them accountable. Though the Constitution does not specify, the practice of secret voting is contrary to representative democracy. In theory, the Judiciary can limit secret voting; however, the dispute regarding the extent of the Supreme Court's authority to interpret the Constitution further exacerbates this situation.

Though there has been valid criticism that the Central Government has not been adequately accountable or responsive to more distant provinces, this will be partly alleviated by holding the various local elections anticipated by the 2004 Constitution, in particular the district and municipality elections, as well as establishing durable secondary non-political and administrative institutions.

Effectiveness: Given the NUG's slow decision-making and extended wrangling over appointments and other issues, many Experts believe it has not been particularly effective in addressing the myriad of issues that the country faces. However, much of the blame for that may be attributed to other critical international and domestic factors including the drastic reduction of international forces.

Compared with alternatives, the presidential system is seen by the public and interviewed Experts as more effective in maintaining national unity, establishing national institutions, and applying the rule of law uniformly across the country. People in the provinces often want the central government, and the President in particular, to intervene to redress their grievances and issues; the socio-political environment of the country has not sufficiently shifted since the adoption of the presidential system under the 2004 Constitution to merit its overhaul.

Stability: The system has proven to be remarkably stable despite increased insurgent activity, economic woes, political crises, social tensions and a sharp reduction in foreign assistance. Moreover, it is safe to say that the Afghan people are committed to the democratic process; regardless of the NUG's performance, it is difficult to envision Afghan society accepting a non-democratic government.

Rather than radically changing the governmental structure, now would be an ideal time for Afghanistan to make adjustments based on the lessons of the past 13 years. When the 2004 Constitution was drafted, Afghanistan had no true democratic experience; thus, it was natural that specific issues would be addressed only in general terms, such as in many post-conflict countries. The opportunity arises now to add detail and specificity to the Constitution by, for example, providing for a greater role by local administrations, clarifying the role of the Supreme Court, and limiting Parliament's ability to undermine the various ministries' responsibility to the President.

10. Recommendations

Based on the suggestions of the Experts, the lessons learned from Afghanistan's constitutional history, international best practices, and other empirical evidence, the recommendations include:

1. Hold Local and Parliamentary Elections

A prerequisite to any constitutional change is the convening of a Constitutional Loya Jirga. Therefore, overdue Lower House elections should be conducted to ensure that the participation of National Assembly members in the Loya Jirga is viewed as legitimate. Similarly, local elections should be held for heads of District Councils so that a Loya Jirga can be convened.

2. Focus the Loya Jirga on Appropriate Issues

Concerns have been raised that a Loya Jirga, once convened, might become embroiled with identity and ethnically-charged issues and discussion of fundamental rights. In order to address these concerns, the scope of the issues should be limited to those involving and relevant to the structure of the Executive Branch. In particular, Chapters I and II - the State and the Fundamental Rights and Duties of Citizens - should not be subject to reconsideration. In advance of a Loya Jirga, a Constitutional Drafting or Amending Commission should be tasked with suggesting specific amendments. This step should be followed by the formation of a Constitutional Review Commission that will not only review the draft, but also solicit public opinion and inform the public about the proposed amendments. In this way, the subsequent Loya Jirga should be required to focus on a pre-determined set of issues.

3. Maintain the Presidential System

A government headed by a single executive with broad authority is the best option for Afghanistan, a post-conflict country with a political system that has not reached maturity. However, in a multi-ethnic country such as Afghanistan, the President and his team of Vice Presidents would need to receive votes and support from across ethnic groups in order to ensure legitimacy and stability. The Loya Jirga may also consider making changes to the position of Vice President as suggested by some of the Experts, or ratifying the NUG structure, but drastic deviation from the presidential system would not be in order under the circumstances.

4. Strengthen Local Governance

Phased and careful delegation of some authorities of the Presidency and the strengthening of other institutions both at the center and in the provinces would reinforce democracy in the country. Empowering local government by putting more authority in the hands of provincial and district bodies and leaders may fit the needs of a country with weak infrastructure, as local government often can act more quickly and efficiently. Local leaders are likely to be more familiar with local needs, and more capable of managing local projects and improving service delivery compared to a distanced centralized government.

5. Constitutionalize Secondary Organizations

As part of the effort to empower secondary organizations, their authority should be specified in the Constitution. If governmental departments such as a Civil Service Commission or an Anti-Corruption Unit are given constitutional standing, their stature and legitimacy will be greatly increased and their effectiveness enhanced. It would also go a long way in establishing non-political or less politically influenced national institutions.

6. Vest Power to Interpret the Constitution in One Body

The current situation, where the Supreme Court's authority to interpret the Constitution is contested by the Parliament, which prefers that the right be vested in the Independent Commission for Overseeing the Implementation of the Constitution, is of great concern and not tenable. The language of the Constitution granting the authority of Constitutional interpretation to the Supreme Court should be unambiguous or in keeping with modern with international constitutional practices, the authority to interpret the Constitution should be vested in a newly-created Constitutional Court.

7. Institute Political Party Reform

As a general rule, the concept of separation of powers works best when there are clear majority and opposition parties operating within the political system. Accountability suffers when the political landscape is dotted with dozens of small groups and self-interested individuals. Establishing an environment where legitimate political parties can flourish, and candidates can freely declare party affiliation, will enhance the political process and expand the country's executive branch options.

8. Hold Officials Accountable

NUG must implement its obligations under the NUG Agreement, especially completing election reform, holding Parliamentary and District Council elections, and fulfilling other governmental duties. Similarly, members of Parliament should be required to disclose how they vote on key issues, including no-confidence votes against individual ministers.

9. Seek International Expertise

While many aspects of Afghan politics are unique to its society, much can be learned from other societies, especially post-conflict ones. Following the experience of 2004, Afghanistan should open the Constitutional amendment process to seek the advice of internationally recognised scholars and constitutional experts.

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