



Evolution of the Executive Branch in Afghanistan:

A Look Back and Recommendations on the Way Forward

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Introduction

After the fall of the Taliban in 2001, Afghan leaders gathered to build the framework for a new democratic government for Afghanistan. At the Bonn Conference, a plan was put in place to draft and adopt a new Constitution in 2004, as a significant step toward the country's first presidential election. Thirteen years later, it is appropriate to evaluate the performance of Afghanistan's Constitution in terms of advancing its adopted system of governance and, in particular, whether the executive branch in its current form is suited to meet the needs of the country.

This paper describes the evolution of the executive branch in Afghanistan. In tracing Afghanistan's constitutional history, this study seeks to place the current National Unity Government (NUG) in historical context, derive the lessons learned from past experience and provide realistic and tangible recommendations on the way forward, from a constitutional perspective.

Methodology

The research utilised an extensive desk review as well as qualitative research methods by way of key expert interviews. The study scrutinised the subject from multiple perspectives that included both primary and secondary sources, as set forth below.

The research comprehensively covered available public sources in print and electronic form and thoroughly reviewed all of Afghanistan's constitutions, as well as available commentaries on them. Particular emphasis was placed on reference materials on various constitutional theories and models, from classical through contemporary sources; studies and analyses on the concept of separation of powers and the role of the executive branch; and criticism and commentary on the 2004 Constitution vis-à-vis the perceived effectiveness of the Office of the President and the NUG.

Qualitative data were gathered through key expert interviews (KEIs). A total of eleven informants including political leaders, university professors, politicians, scholars and political analysts were interviewed to gain their perspective and insights. The interviewees were selected based, among other things, on their expertise on the Executive Branch in Afghanistan and comparative constitutional law. The need for representation of diverse political orientations and ethnic backgrounds was also considered in the selection of the experts. The informants have held high-level government positions, been closely associated with the political process or are teaching constitutional and comparative law at universities. The breadth and depth of their experience extend not only to the central government, but also to local government.

Key Findings

This paper concludes that despite many challenges, Afghanistan has made major strides toward establishing a deep-rooted democratic system under the Karzai and Ghani administrations. It is recommended that modifications—but not sweeping reforms—to the Constitution are appropriate.

Criteria of the Study

There are many ways to evaluate the performance of a political regime. This study used five benchmarks: Legitimacy, Flexibility, Accountability, Effectiveness and Stability.

A government must appear legitimate, both to its own people and to the international community. Afghanistan's results are mixed. While there have been three presidential elections, including a successful transition of power to a new administration, the last two elections have been tainted by allegations of fraud and contested results, raising consideration of the Office of the Prime Minister as per the NUG Agreement. In addition, the delay in holding parliamentary and local elections has further caused concern for political legitimacy of the government.

A robust political system must have flexibility to deal with unforeseen circumstances. That the contested elections results and the subsequent political standoff between candidates Mr. Ghani and Dr. Abdullah did not lead to violence or the collapse of the government is testament to the system's resilience. However, it was necessary to implement a temporary structure not explicitly provided in the Constitution in order to achieve the NUG.

Accountability is important in a political system on several levels. Afghanistan's system is weak on most of these levels – members of Parliament are often elected from large provinces and are not accountable to any particular district or constituents; key parliamentary votes are cast in secret; local level government is mostly appointed by the central government and is largely not seen as accountable to the local population. Democratic local governance and appropriate accountability mechanisms can be put in place through constitutional amendments.

Obviously, to be successful any system has to be effective. The effectiveness of the NUG has been called into question, particularly given its slow decision-making and deteriorating security and economic situations. Nevertheless, the Experts believe that under the circumstances, the presidential system is superior to other options.

Finally, a governmental system needs a high degree of stability. Afghanistan's system has proven to be remarkably stable despite increased insurgent activity, economic woes, political crises, social tensions and a sharp reduction in foreign aid. Moreover, it is safe to say that most Afghans are committed to the democratic process; regardless of the government's performance, it is difficult to envision Afghan society accepting a non-democratic government.

Opinions of the Key Experts

The authority to amend the Constitution rests with the Loya Jirga as the highest manifestation of the will of the people of Afghanistan. The Experts all recognise significant social, political and security obstacles to convening a Loya Jirga. Some Experts fear that ethnic and identity issues may cloud other issues, such as the structure of the government. Legally, the possibility of convening the Loya Jirga pursuant to the Constitution is in question because (1) Afghanistan has not held district council elections whose heads must be members of the Loya Jirga and (2) as some of the Experts point out, the legitimacy of the current Parliament whose tenure has been extended by presidential decree and whose members must participate in the Loya Jirga is also doubtful.

Among the key issues to be considered if Loya Jirga convenes is to deliberate the most suitable model for the executive branch for Afghanistan. Given the current state of the weakened political party system of Afghanistan, all the interviewees believed that the parliamentary model is not yet viable. The informants unanimously believe that there are no strong political parties in Afghanistan.

The opinion of most of the informants is that an improved presidential system is more suitable than any other system under the current conditions for Afghanistan. Some informants suggested modifications in the current set-up to include an appointed prime minister; adding a third vice-president or otherwise strengthening that position. Informants strongly recommended limiting Parliament's power to issue secret votes of no-confidence against ministers; clarifying the process of constitutional interpretation; and improving the local government administrative system.

Recommendations

Based on the suggestions of the Experts, the lessons learned from Afghanistan's constitutional history, international best practices and other empirical evidence, 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. The Experts' research suggests that under the current system, the President may get involved in both major national policy issues and minor matters in both Kabul and in the provinces. There is a concern regarding too much centralisation 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 centre and the provinces were empowered. Hence, it is the opinion of the Experts that phased and careful delegation of some authorities of the Presidency and the strengthening of other institutions both at the centre and 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 centralised government. 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 toward federalism, which will divide the country. 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.

5. Constitutionalise Secondary Organisations

As part of the effort to empower secondary organisations, 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 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. 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.

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.

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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