



A Study of Afghanistan's Organization and Structure of Public Administration under the 2004 Constitution

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Research
for a Better
Afghanistan



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AREU's core donor is the Swedish International Development Cooperation Agency (SIDA). Specific projects in 2018 are being funded by the European Union (EU), Global Challenges Research Fund (GCRF), United States Institute of Peace (USIP), Norwegian Institute of International Affairs (NUPI), Food and Agriculture Organization of the United Nations (FAO), Overseas Development Institute (ODI-UK), Institute of Development Studies (IDS) and Swiss Agency for Development and Cooperation (SDC), School of Oriental and African Studies (SOAS) and British Council (BC).

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In 2018, AREU was awarded Best International Social Think Tank by Prospect Magazine.



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The U.S. 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.

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It is noteworthy that the responsibility for any shortcomings in the paper is ours.

Mirwais Ayobi and Haroun Rahimi

Foreword

The Afghanistan Research and Evaluation Unit (AREU) is pleased to present a paper from the third phase of its work under the thematic area of Constitutional Law in partnership with United States Institute for Peace (USIP). We would like express our gratitude to USIP for its generous financial support on the research conducted in this field.

In the first phase, the research on Constitutional Law focused on overall constitutional reform topics, such as separation of power, electoral systems, citizen's fundamental rights and ten years of constitution. In the second phase, our authors expanded the research into the 2004 Constitution, mainly studying the evolution of the Executive Branch and the process of judicial review in Afghanistan.

In this phase, we are grateful to present one of the two papers focusing on chapter eight of the Afghan Constitution on Administration. This paper is very timely because of the growing and dire need for further clarity on the public administration in Afghanistan. This is also the first attempt by AREU's Afghan researchers to highlight the flaws and challenges of the relevant constitutional articles in theory and in practice.

The authors, Mirwais Ayobi and Dr Haroun Rahimi, ask whether and to what extent the constitutionally prescribed public administration offers a sufficient legal framework and if it has been able to perform its function. The authors found that a majority of the people they interviewed believe the constitution provides for a deconcentrated centralized public administration. Meanwhile, a significant minority argue that a holistic interpretation of the constitution demonstrates that it provides for a semi-centralized or deconcentrated decentralized public administration. Ayobi and Rahimi's paper includes a set of recommendations on what the Afghan government can do in the short-term and what changes should be brought to the constitution in the longer run.

The findings in this paper are critical to our understanding of public administration in Afghanistan, particularly how it has been envisioned in the current constitution. I hope this paper will serve not only as a resource that will help the Afghan government and all stakeholders in the reform processes, but also open the space for a larger debate on what mode of public administration suits our current and evolving systems of governance the best.



Dr Orzala Nemat

AREU Director

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List of Abbreviations

ACC	Afghanistan Civil Code
AOP	Administrative Office of the President
CDCs	Community Development Councils
CEO	Chief Executive Office
IARCSC	Independent Administrative Reform and Civil Service Commission
ICOIC	Independent Commission for Overseeing the Implementation of Constitution
IDLG	(Independent) Directorate of Local Governance
IEC	Independent Election Commission
KII	Key Informant Interview
MoFA	Ministry of Foreign Affairs
MoJ	Ministry of Justice
MP	Member of Parliament
NC	National Council
NGGPA	National Good Government Policy for Afghanistan
NUG	National Unity Government

Glossary

Centralization	An administrative system which stresses the concentration of authorities in the center and their exercise through a hierarchical structure
Decentralization	An administrative system which emphasizes the distribution of authorities and their exercise through a horizontal structure
Deconcentrated Centralized	It is a loose centralized administrative system in which some of the decision-making powers are delegated to the decentralized public bodies and authorities
Good Governance	A very updated system of public sector management
Loya Jirga	Grand Assembly/Council, the traditional Afghan assembly that decides matters of national importance such as the adoption of or amendment to the constitution.
Mujahideen	Holy fighter who fought against the Russian invasion in Afghanistan
Nizamnama(s)	Another name for the Laws, which were adopted by King Amanullah Khan
Sharwali	Municipality
Taliban	Literally means student of religious knowledge. They ruled Afghanistan after Mujahideen and their regime collapsed after 9/11 incident.
Tashkilat	The organization and distribution of positions within a public organization
Usulnama(s)	Another name for the laws, which were adopted by King Nader khan

Executive Summary

System of public administration is one of the most important issues addressed under Afghanistan's Constitution. Seven articles of Chapter Eight of 2004 Constitution lay down the basic structure and model of public administration in Afghanistan. However, study of organization of public administration in Afghanistan reveals that some of the constitutionally-mandated administrative institutions are not yet established, and the current system of public administrations often diverge from the constitutional model in significant ways. In addition to the gap between the constitutional model of public administration and the *de facto* administrative system of Afghanistan, the experience of the last decade and half also highlights a number of constitutional design flaws in area of public administration. Until now, there are still unanswered questions about the basic structure and model of public administration under the 2004 Constitution. The paradoxical and ambiguous formulation of the formal constitutional framework of public administration underscore the need for revising the constitutional provisions of public administration system. The overwhelming majority of the stakeholders also concur on the need for the revision of constitutional provisions of public administration.

While those who drafted the 2004 Constitution must have been aware of the treatment of public administration under past constitutions, they failed to effectively incorporate the historical lessons of public administration design into Afghanistan's latest constitution. Study of Afghanistan's past constitutions reveals that different models of centralization, decentralization, and deconcentrated centralization were tried by different regimes; a historical understanding of these different models could inform better constitutional design for public administration in Afghanistan. Lack of sufficient historical studies and indigenous theories of public administration has contributed to poor constitutional design of public administration system in Afghanistan. However, a more holistic view also shows that during the last decade and a half, Afghanistan has been struggling with formidable legal and extralegal challenges and lacked some of the necessary preconditions for a good system of public administration. Given these challenges, which persist until today, a decade and a half may not be a long enough timeframe for evaluating the effectiveness of the basics of the 2004 Constitution's model of public administration.

This study recommends that Afghanistan, drawing on historical lessons and a realistic understanding of the challenges facing the country, undertakes a number of mid-term and long-term legal reforms that would gradually create a more effective constitutional framework for public administration in Afghanistan improving delivery of public services and political stability of the country.

1. Introduction

Although we do not know exactly when organizations of public administration first developed, the historical studies suggest that development of public administration has been concomitant with development of state. In Afghanistan, however, the development of public administration only dates back to a century and half ago. Organizations of public administration has been an effective tool for rulers to exercise power and regulate their relations with those under their rule. Thus, organization of public administration has evolved along with the evolution of state. However, depending on the context, and the will of rulers, states have utilized different models of public administration. In Afghanistan, since the inception of modern organizations of public administration, towards the end of nineteenth century, states have utilized different models of public administration ranging from centralization, to deconcentrated centralization, to decentralization. However, due to a whole host of reasons, such as tribal and traditional structures, political instability, rapid regime change, constant historical raptures, top-down and imported nature of attempted administrative reforms, and xenophobic and centrifugal forces within Afghan society, none of these models were successfully institutionalized. The current Constitution, adopted in 2004, seeks to establish a deconcentrated form of centralized administration albeit with some qualifications.

The experience of the last decade and half suggests that the current public administration system has proven ineffective at performing its functions and achieving its stated goals; it could be even argued that it has been a failure. Ambiguity and excessive deferral by the Constitution in areas of public administration, shortcomings of the administrative institutions prescribed by the Constitution, failure in implementation of the Constitution in the areas of public administration, the failure to establish constitutionally-mandated administrative institutions are offered as the reasons for the weakness of public administration in Afghanistan. The question this assessment poses is that whether and to what extent the constitutionally prescribed public administration offers a sufficient legal framework and has been able to perform its functions. To answer this question and other related subsidiary questions, we have employed a qualitative multimethod research design. Under this research design, we reviewed the existing research on the administrative system of Afghanistan. We also analyzed the laws, regulation, policies, and officials reports on public administration in Afghanistan. The analysis of primary and secondary sources was complimented with semi-structured interviews with key informants. We then conducted a thematic analysis of the interview notes in order to highlight the important themes from the interviews. The interview data was leveraged to deepen our understanding of *de facto* structure and operation of administrative system in Afghanistan as well as different views on the problems of and solutions to issues of public administration in Afghanistan.

This paper includes of four parts. Part one comprises of introduction, research methodology and research questions, the need for this research, and the theoretical framework. Part two focuses on the history and evolution of public administration in Afghanistan. Part three describes the constitutional framework and legal structure of public administration of Afghanistan, and the conformity of the *de facto* structure of public administration with its constitutional model, and the need for reform. Part four offers conclusions, and recommendation in light of analysis from this paper.

1.1 The importance of this research

Public administration is an important inquiry for understanding the reasons for the failure of post-2001 order in Afghanistan. This is because public administration plays a critical role in development, institutionalization of democracy, operationalization of national sovereignty, implementation of participatory governance, and delivery of public services. The ability of a political community to achieve these goals is closely related to the quality and performance of public administration. A failing system of public administration surely cannot take upon the demanding tasks of bringing about political, economic, and social developments. Therefore, having a system of public administration based on a well-known model and a good legal framework, and indigenous experiences is an important precondition of a successful nation-state. Since creation of such a system of public administration requires in-depth studies of the administrative system in its context, research like this is of utmost important for creating the necessary conditions for achieving good governance in Afghanistan.

1.2 Research Methodology

The authors have employed a qualitative multimethod research design; our research design consists of analysis of secondary and primary sources as well as semi-structured interviews with experts and discussions with policymakers. Authors have chosen to include individuals in the sample who possess both theoretical knowledge as well as practical experience. Therefore, among others, members of Independent Commission for Overseeing the Implementation of Constitution (ICOIC), high ranking administrative officials, and legal and administration scholars were interviewed. The interviews were conducted in-person and face-to-face. A total of twenty-eight interviews were conducted during the month of July of 2018. Of those interviews, six were occurred in Herat while the remaining were conducted in Kabul. The interviews were conducted based on the prepared questions, however, interviewees were encouraged to raise the issues that they considered relevant and important; interviewers also probed further and asked follow-up questions when necessary. In the study of primary and secondary sources, authors have carefully studied Afghanistan's constitutions, laws and regulations, legislative decrees, administrative guidelines, official reports, as well as academic publications. In addition to this, comments and feedback were also noted from an open dialogue at AREU where authors have shared initial findings esteemed experts from the field. At the end, this paper draws upon a theoretical study of public administration, a study of its historical evolution in Afghanistan, and a critical assessment of its current state, functions, and goals. The limits of this study include scarcity of empirical research on administrative organization in Afghanistan, and limited access to top-ranking policymakers.

Research Questions

The main research question this study aims to look at is: Whether Afghanistan's constitution provides an adequate and appropriate legal framework for the organization of public administration?

Secondary research questions are:

- Can history of public administration in Afghanistan offer us with useful insights and models for understanding and improving public administration in Afghanistan?
- Whether and to what extent the existing structure of public administration is consistent with its legal framework in Afghanistan?
- What are the weaknesses and strengths of public administration in Afghanistan?
- Whether and to what extent the attempts to reform the public administration in Afghanistan have been successful?
- How we can reform the public administration in Afghanistan and improve its legality?

1.3 Paradigms of Public Management

Although some of the criteria of modern public management, such as managerial and hierarchical management structures, existed in the rudimentary political orders as well, the modern public management is only a century-and-half old. Since nineteenth century, three major paradigms have been dominant in most countries: classic public management, new public management, and good governance.

Classic public management is mostly the product of works of Max Weber and Wilson Woodrow.¹ Weber advocated for legal and rational authority over charismatic and heredity form of power, hence, he was a great proponent of administrative rules and regulations, administrative hierarchy, written and legal documentation, division of labor, and impersonalized public administration. In the 1970s, after the shortcomings of the classic paradigm become clear, a new paradigm, new public management, emerged to replace the classic paradigm of public management.

¹ Woodrow Wilson, "The Study of Administration", *Political Science Quarterly*, no. 2 (1887), http://www.iupui.edu/~spea1/V502/Orosz/Units/Sections/u1s5/Woodrow_Wilson_Study_of_Administration_1887_jstor.pdf

The new paradigm favored market mechanisms over state institutions, hence, it favored a smaller state, privatization of public service deliveries, and deregulation. This new paradigm's excessive reliance on market mechanisms and overlook of the role of public oversight caused it to be replaced with a new paradigm in the 1990s. Perhaps, the most important criticism of new public management was its neglect of social justice which led to increasing inequality. To overcome new challenges and meet new demands, good governance emerged as the new dominant paradigm.

Good governance paradigm highlighted the need to redefine the role of state in society.² In the contrast with the previous approaches, which respectively advocated for an increasing and decreasing role for the state in the market, the good governance approach adopted a middle position. The good governance approach emphasizes on an appropriate level of regulation, cooperation, and partnership between government, civil society, and the private sector. This paradigm proposes that creating cooperation and partnership among these three sectors is the most effective way to overcome challenging problems of modern times.³ The theoretical basis of the good governance is influenced by the ideas of democracy, public participation, participatory governance, and accountability of public officials to the citizens.⁴ To embed these values in the public administration, this approach moves away from the closed model of public decision-making and advocates for the creation of new public institutions that facilitate citizenry participation and public involvement in decision-making.⁵

The current constitution of Afghanistan enshrines the basic values of civil society, individual freedom and liberty, participatory governance, democracy, market economy, and promotion of private sector.⁶ The constitution reflects a strong desire to actualize these ethical goals. Therefore, the paradigm that underpins the current constitution is good governance; as evidenced by the title of "National Good Governance Policy (draft)"⁷ which is currently under consideration within the government.

Public administration model in Good governance paradigm

In the past, generally prior to introduction of democratic governments, rulers used public administration to exercise their personal power. However, as the nature, functions, and role of state have changed over time, the functions and nature of public administration too have changed. The change in the nature and functions of public administration has been context-dependent and followed different paths in different countries.⁸ While, in developed countries, public administration has become increasingly more effective and democratic, in the less-developed countries like Afghanistan it has not had the same success. Afghanistan has experienced different organizations of public administration and public management; however, they all have fallen short of achieving their goals. Similarly, study of public administration and public management over time reveals that a range of administrative paradigms—traditional administration, new public management, and good governance—have been employed by different regimes in the Afghanistan's history.⁹

2 Mehdi Hadavand et al, *Aein Hai Tasmimgiri Dar Hoqooq Adari* [Administrative Procedures in Administrative Law], (Tehran: Khursand, 1391: 2012), p. 27.

3 United Nation Development Program, "Governance for Sustainable Growth and Equity", Report of International Conference, (New York: United Nations Publication, 28-30 July 1999), p. 42.

4 Habibullah Salarzai and Habib Abraham Poor, "Evaluation of Historical Evolution of Public Management Paradigms", *Public Management Review* 4, no. 9 (2012), p. 57.

5 Mehdi, Hadavand, *supra* note Error! Bookmark not defined., p. 29.

6 *Constitution of Islamic Republic of Afghanistan* 1382 (2004), preamble, arts. 4, 6 and 10, and Chapter 2.

7 "National Good Governance Policy" (draft, unpublished, July 2018).

8 Manochehr Tabatabai-Motamini, *Hoqooq Adari* [Administrative Law] (Tehran: SAMT, 1383 [2004]) p.52.

9 This reality will be clarified by referring to the legal systems of different regimes thorough the body of the text.

However, in Afghanistan, the promise of these administrative models and paradigms, which were imported and did not organically develop in the Afghan context, have not materialized. This failure can be attributed to a number of causes including their inadaptability to the Afghan context, short life of their implementing-regimes, inability of the implementing-regimes to completely understand and implement these administrative paradigms and models. At the current time, a convergence of external and internal factors (such as a broad consensus on the need for administrative reform among different political groups, improved access to Afghans with knowledge of modern paradigms of public administration, and interest of Afghanistan government's foreign partners to fund administrative reforms) has afforded Afghanistan with a new chance at reforming its system of public administration. Afghan reformists should be extremely careful about the choices they make and the administrative models, and paradigms that they choose. Any decision in this regard should be guided by lessons drawn from the past experiences, and a complete assessment of the needs and wants of today. The 2004 Constitution has adopted the good governance paradigm as it emphasizes on the rule of law, participatory governance, market economy, and a vibrant civil society; however, it does not provide a clear choice of the model of public administration. Given the constitutional ambiguity in areas of public administration, it is important to discuss some basic concepts of public administration here.

Administrative Systems

Countries use different models to structure their public administration. This is because the method of public administration in each country is determined by its political, social, economic, and geographical conditions. Centralized administrative systems may be useful for the countries that have not achieved a high level of political development, are concerned about local strongmen, and secession of parts of their territory. Conversely, decentralized form of public administration may be appropriate for the countries that have strong democratic traditions, have achieved a higher level of development, and enjoy a more resilient national unity. The former group of countries tend to administer the public affairs at the center and local level through a centralized system of administration. In these countries, to perform different administrative and public functions, administrative institutions are established in the capital, and if necessary, these centralized institutions establish line department on the local level as well.¹⁰ This model was widely used in the past; for example, France had a highly centralized administrative system under the reign of Louis XIV. However, currently countries seldom adopt a highly centralized administrative system. Afghanistan, on the other hand, still possess a *de facto* highly centralized administration.

In some other countries such as England, France, and Belgium that follows this model, the national affairs are administrated by the centralized institutions while the administration of local affairs fall under the jurisdiction of local institutions. In these countries, centralized institutions administer the national affairs while local elected institutions exercise jurisdiction over local affairs under the general oversight of the national government.¹¹ In countries where jurisdictions over administration of national issues such as legislation, domestic policies, and judicial affairs are delegated to local institutions, a decentralized political system like federalism starts to emerge.¹² The study of decentralized form of political systems belongs to the field of constitutional law. In a hybrid system, in some countries, while the system of public administration is centralized, the authority and jurisdictions over a range of issues are delegated to local institutions. The delegation of

10 Ibid.

11 Waliullah Ansari, *Kuliyat-e Hoqoq Adari* [Fundamentals of Administrative Law] (Tehran: Mizan, 1386 [2007]), p. 131.

12 Bezhan Abasi, *Mabani Hoqoq Asasi* [Fundamentals of Constitutional Law] (Tehran: Jungle, 1389 [2010]), p. 187.

authority in the hybrid systems is meant to reduce the concentration of administrative power in the capital and remedy some of the drawbacks of a centralized administrative system.

Administrative models are generally divided into centralized and decentralized each are divided into subtypes. These systems represent two divergent views of public administration with markedly different consequences for the quality of public administration and the democratic nature of the administration.¹³ Centralized system stresses the concentration of authorities in the center and their exercise through a hierarchical structure. The decentralized system, on the other hand, emphasizes the distribution of authorities and their exercise through a horizontal structure.¹⁴ In the centralized system the entirety of administration organizations takes on the form of a single organization; they are under a unified, centralized system of command. Thus, in a centralized system, the entirety of organization of public administration has a unitary legal personality.¹⁵ Conversely, in a decentralized system, authorities are dispersed through different organizations and different administrative units enjoy a varying degree of autonomy. In a decentralize system the entirety of administration organization is not under a unified command; however, it is still under the general leadership of the government. Thus, in a decentralized system, in addition to the legal personality of the government, a number of administrative bodies have distinct legal personalities.¹⁶ The centralized system is divided into deconcentrated and concentrated while decentralized system can be divided into local decentralization, regional decentralization, and technical decentralization. As it was explained earlier, the constitution seems to adopt a deconcentrated centralized system of public administration, however, it also contains some features of decentralized systems.

Deconcentrated centralized system is a type of centralized system which is designed to remedy some of the shortcomings of a centralized administration. This system, which is sometimes referred to as delegation of extraordinary authorities, differs from a decentralized system because in the former the authorities are delegated to the local administration in the interest of central administration.¹⁷ Stated differently, the authorities of local administration are delegatory not original. Both systems have their strengths and weaknesses. The usefulness of a system depends on the historical, social, and political contexts of its use; however, the followings are considered the weaknesses of centralized administrative systems: undemocratic tendencies, the information gap between center and localities, promotion of culture of blind obedience, loss of innovative initiatives from below, and excessive bureaucracy.¹⁸ Deconcentrated centralized system is a way for the states which for a number of reasons are not willing to adopt a decentralized system but wish to remedy some of the weaknesses of the centralized system.

13 Waliullah Ansari, *supra* note 11, p. 130.

14 *Id.*

15 Manochehr Tabatabai-Motamini, *supra* note 8, p. 53.

16 *Id.* at p. 58.

17 *Id.* at p. 57.

18 Waliullah Ansari, *supra* note 11, p. 136

2. Historical Background of Public Administration in Afghanistan

2.1 Formation of the centralized administration system

Most legal scholars believe that law and legal rules in a country develop base on that country's cultural and historical contexts;¹⁹ Afghanistan is no exception. Given the importance of historical context in understanding a country's legal system, Afghanistan's administrative law too cannot be fully understood without understanding the historical processes that have led to the emergence of the existing administrative system. Although modern Afghanistan as an independent state with recognizable boundaries was founded by Ahmad Shah Abdalli (1747),²⁰ Afghanistan did not have a centralized system of governance and a public administration until the reign of Amir Abdul Rahman Khan (1880-1901).²¹ Until the reign of Amir Abdul Rahman Khan, with the exception of few other failed attempts at reforms, only Amir Shir Ali Khan's not so successful administrative and governance reforms merit mention. In addition to securing the country from internal unrest and conflict as well as foreign threat and invasion, Amir Shir Ali Khan (1869-79) attempted a number of lasting administrative innovations. Shir Ali Khan, for the first time in the country's modern history, formed a formal cabinet, (which consisted of seven ministers, prime minister, and a secretary), and improved the organization of the armed forces, thus taking the first steps towards creation of administrative organizations and an administrative system in Afghanistan.²²

After Shir Ali Khan, Amir Abdul Rahman Khan (Amir) was the first Afghan ruler who was able to create a centralized, countrywide system of administration. Amir used military force and oppression to bring the "confederation of tribes"²³ of Afghanistan under the control of a centralized power. Amir believed that imposition of a highly centralized system was the only way to restore security, order, and stability to Afghanistan and end the chaos that had resulted from the second Anglo-Afghan war, and unchecked power of autonomous local strongmen, feudals, tribal leaders, and religious elites. Therefore, he prioritized creating an absolute state, and reforming the system of governance; he had significant, lasting achievements at both tasks.²⁴

Amir had divided the country administratively to four major provinces (Welayat), namely Turkistan, Herat, Kandahar, and Kabul, and seven sub-provincial districts (Wuliswali) which were headed by an Amir's representative, titled hakim (ruler) or nayeb al-hukuma (successor of ruler). In this period, the division of the territory to administrative units was meant to facilitate the execution of the centralized authority rather than delegation of authority or decentralization.²⁵ Public officials were prohibited from exercising any form of public authority unless it was explicitly delegated to them by the provisions of the law. If there was need for exercise of such authority, they were required to ask for instruction from the Amir himself.²⁶

19 Genevieve Helleringer and Kai Purnhagen, *Towards a European Legal Culture*, (Baden-Baden: Nomos Verlag, 2014), preface and p. 12.

20 Gholam Mohammad, Ghobar, *Afghanistan Dar Masir-e-Tarikh* [Afghanistan in the Course of History], (Kabul: Maivand, 2009), p. 554.

21 Varan, Gregorian, *The Emergence of Modern Afghanistan: Politics of Reforms and Modernization* (Stanford: Stanford University Press, 1969) pp. 171-175.

22 *Id.* at pp. 115-118.

23 Olivier Roy, *L'Afghanistan et Modernite Politique* (translated: Abulhassan), p. 29, www.afghandata.org:8080/xmlui/handle/azu/254

24 Abdul Ali Mohammadi, *Afghanistan wa Dawlat Modern* [Afghanistan and Modern State], (Kabul: Amiri Press, 2015), p. 111.

25 Tarek Azizy, *Rahnamud Max Planck baraye Huquq Idari Afghanistan* [Max Planck Institute's Manual for Administrative Law in Afghanistan], (Kabul: Max Planck Institute, 1391 [2011]), p. 33.

26 Ahmad Jan Khan Alikozai, *Katabchah-yi Hukumati* [Government Booklet], in: Faiz Mohammad Kateb, *Siraj al-Tawarikh* [Light of Histories] (Kabul: Afghanistan Digital Library, lunar 1331 [1913]), pp. 762-771.

There are striking similarities between the internal conflicts, disorder, and centrifugal forces that characterized the early periods of Amir's rule and the general conditions of the country during the rule of Taliban regime, and even the contemporary Afghanistan.²⁷ The dissimilarities of current Afghanistan state and Amir's state in areas of public administrations can be summarized as follow:

1. Amir came to power at the time when Afghanistan was not yet established as a state as a unified state within recognized boundaries. After resuming power, Amir took on the task of reestablishing Afghanistan as a unified state and surpassing internal divisions. To accomplish this task, Amir utilized a highly centralized administrative system.
2. When Amir resumed power in Afghanistan, absolute monarchy had been the only political system tried in Afghanistan and was the only system that was known to Afghans.
3. Despite the adoption of a number of laws and regulations which set forth the duties and authorities of different public positions, it cannot be claimed that Afghanistan possessed administrative law because of two main reasons. First, at that time public administration was not distinguished from judiciary, legislation, politics, or public policy. Second, Amir's rudimentary legal system did not contain even limited legal protections for individual rights and liberties.
4. Amir's laws were enacted to facilitate direct rule of Amir over people and the territory. Neither formal laws protected the individual rights and liberties of the people nor Afghans saw themselves as right-bearing citizens. As a result, Afghan state at the time did not feel the need to decentralize the administrative system in order to meet the public demand for public services or protection.
5. Amir had proclaimed himself, the representative of the God charged with implementation of Shari'ah; to him, the right to rule was granted to him by God. Given this justification of authority, Amir was the ultimate source of the authority and distribution of authorities or participation in public authority were out of question.

Study of the performance of centralized system during the reign of Amir suggests that the centralized system was successful. Amir used this type of system to establish a strong state which lasted for forty years until the failure of Amani's reforms ended the continuity of the Amir-established state.

2.2 Decentralization tendencies: administrative deconcentration

King Amanullah Khan (1919-1929)²⁸ attempted one of the most ambitious modernizing reforms in Afghanistan. Adoption of the first formal constitution of Afghanistan, "Nezam nama Asasi Dulat Ellie Afghanistan" in 1923, ("1923 Constitution"), and a number of fundamental reforms were a critical junction in the modern history of Afghanistan. The 1923 Constitution created a new administrative system with distinct central and local administrative levels, a dual judicial system which consisted of general and administrative courts and included a number of individual rights and liberties that were inspired by western constitutional systems.²⁹

27 Abdul Ali Mohammadi, *supra* note 24, p. 144.

28 Gholam Mohammad Gobar, *supra* note 20, p. 751.

29 *Nizamnama-e- Asasi Dawalt-e Alliyya-e Afghansitan* [Constitution of Afghanistan] 1301 [1923].

The relevant Amanullah's reform for this research is his reforms of the system and organization of public administration. During Amanullah's reign, 65 laws and regulation were enacted, majority of which were administrative laws, aimed at expanding the public administration and laying the foundations for a modern education system in the country. The prevalence of administrative law legislation in this period is the reason why Amanullah's rule is considered the beginning of legal modernization, especially development of administrative law, in Afghanistan.³⁰

Article 63 of 1923 Constitution had stipulated three principles as the basis for local administration, "expansion of delegation, separation of duties, and specification of responsibilities"; this is a clear evidence for decentralizing tendencies of the Amanullah's formal system of governance. In addition to this constitutional principle, administration was divided into central and local administrations. So much so that some local administrative institutions were comprised of up to 50% elected officials, namely local majales mashvara (local consultative councils).³¹ Under the 1923 Constitution, the affairs of the country were conducted by the council of ministers collectively and individual ministers individually.³² However, most important authorities, such as appointment of high-ranking officials were of the exclusive authority of the King. Therefore, the system of administration was essentially centralized but deconcentrated. The 1923 Constitution envisioned the position of the prime minister as the head of government, however, no one was ever appointed to this position.

During Amanullah's rule, Law of General Organization of State specified the organization of public administration. Article 81 of this law specifies the types of local administrations and their hierarchy. Under this law, local administration included walayat/hukumati a'ala (province/supreme governance), hukumati a'ala (high governance), hukumati (governance), alaqedari, (county), and qaraye (village).³³ All these administrative units were under the jurisdiction of Ministry of Interiors.³⁴ However, local units of other ministries were also present on the local level, such as local units of education, finance, and agriculture. The local institutions that illustrate the decentralizing tendencies of the Amanullah's system were local consultative councils and municipalities.

Although these councils were under jurisdiction of a centralized body, State Council, having 50% elected members and their broad authorities made them very similar to decentralized governance institutions. Another administrative institution that illustrate the decentralizing tendencies of this period was municipality which was called "Baladiya". While the mayors were appointed by the central authority, the law established an elected city council with numerous authorities.³⁵ The important authorities of the city council included appointing officials and setting their salaries, budget, approval of contracts, and oversight of the conduct of the municipality.³⁶

After reign of Nadir Khan, which did not witness major changes in the areas of public administration and rights of citizens,³⁷ King Zaher's adaptation of 1964 Constitution another critical juncture in the historical process of modernization of Afghanistan, however, his

30 Sarwar Danish, *Hoqoq Adari Afghaniṣṭān* [Administrative Law of Afghanistan] (Kabul: Ibn Sina, 1392 [2013]), p.63.

31 1923 Constitution of Afghanistan, *supra* note 29, arts. 39-49.

32 *Id.*, arts. 6, 25 and 27.

33 *Nizamnama-e Tashkilat Asasiya-e Afghaniṣṭān* [The Law of Basic Organization of Afghanistan], 1301 [1923], art. p.81.

34 *Id.* art. 25.

35 *Nizamnam-e Baladiya* [Code of Municipality], 1303 [1924], art. 25.

36 *Id.* arts. 22, 25 and 32.

37 Muhammad Hamid Saboori, "The Progress of Constitutionalism in Afghanistan" in *Shari'ah in the Constitution of Afghanistan, Iran, and Egypt: Implications for Private Law*, ed. Najma Yaseri (Germany: Mohr Siebeck, 2005).

reformist agenda, like Amanullah's, could not last more than a decade. By adopting 1964 Constitution, King Zahir in effect obtained the power from his uncles and opened a new chapter in the history of modernization of Afghanistan.³⁸

The 1964 Constitution did not fundamentally change the deconcentrated centralized model of public administration system, it provided a more complete, modern, and effective legal framework for the public administration system. Under the 1964 Constitution, ministries were the units of central administration, and provinces were the units of local administration. Provincial councils and municipalities were two other local administrative institutions; the former was meant to consult and participate in the provincial administrations and the latter was tasked with administration of affairs of the cities.³⁹

The 1964 Constitution eliminated civil servant/administrative courts and the consultative councils, which were considered for each of every administrative unit, even for the villages, however, provincial councils were instituted instead, and the authority of municipalities expanded. The members of provincial councils and city councils were elected by direct and popular vote.⁴⁰

Despite bearing the name of Republic, Daud's regime was in essence a dictatorship with socialist tendencies.⁴¹ Daud's regime displaced similarities to the "Modernizing Oligarchies" as defined by Edward Shils.⁴² Daud's 1977 Constitution did not include a chapter on administration; it merely contained one article which stated that the administration shall be centralized.⁴³ The government was the same as the council of ministers which was headed by the President, and there was no prime minister.⁴⁴

2.3 Decentralized Administration

The communist parties toppled Daud's regime by a coup in 1977. During the communist rule, Afghanistan experienced three different constitutions: one adopted during the Presidency of Nour Muhammad Taraki, in 1980, the first communist president of Afghanistan, and the other two adopted by President Najibullah, in 1987 and 1989, the last communist president of Afghanistan. In light of commitment to the social values, all legislative, judicial, and executive powers were vested in the Revolutionary Council.⁴⁵ During this period, in addition to local councils, local executive committees were also instituted. The 1980 Constitution clearly adopts a decentralizing approach to administration.⁴⁶

Like 1980 Constitution, President Najibullah's constitutions have clear decentralizing approach. The 1987 Constitution institute the most obviously decentralized administrative institutions in Afghanistan. Here we will point out two of the decentralized characteristics of the Najibullah's administrative system:

38 Mohammad Zahir lost his father, King Mohammad Nader, when he was only 19-year-old. Due to this reason, his uncles held the real power for first three decades of his fourteen years reign. It was in 1964 when Mohammad Zahir resumed the power. Following his rise to power, King Zahir introduced his reform agenda and adopted a new Constitution.

39 *Constitution of Afghanistan* 1342 [1964], Chapter 8.

40 Code of Basic Organization (Official Gazette no. 15), 1965 (1343), arts. 45 and 47.

41 Amin Tarzi, "Islam and Constitutionalism in Afghanistan" 5 *Journal of Persianate Studies* (2012), p. 223.

42 Almond Gabriel et al, *The Politics of the Developing Area* (New Jersey: Princeton University Press, 1970), p. 53.

43 *Constitution of Afghanistan* 1355 [1977], art. 26.

44 *Id.* art. 88.

45 *Constitution of Afghanistan* 1358 [1980], art. 37.

46 *Id.* Chapter 6.

1. Article 1 of the 1987 Constitution states that the sovereignty belongs to the people which is exercised by “Loya Jirga, National Council, and Local Councils.” According to this article, the people clearly participate in the exercise of sovereignty on the local level through local councils; therefore, local councils enjoy original authority which is a quintessential feature of decentralized administrative systems. This stands in contrast with the 1964 which declares the King as the national sovereign; which is indicative of the centralized administration under which the authority is delegated by the central authority to the local administrations.
2. Under the 1987 Constitution, local councils, to which a separate constitutional chapter is dedicated (Chapter 11), enjoy broad authorities. In essence, these councils are charged with the local governance. Local councils had elected executive committees which were headed by the local governors. In this system, councils not only had oversight, consultative, and participatory roles but also enjoyed real administrative and executive authorities; they directly exercised state authorities on the local level. In this regard, article 129(2) states, “all organizations, institutions, and respective local administrations must comply with the decisions of local councils and their executive committees.”

The 1989 Constitution reversed this decentralized administrative system and returned to the 1964 model of administrative system. After the Mujahedeen government rose to power the country descended into chaos, civil war, and lawlessness. While not all the laws were formally suspended, the country did not have a recognizable legal system. Like other areas, no positive development occurred with respect to public administration. Furthermore, the basic structure of public administration collapsed, and the country was no longer a unified territory.

Prior to Amanullah’s reforms and decade of constitutional monarchy, highly centralized administrative systems ensured the stability and continuance of the state. However, these long periods of highly centralized administrative-political power limited the opportunities for practicing participatory forms of governance which hindered the development of a democratic political culture and ensured the continued dominance of conservative views. The undemocratic, conservative political culture caused by a highly centralized system of governance were also a reason why periods of social reforms were met with public resistance.

A move towards decentralization has historical, political, and social causes.⁴⁷ The influence of historical trends highlighted above are observable in the current discourse around administrative reforms. In the current debate on administrative reform in Afghanistan, on the one hand, some argue, at a time when local strongmen who enjoy personalized power and have centrifugal tendencies hold sway decentralization can pose serious challenges to the central authorities. On the other hand, others argue that a highly centralized system creates the conditions which makes it difficult to reform the system. They posit that there exists a feedback loop. Centralized system ensures low level of local capacity, and low level of political development in the provinces, thus, ensuring the need for a centralized system.

⁴⁷ Abdul Ali Mohammadi, *supra* note 24, p. 162.

3. Public Administration Under the Current Constitution

3.1 Approach of the Current Constitution to the Organization of Public Administration

Although the development of public law, particularly administrative law, in Afghanistan has been slow, flawed, haphazard, and disconnected, Afghanistan has experienced considerable legal development after the fall of Taliban regime. The 2004 Constitution, which is the outcome of more than a century struggle in legal development, is the most democratic and progressive constitution in Afghanistan yet. In this regard, the special attention of the international community to the making of 2004 Constitution has played a crucial role as well. The 2004 Constitution in areas of administrative laws is heavily influenced by the 1964 Constitution, however, it is unique in that it puts especial emphasis on the principles of democracy, rule of law, and individual rights and liberties.⁴⁸ Despite being a landmark achievement, the experience of the last decade and half reveals that the 2004 Constitution has a number of serious flaws as well.

It would be hard to argue that the 2004 Constitution provides a comprehensive and complete system of public administration, like the ones prescribed by the constitutions of developed countries. However, the 2004 Constitution has devoted significant attention to public administration. In addition to the chapter eight, which is titled organization of public administration, the 2004 Constitution contains a number of important rules and principles which directly or indirectly touch upon the issues related to administrative law or organization of public administration. One can name the basic principles enshrined in the 2004 constitution (like popular sovereignty and participatory governance) or the mechanism of circumscribing public authority (such as separation of power and judicial review) or extensive protections that are afforded to individual rights and liberties. It should be noted, however, that the effectiveness of these constitutional measures in the context of Afghanistan are subject to debates.⁴⁹

Chapter eight of 2004 Constitution which comprises of seven articles describes the organization of public administration and prescribes its governing rules. This chapter contains provisions on the type of administrative system, the relation between central and local administration, administrative unites, and local institutions. Study of this chapter, which is the main focus of this research, suggests that the 2004 Constitution, despite its shortcomings, describes and clarifies the basic structure and basis of public administration in Afghanistan. The Constitution, however, has not been fully implemented in areas of public administration.

In addition to the chapter eight, administrative law and organization of public administration is closely based on the fundamental principles of the 2004 Constitution. For example, Ramin Moschtaghi, who is the author of some valuable work concerning Afghanistan legal system, has argued that unified and centralized state, Islamic republic, rule of law, expansive rights, and democracy make up the five fundamental principles of the 2004 Constitution. This is while all these five principles have direct bearing on administrative law and organization of public administration in Afghanistan. Including the principle of

48 Moschtaghi, Ramin "Constitutionalism in an Islamic Republic: The Principles of the Afghan Constitution and the Conflict Between Them," in *Constitution-Making in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann Roder 683-713 (Oxford: Oxford University Press, 2012), p 685.

49 Rangin Dadfar Spanta, "An Overview of Citizens' Fundamental Rights: Challenges and Opportunities" (Kabul: Afghanistan Research and Evaluation Unit, 2015), pp. 24-25.

“Islamic Republic”, which some may question its position as a basic principle of public administration, all of these principles form the basis for development of a progressive, democratic, and modern public administration system. The study of these principles as the basis of a public administration system merits a separate research. In addition to these principles, constitutional mechanisms which are meant to control public authority and ensure the respect for civil liberties have direct bearing on the structures, processes, institutions, relations, and operation of organization of public administration. Principle of separation of power, the type of political system chosen in the constitution, the right to sue the state and public administration, and the constitutional commitment to public participation in public administration are inextricably linked with the constitutional organization of public administration. In this research, however, we will focus on the structure and organization of public administration in Afghanistan and their relationships, the centers of administrative decision-making, and implementation of the administrative decisions.

3.2 The existing administrative system

Article 137 Constitution provides the most relevant constitutional provision with regard to the model of administrative system in Afghanistan. It states, “The government, in preserving the principles of centralism, shall delegate necessary authorities, in accordance with the law, to local administrations in order to accelerate and improve economic, social as well as cultural matters, and foster peoples’ participation in developing national life.” This article, on the one hand, stresses the “preserving the principle of centralism”, on the other hand, it requires the delegation of “necessary authorities” to local administration. Thus, this article reflects a dual constitutional preference for the centralized system as well as decentralization. It, similarly, stresses the public participation in development of the country. This institutional design has led the majority of scholars to conclude that the constitution prescribes a “deconcentrated centralized” administrative system.⁵⁰ However, the constitution also envisions elected local councils and city councils, which are of the features of decentralized administrative systems, in articles 140 and 141, thus raising doubt about the constitutional adoption of the centralized administrative system. This seemingly paradoxical institutional design by the constitution has led to a difference of opinions on the issue of type of administrative system in Afghanistan. In other words, the paradoxical administrative design in the constitution has prevented the formation of a consensus amongst scholars and policymakers on the type and organization of administrative system in Afghanistan. Constitution and administrative law experts hold widely divergent views on the issue of constitutionally-mandated type of administrative system in Afghanistan. While some believe the administrative system prescribed by the constitution to be a “deconcentrated centralization”, others consider it to be a “decentralized” system, some even go further and argue that the constitution adopts a “deconcentrated decentralization” administrative system.

50 Sayed Ali Hosseini, *Hoqoq Edari Afghanistan* [Administrative Law of Afghanistan] (Kabul: Amiri Press, 2013), p. 154.

Views of the supporters of centralized administrative system

The views of those who believe that the Constitution has favored a centralized system of public administration is informed by the historical trend of centralizing policies of past regimes, strong pro-centralization views that were prevalent at the time of making of 2004 Constitution, and their holistic interpretation of the Constitution. The centralized administrative system has a longer history compared to its alternatives. This historical precedent could be attributed to the close affinity between centralized administrative systems and absolutists regimes. As it was explained in section two, the formation of a unified state in Afghanistan was accompanied by the development of a centralized administrative system. While Amanullah's reforms introduced decentralization to the Afghanistan legal system, in practice, most regimes in Afghanistan have had strong centralizing tendencies. Even during the communist regimes, which employed a decentralized administrative system, the power to make administrative and political decisions was concentrated in the center. As one interviewee states,⁵¹

Basically, over the last two centuries, we have had a centralized administrative system with the aim of controlling the territory in the favor of rulers. The fact that Afghanistan has never colonized also caused Afghanistan not to converge with other common administrative systems in the world. 2004 Constitution, while being successful in areas of fundamental rights and liberties of the citizen and championing values of popular sovereignty, does not have significant achievement in areas of structural reform which would ensure the implementation of these values in practice. In other words, in the area of public administration, we have a powerful institutional legacy of centralized and undemocratic public administration.

In addition to Afghanistan's institutional legacy, general conditions of the country at the time of making of 2004 constitution favored centralization. The general conditions of Afghanistan after the fall of Taliban regime paralleled those of Amir Abdul Rahman Khan's in that the country was suffering from the lack of a countrywide sovereignty, and prevalence of chaos, decohesion, and deep internal divides.⁵² As one interviewee stated,⁵³

During the making of 2004 Constitution, Afghanistan was de facto governed in a decentralized way. Local strongmen controlled different parts of the country; public revenue was neither collected nor spend by a centralized authority; a centralized authority with monopoly over the political and military power in the country did not exist. These were the reasons why the majority of the constitutional drafting committee favored a strong central state. The surveyed that were conducted at the time showed that people were wary of the influence of local strongmen and favored a strong central state.

Some even argue that international community favored a centralized system thinking that it was easier to deal with a central authority power of a system of decentralized a power.⁵⁴ However, others believe that the international community could have been persuaded to support a decentralized system as they actually setup a decentralized system of support in Afghanistan through Provincial Reconstruction Teams.⁵⁵

The content of the Constitution also lends support to the interpretation that the constitutional mandates a centralized administration system. The constitutional approach to the basic structure of political power and structure of administrative law system supports the view that the constitution favors a centralized administration system. Some believe that the centralized administrative system was favored to ensure alignment with the centralized political system. Article One of the Constitution prescribed the basic structure of political system in Afghanistan. It states, "Afghanistan shall be an Islamic Republic,

51 KII, senior official, MoFA.

52 Abdul Ali Mohammadi, *supra* note 24, pp. 143-144.

53 KII, member of draft commission of the constitution of 2004.

54 KII, ex-member of ICOIC.

55 KII, senior official, MoFA.

independent, unitary and indivisible state.” This article not only removes the possibility of decentralized political systems (such as federal, confederal, local autonomy, etc.) it also raises some doubts about the constitutionality of a decentralized administrative system. It is clear that a unitary, centralized political system can have a decentralized administrative system, as many unitary political systems do; however, prescribing a collective identity of the Afghanistan’s state, locating the political center in the capital, and stressing the indivisibility of the country can be used as evidence that the constitution reflects a general fear of possible dangerous consequences of decentralization.⁵⁶ Thus, strong emphasis on a highly centralized political system has led the centralized administrative system to be treated as a necessary condition for a centralized political system while administrative decentralization would not pose a constitutional problem.⁵⁷ It should be noted that those who put forward a centralized interpretation of the constitution acknowledge that the constitution clearly requires the delegation of necessary authority to the local administration; they are merely describing the operating interpretation of the 2004 constitution during the last decade and half.

Views of the supporters of administrative deconcentration

Overwhelming majority of interviewees agreed with the view that the 2004 Constitution mandates a “deconcentrated centralized” system of public administration citing the constitutional requirement that the necessary authorities must be delegated to the local administration. This is understandable since in the Afghanistan’s legal system generally two competing principles co-existed: emphasize on a centralized administrative system and local participation in governance and development.⁵⁸ Commitment to these two competing principles is understood to be the adaptation of “deconcentrated” model of public administration.⁵⁹

However, a small number of interviewees were satisfied with the current system. Acknowledging the shortcoming of both centralized and decentralized administrative systems, they considered a deconcentrated centralized administrative system the best system in the current context of Afghanistan. The supporters of the current system offer two specific arguments; first, they argue that the current system has not been actually implemented, therefore, judging its effectiveness is premature; second, they believe, replacing a formal model before it has been actually implemented is an economically unwise decision which has been part of Afghanistan culture of reform.⁶⁰

56 Abdul Ali Mohammadi, *supra* note 24, p. 156.

57 KII, ex-member of ICOIC.

58 Abdul Ali Mohammadi, *supra* note 24, p. 154.

59 KII, member of draft commission of the constitution of 2004 and senior advisor of MoJ.

60 KIIs, advisor to the President and member of ICOIC.

Views of the supporters of decentralized administration

As it was explained above, the 2004 Constitution in addition to stressing preserving of principle of centralization requires the establishment of a number of elected local councils, which are the quintessential features of a decentralized system. This is because the election of members of these councils by direct popular vote of local people grant them original authority. In this way these local institutions are more dependent on the local constituents for their legitimacy and power rather than central government. This local-dependence is acknowledged by the constitution as well. This has led some to argue that the authority of these locally elected institutions should not be driven from a central authority, which they argue gives Afghanistan a constitutionally-mandated decentralized administrative system.⁶¹ The supporters of decentralization argue that a literal interpretation of constitutional provisions on administration is not helpful and that the inclusion of “preserving the principle of centralization” does not necessary mean that the Afghanistan must have a centralized administrative system. They put more weight on the constitutional mandate of delegation of necessary authorities, arguing that the constitution talks about delegation in the context of a decentralized administrative system. As one interviewee stated,⁶²

If we consider the constitution as a whole and adopt democratic legitimacy and implementation of ethical values as the basis of constitutional interpretation, it becomes clear that the constitution favors a deconcentrated decentralized administrative system. It is under such a decentralized system that the constitution mandates the creation of elected local councils, elected city councils, and elected mayorship. The constitutional position of these elected institutions suggests that not all the members of local governments are under the direct control of central government, but some derive their authority and legitimacy directly from people. The issue of delegation in the constitution refers to the principle of deconcentration but from the authors point of view this deconcentration is supposed to be implemented in the context of a decentralized administrative system.

Interview data reveals that the failure to adopt the constitutionally required laws on basic structure of the state has also contributed to the continued disagreement on the constitutional model of public administration in Afghanistan. If these laws (such as the Law of Basic Structure of State, Law of Local Governance, Law of Local Councils, and Law of Municipalities) are enacted and/or updated it would aid reduce some of the ambiguities that currently surround the question of basic model of public administration in Afghanistan. Enactment of these laws can also aid the process of administrative reform in Afghanistan by providing and enhancing the basic legal framework of public administration in Afghanistan.⁶³

3.3 Central and local administrations

Article 136 of the 2004 Constitution states, “The administration of the Islamic Republic of Afghanistan, based on the units of the central administration and local administration, shall be regulated according to the law. The central administration shall be divided into several administrative units, each headed by a Minister. The local administrative unit shall be a province. The number, area, divisions and related provincial organizations as well as number of provincial units shall be regulated on the basis of population, social and economic conditions, as well as geographical location”.

According to this article, organization of public administration is divided into two levels of central and local administrations. This two-level administrative system has a long history. Under the current system, administrative power rests in the central administration and according to the constitution it is delegated to the local administrations. However, the

61 KII, member of draft commission of the constitution of 2004 and senior advisor of MoJ.

62 KII, ex-member of ICOIC.

63 KII, senior official of in the government.

existence of elected local institutions in the constitutional system of Afghanistan poses the question: how and to what extent should authorities be delegated to the local administration in order to achieve the overall goals of the constitution including its ethical goals such as democracy, participatory governance, and good governance?

Administration at the Central level

Under the current Constitution, the central administration is equivalent to the government which consists of ministers, and president.⁶⁴ The units of central administration are ministries, but the constitution also mandates the creation of a number of independent commissions and independent directorate as exception to the principle. In practice, however, the *de facto* structure of administrative system in Afghanistan significantly diverges from this constitutional view; an issue which will return to later in this paper. In other word, there is a wide gap between the constitutionally-mandated system of public administration and the *de facto* system of public administration in Afghanistan which will be discussed in this paper.

President

By dedicating a whole chapter to the president, the Afghanistan's Constitution affords an especial position in terms of power and prestige to the president. The President under the 2004 Constitution roughly holds the same amount of power as the prime minister and king did under the 1964 Constitution. In addition to chapter three, the Constitution grants special powers and authorities to the President in other places.⁶⁵ In this way the political-administrative system of Afghanistan is based on a strong presidential system. The president which is elected by direct and popular vote heads both state and the government.⁶⁶ The position of the President as the head of state has led some to believe that the President has special authority over all three branches of government undermining the separation of power and independence of judiciary.⁶⁷ This is while a correct interpretation which could preserve two fundamental constitutional principles of judicial independence and separation of power is that the position of the President as the head of states allows him/her to represent the state of Afghanistan in relations with other countries not that he/she holds authority over all three branches of the state.⁶⁸ This later interpretation is more consistent with the way that the Constitution structures the relation between three branches of the state. For example, the Constitution renders the exercise of a number of presidential power conditional to the approval of national assembly and the national assembly can override a presidential legislative veto with a two-third majority. These two examples, which are following up normally, show that the President does not have authority over the National Assembly as the head of state. However, in practice the president power is seemingly hard to be controlled. It is not to say, however, that President does not have legislative and judicial authorities;⁶⁹ rather it is to say that numerated and specific legislative and judicial authorities of the President does not make the legislative and judicial branches of the states subordinate to the President.

While we are not going to attempt a complete study of all types of authorities and powers of the President here, the administrative powers of the President, which are the focus of this study, cannot be understood in isolation from his/her other types of authorities, especially

64 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., art. 60.

65 *Id.* arts. 65, 79, 94 and 117.

66 *Id.* arts. 60 and 71.

67 M. Qasim Hashimzai, "The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan" in *Constitution-Making in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann Roder 665-681 (Oxford: Oxford University Press, 2012), p. 668.

68 KII, ex-member of ICOIC.

69 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., art. 60.

his political authorities. This means it is impossible to draw a clear line between the political actions of the president from his/her administrative actions; administrative actions can and often are undertaken with the aim of achieving a political goal. This is why administrative actions usually follow a political action.⁷⁰ In this way the expansive political authorities of the president have afforded him/her a great latitude in exercise of his/her administrative authorities as well. Additively, the unitary and centralized structure of administrative-political system of Afghanistan, on the one hand, and weaken position of two other branches of the state in areas of policymaking and exercise of sovereignty, on the other hand, have placed the president on the top of political pyramid in Afghanistan. The political dominance of the executive branch and concentration power at the hands of the president are the source of concerns for most interviewees.⁷¹ During the tenure of the national unity government, majority of independent Afghan scholars have become increasingly concerned about the rise of authoritarianism and personal power in Afghanistan.⁷² To exemplify further, one can refer to the political coalitions and alliances recently formed of different political parties and leaders to challenge what they claim as authoritative behavior of the government as well as monopolizing the power by the president.⁷³

The redistribution of institutional power and restructuring the inter-branch relations requires constitutional amendment, which in turn would require the Loya Jirga to be convened. Amending the constitution was widely supported by those interviewed for this research;⁷⁴ one of the important terms of the Agreement of National Unity Government required the constitution to be amended through Loya Jirga, however, this commitment has not been fulfilled.⁷⁵

The main administrative authority of the President, in addition to the enforcement of the constitution and other laws (art. 63), is appointment of high ranking officials of the government (sub-articles 10-14 of article 64). Sub-article 20 of article 64 empowers the President to create new administrative offices and commissions. With regard to the change in the administrative structure of the state, article 58 of the code of basic organization of the state provides, “addition and reduction in the structure of ministers and public administrations, according to the need, will be done by the proposal of the respective administration and approval of the president according to procedure set forth in the law.” President in Afghanistan holds extensive appointment authorities. The President appoints ministers with approval of the national assembly and appoints other heads of administrative bodies such as independent commissions and administration through his/her sole power. While the 2004 Constitution provides for elected mayors, since no mayorship election has been held yet, the president has been appointing all mayors as well. In addition, under article 10 of Civil Servants Law, the President has the sole authority of appointing public employees of ranks first and second based on the proposal of administrative reform and civil service commission. The President has the authority to oversee and control almost all administrative affairs throughout the Afghanistan’s public administration and holds the hiring and firing authorities over all high ranking administrative officials.

70 Reza Musa Rezazadeh, *Huquq Idari* [Administrative Law] (Tehran: Mizan, 1388 [2009]), p. 40.

71 M. Qasim Hashimzai, *supra* note 67, p. 669.

72 KII, senior member of Asia Foundation.

73 For example, the Grand National Coalition of Afghanistan, which announced its formations in July 2018.

74 As the overwhelming majority of interviewees in this study support amending the constitutions while having disagreements on which amendments are necessary or desirable at what stage.

75 See the full text of the “Government of National Unity Deal” as emailed to the journalists by the US Embassy on 21 September 2014 at the Afghanistan Analyst Network’s website; articles of the Constitution cited in the agreement were given after the text by the Afghanistan Analyst Network, <https://www.afghanistan-analysts.org/miscellaneous/aan-resources/the-government-of-national-unity-deal-full-text/>.

Cabinet

Chapter four of the Constitution is devoted to the government. First article of this chapter states, “The Government shall be comprised of Ministers who work under the chairmanship of the President. The number of Ministers as well as their duties shall be regulated by law.” Second sentence of this article refers to the law of basic structure of state which has not yet been enacted. The first sentence of this article defines the government. Under this article, the head of state is also the head of government. This is because under the Afghanistan’s presidential system president is the only person with the authority to lead the executive branch and also because the authorities saved for the prime minister under 1964 Constitution have transferred to the President by the 2004 Constitution. This arrangement creates a number of problems for the organization of public administration in Afghanistan. We will return to these problems later in this paper. In the past regimes, cabinet which was headed by the prime minister stood as a distinct collective entity with legal personality in relations to other branches of the government as it acted as an independent body with clear decision-making authorities. However, under the 2004 Constitution, the legal personality of the cabinet has become tantamount to the legal personality of the head of state; the fact that the head of state also heads the cabinet has caused the position of cabinet to raise considerably with relation two other branches of the state so much so that often the legal personality of the cabinet is not clearly separated from the legal personality of the state.⁷⁶ In addition to the Cabinet, under the National Unity Government, Council of Ministers have emerged as a distinct institution whose authorities and responsibilities fall below of those of the Cabinet. The Council of Minister in the current government is headed by the CEO Abdullah. The formal legal standing of the Council of Ministers, however, is unclear.⁷⁷

It is hoped that by passage of the law on basic structure of the state the current ambiguity surrounding the structure of state would greatly decrease.

In addition to extensive list of authorities of the head of state, the 2004 Constitution provides the government with expansive administrative-political authorities most important of which are reflected in articles 75-76 of the Constitution. Enforcement of provisions of the constitution and other laws, enforcement of court decisions, preservice of security and public order, making the budget, planning and implementation of development projects, and promulgation of regulations make up the bulk of the responsibilities and authorities of the government. Also, drafting of the legislative decrees to be signed by the President falls within the authority of the government.⁷⁸ Another important issue with regard to the authority of the government is the hierarchy that appears to exist between ministry, council of ministers, cabinet, and presidency. While they are all part of the government, each have a distinct institutional position as well. For example, the President and ministers have certain authorities and responsibilities independent of cabinet.⁷⁹ When discussing the structure of the government, the constitution does not include the Vice Presidents.⁸⁰ However, according to the code of Basic Structure of the State (1965), and

⁷⁶ For example, the Supreme Court refused to hear the case of Minister Mujtaba Patang on the ground that the government can only refer a case to the Supreme Court not the individual ministry. This decision, on the one hand, implies that the government has a legal personality which is distinct from its members (i.e. ministers), on the other hand, it suggests that without the agreement of the president, the government cannot make a decision even all individual ministers agree on a decision. Now the question is: what is meant by the government? Or, what does the legal personality of the cabinet, independent of the president, entail?

⁷⁷ The Agreement of National Unity Government, *supra* note 75.

⁷⁸ 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., art. 79.

⁷⁹ *Id.* Chapters 3 and 4.

⁸⁰ *Id.* art. 60.

also in practice, the Vice Presidents are members of the cabinet. In addition to assisting the President in leading the executive branch, the VPs also head the cabinet in president's absence. It should be noted that the President has a large number of advisors, however, there has been no legislation yet that would regulate their numbers, responsibilities, appointment, or performance of these advisors. This has created a legal vacuum which has caused a number of challenges in areas of rule of law⁸¹ and accountability.

According to the 2004 Constitution, the units of central administration are ministries that are each led by a minister.⁸² Authorities and responsibilities of each ministry or unit of central administration is set forth in its respective legislation.⁸³ Minister as the head of ministry, is the highest administrative authority of that ministry. In addition to exercising ultimate administrative authority over their respective ministries, the ministers also have a political role; as the position of minister, its appointment procedure, and parts of their responsibilities highlight the political nature of the position of ministers.⁸⁴ The minister is the ultimate administrative authority with regard to his/her respective ministry with exception of the administrative decisions that requires the approval of the cabinet or the president. The ministers hold administrative authorities in areas of budgeting, hiring, administrative organization (tashkilat), legislation, decision-making, and oversight.

Although the budget is determined by the Ministry of Finance, Cabinet, and National Assembly, the ministers still has authorities with respect to the budget. The financial authorities of the minister include making the ministerial budget and overseeing its implementation, making and signing contracts on behalf the ministry, and authorities with regard to raising revenue and expenditure the ministerial sector. The ministers also hold a number of hiring authorities. According to the Civil Servants Law hiring of "employees in the ranks of three, four, and five in the center and provinces, as well as employees in the rank of six in the center, in accordance with the determination and proposal of the hiring committee of the ministry or independent administrative directorate"⁸⁵ are of the authority of minister or director of independent directorate. The authority of minister over the organizational structure of the ministry includes decisions regarding the minor changes to the organization of the ministry. In case of major changes, either the National Assembly or the Council of Ministers must approve the change. The legislative authority of the minister includes promulgation of directive, procedures, and guideline, as well issuance of common instruction. In areas of designing and adaptation of policies, the ministers enjoy significant authorities. The ministers are ultimate authorities with regard to design and adaption of policies in their ministerial sectors. The ministers are also required and have the authority to oversee the performance of the subordinate administrative units. It should be noted that ministerial authorities are set forth in their respective laws.

81 Sayed Ali Hosseini, *supra* note 50, p. 114.

82 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., arts. 77 and 136.

83 Sayed Ali Hosseini, *supra* note 50, p. 106

84 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., art. 91.

85 Law of Civil Servants, (Official Gazette no. 25) 1970 (1348), art. 10.

Other central administrative organs

Although the 2004 Constitution explicitly states that the government shall comprise of the President and ministers and considers the ministers to be the units of central administration, there are other units of central administration that are neither a ministry nor fall under jurisdiction of a ministry. These administrative units, which exist under different titles such as commission, high office, council, committee, are under direct control of the President. A number of these administrative units are created by the constitution;⁸⁶ others are created by a law or a presidential decree such as IARCSC and IDLG. The number of these administrative units which do not necessarily part of the cabinet is high and is increasing. There is no consensus on the legal basis of these non-ministerial administrative units. Most interviewees considered these non-ministerial administrative legally and practically problematic. However, there is a group of interviewees who justify these non-ministerial administrative units. We will discuss the reasoning of both camps later.

Local administration

By dividing the administration to central and local, the Constitution has created a number of institutions on the local level as well. Provinces, districts, village, provincial council, district councils, village council, and municipality are local administrative institutions that have constitutional standing under chapter eight of the constitution.⁸⁷ In addition to these local administrative units, a number of line department of ministries and other central administrative units are also created on the local level. We will discuss the legal standing of these line departments later. It seems that local administrative units can be put into four categories:

1. Provinces and districts
2. Line departments of central administrative units on the local level
3. Local councils
4. Municipalities and city councils

Of these four categories, the first and second are the extension of the central administration. These two categories are in effect the representative of central government and act as implementors of national policies and politics on the local level. The members of these two categories, in principle, do not have independent legal personality as they are structurally subordinates of the central administration and exist to implement their decisions and policies on the local level. That being said, the deconcentrating preferences may lead to the creation of a system where they enjoy some level of autonomy. If that happens the administrative system would move closer to a deconcentrated centralized administration. In other words, the organizations that fall in the first two categories are created to deconcentrate the public administration while preserving the principle of centralized administration.⁸⁸ This is a controversial topic amongst scholars of administrative law in Afghanistan.

86 For example, Independent Election Commission and Independent Commission of Human Rights.

87 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., arts. 136-a42.

88 Waliullah Ansari, *supra* note 11, p. 124.

Two other categories, three and four, are constitutionally-mandated institutions which are meant to operationalize the public participation in the governance and national development. These institutions, as part of local administration, are elected by the people, who are deemed to be the true holder of sovereignty, through open, general, secretive, and direct elections.⁸⁹ These types of institutions are most often found in decentralized administrative systems. Therefore, a subordinate hierarchical relationship between these institutions and central administration is against the nature of these institutions.⁹⁰ In Afghanistan, there are a number of slippages between formal legal order, structural order, and performative order of the public administrations, therefore, the differences between the institutional positions of the last two categories and the first two categories are unclear and ambiguous. In this article, by relying in the formal legal order, we will highlight the slippages that exist between the formal laws and the *de facto* structure and operation of public administration in Afghanistan. For this purpose, and for the sake of convenience, the authors believe that these administrative institutions can be put into two broad categories of local units of central administration and elected local administration.

Local units of central administration

The local units of central administration, for the purpose of this article, includes provinces and their geographically subordinate administrative units i.e. districts and villages, as well as line departments of central administration within the geographical boundaries of a province. These administrative units, in accordance with administrative hierarchy, are subordinate to ministers and other central administrative units and operate under direct control of their central administrative superiors. Therefore, they can be considered local units of central administration. Some interviewees have argued that since the Constitution defines the central administration as ministries and local administration as provinces, the existence of line department of ministers on the local level is inconsistent with the constitutionally-mandated administrative structure. These interviews have advocated for the subordination of these line departments under the jurisdiction of province; a view that is reflected in the draft National Policy of Good Governance for Afghanistan. Under this draft policy, the ministers will retain policymaking authorities, but the majority of executive authorities are transferred to the provinces.⁹¹

The 2004 Constitution designates the province as the local administration;⁹² province is a geographical concept which covers a particular geographical territory. Each province is headed by a provincial governor who is the highest administrative authority in the system of local administration. Provincial governors have historically been very prestigious positions as they have historically enjoyed extensive administrative-political authorities within a province. In addition to being, *de jure*, the highest administrative authority within a province, the provincial governor is also a political position representing the central government on the local level. The provincial governor oversees the operation of all administrative units within a province and chairs the administrative sessions of the province where all administrative officials of the province attend. By creation of Directorate of Local Governance (IDLG),⁹³ the province has come to occupy a distinct position with relation to other local units of central administration. Before the creation of IDLG, province and district were part of ministry of interior affairs but now they are considered part of IDLG. IDLG which has been created through a presidential decree, and is directly answers to the President, is responsible “to lead the affairs of local governance, implement the laws and regulations, and coordinate the official

89 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., arts. 138, 140 and 141.

90 KII, ex-legal advisor of the president.

91 NGGPA(Draft), *supra* note Error! Bookmark not defined., p. 5.

92 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., art. 136.

93 President Decree (Official Gazette no. 1047) 2007 (1386).

works of 34 provinces, 387 districts, including 364 formal and 23 informal districts/temporary districts,⁹⁴ and 157 municipalities.⁹⁵ Since the IDLG has been put in charge of coordinating the affairs of provinces as well local councils and municipalities, it seems there was no intention to distinguish between elected local institutions, in terms of independence, legal personality, and autonomy, and their non-elected local counterparts. In any case, the elected nature of these councils makes them unique with relation to their non-elected local counterparts.

The authorities of the provincial governors, which is numerated in the Law of Local Governance, which is valid till now, enacted by the Taliban regime, are very broad. These broad authorities neither conform to the principles of the current Constitution nor *de facto* working of public administration. Article 14 of this law enumerates the authorities of the provincial governors under 60 paragraphs which cover a wide range of areas. However, in practice, most of these authorities are transferred to other administrative bodies. To avoid violating the constitution, IDLG has drafted the descriptions of responsibilities of provincial and district governors based on the Law of Civil Service, Law of Civil Servants, and the Law of Local Administration as far as it is consistent with the current constitution.⁹⁶ Basically, the current authorities of the provincial governors, as reflected in the new directives and guidelines, focus on oversight over and coordination of the working of public administration within the province. For example, the provincial governor has broad authorities with relation to provincial budgeting and affairs of provincial employees. All spending documents are processed through the office of provincial governor and send to Kabul after they have obtained his signature.⁹⁷ In practice, however, the relation between the provincial governor and other local administrative bodies is not free of tension. In absence of current laws in areas of administration, the division of authority and relations between provincial governor and police, local councils, municipalities are rife with challenges and ambiguities.

According to the outdated Law of Local Administration, (some parts of which are inconsistent with the current constitution), the district governors have the same authorities as the provincial governors with respect to the district except for the authorities that are especially saved for the provincial governors.⁹⁸ This means district governors occupy the same position as the provincial governor with respect to his/her respective district. This parallel is observable with respect to hiring authority as well. Article 10(3) Law on Civil Servants provides that employees in the rank of six in a province will be appointed by the governor based on determination and proposal of the provincial hiring committee. The same article goes on to state that,⁹⁹

[h]iring of contract-based employees in the ranks of seven and eight in the center are going to be appointed by the ministers or the general director of the independent general directorate based on determination and proposal of ministerial or directorate hiring committee, and in provinces and districts are going to be appointed by the provincial or district governor based on determination and proposal of provincial or district hiring committee.

Despite this apparent legal parallel between province and districts, in practice, due to prevalence of a centralizing tendencies, the provinces have received a lot more attention than districts, this has had negative consequences on development projects and the relation between state and the citizens.¹⁰⁰ This is because the governor of the provinces are closer to the central authorities.

94 Interview with a senior official of IDLG, Oct 24, 2018.

95 IDLG website, <http://idlg.gov.af/fa/history-idlg/> (last visited, Sep 17, 2018 11:07 p.m.).

96 KII, Senior Local Government Employee in Herat.

97 9, p. 17.

98 Law of Local Administration, (Official Gazette no. 793) 2000 (Lunar 1421) art. 5.

99 Law of Civil Servants, *supra* note 85, art. 10.

100 KII, senior officials, MoFA and IDLG.

Elected local administration

Afghanistan's 2004 Constitution has mandated the creation of a number of elected institutions (elected local councils, elected mayorship, and elected city councils) as a part of local administration. All members of local councils and city councils as well as mayors must be elected through open, general, secretive, and direct elections, according to the constitution.¹⁰¹ The elected nature of these institutions afford them a real local identity. The constitution explicitly states that these institutions are made elected so to achieve popular participation in governance and national development.¹⁰² In practice, however, with exception of provincial councils, the rest of these local institutions have either not being formed or have not been made elective yet. District councils, city councils, village councils have not yet been formed, city councils have neither formed nor made elected, and mayors are appointed by the President based on the proposal of the IDLG. It is worth mentioning that there is some semi-elected bodies such as municipal advisory boards in the urban settings and Community Development Councils (CDCs) at the villages level. However, these newly established institutions, which their legality has been highly contested, could not compensate the councils considered by the constitution. In order to determine the authorities, responsibilities, and institutional position of the elected local institutions within the structure of public administration of Afghanistan there is a pressing need for promulgation of laws that are developed based on the current Constitution. In this regard, with exception of Law of Provincial Councils (which has experienced several controversial amendments), no legislation has yet been enacted. Municipalities are still regulated under the Law of Municipalities enacted during the Taliban regime.

With respect to the authorities of provincial councils, article 139 of the Constitution states:

The provincial council shall participate in the attainment of the development objectives of the state and improvement of the affairs of the province in the manner prescribe by laws and shall advise the provincial administrations on related issues. The provincial assembly council shall perform its duties with the cooperation of the provincial administration.

The scope of authority of provincial councils have been the subject of an on-going debate in Afghanistan. While the apparent meaning of this article limits the authority of these councils to “participate and advise”, the question is whether this limitation is consistent with the *raison d'être* of these institutions and the general principles of the Constitution. The Constitution states that the *raison d'être* for provincial councils, and other elected local institutions, is to institutionalize democracy and attain participatory governance. Perhaps to facilitate the attainment of these stated goals, the 2007 amendment to the law of provincial councils should have afforded these councils with “oversight” authorities as well;¹⁰³ the authority which has been delegated and removed a number of times so far. While, currently, provincial councils have been delegated with oversight authority by presidential decree, it is not clear what this oversight authority entails and what are its limits.

Article 4 of Law of Provincial Councils numerates the responsibilities and authorities of these councils;¹⁰⁴ however, a close examination of this article reveals that these councils do not have executive authorities or responsibilities. Under this law, provincial councils do not promulgate policies, nor hold executive authority, nor possess necessary mechanism to exercise effective oversight. The tension between the administrative reality of provincial councils and their democratic ideals stem from the fact that they are inherently political

101 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., Chapter 8.

102 *Id.*

103 Law of Provincial Councils (Official Gazette no. 920) 2007 (1386), arts. 2 and 4.

104 *Id.* art. 9.

institutions that are imposed upon a centralized administrative system. Members of these councils are elected by popular vote, therefore, are under political pressure from their constituents. Also, historically, these councils were meant to ensure political participation for the local elites as evidenced by the fact that these councils are a conduit for joining the upper house of national assembly as well. Contrary to their historical logic which has been preserved in the current system as well, these councils have been treated as administrative institutions; a contradiction which has increasingly caused problems and tensions as the system of public administration was repurposed for delivery of public services (as opposed to its historical function of exercising control in favor central ruler).

Another important local institution which is provided by the Constitution is municipality (sharwali). This vital local administrative institution which is in charge of “administering the affairs of the city” is an elected local institution under the constitution.¹⁰⁵ According to the provisions of the Constitution, mayors and members of city councils must be elected by the residents of the respective city. Municipalities enjoy independent legal personalities under public law, possess separate budget and revenue sources.¹⁰⁶ Organizations, operation, authorities, and responsibilities of municipalities are governed by a number of different legislation, most of which, especially the Law of Municipalities¹⁰⁷, were enacted prior to the current Constitution.¹⁰⁸ These laws, on the hand, are not consistent with the provisions of the current Constitution, on the other hand, they cannot meet the needs of modern cities. A review of the law of municipalities, which was amended by the Taliban regime, reveals that this law is not consistent with the spirit of the current constitution: market economy, and democratic values. Article 16 of this law numerates the authorities of the municipalities within 44 paragraphs which can be divided to four categories of service, regulation, coordination, and administrative. These authorities which are deemed very important for “the delivery of public services, meeting the public needs of city residents, and preserving of public order”,¹⁰⁹ must be clarified and operationalized through regulations, directives, and guidelines. Municipalities as elected local institutions with broad authorities are the perfect example of a decentralized administrative institution in the 2004 Constitution.¹¹⁰

Municipality councils are not yet formed in Afghanistan. However, recently, IDLG has established consultative councils within municipalities through a directive. These newly established consultative councils comprise of members who on a voluntary basis participate in and closely observe the affairs of municipalities based on a regular meeting schedule. These members are elected informally from neighborhood representatives, local elites, and members of social organizations.¹¹¹ These councils, which are often tilted Consultative Councils of Municipalities, are meant to create the necessary conditions for the establishment of constitutionally-mandated city councils.

105 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., art. 141.

106 Law of Municipalities, (Official Gazette no 794) 2000 (Lunar 1421) arts. 2 and 12.

107 *Id.*

108 See Municipalities Law, Law of Fees of Public City Services, Anti-Trust Law, Regulation on Cleaning and Gardening of the Cities, Regulation on the Cleaning Fees, Regulation on the Setting of Rents and Properties of the Municipalities.

109 Sawar Danish, *supra* note 30, p. 183.

110 KII, senior official in the government.

111 IDLG, *The Guide for Establishment of Advisory Councils of Municipalities* (Kabul: IDLG).

3.4 The conformity of administrative organization with the Constitution

One of the fundamental questions with regard to the organization of administrative system in Afghanistan is the extent to which it conforms with the prescriptions of the Constitution. In the previous sections, we discussed the organization of administrative system under the Constitution using the commonly agreed upon interpretations of the administrative rules of the Constitution. Here, we will compare those agreed up Constitutional mandates with the *de facto* organization of the administrative system in Afghanistan. Such comparison reveals that the *de facto* organization of public administration in Afghanistan widely diverges from its *de jure* constitutional model. On the one hand, parts of the *de jure* administrative structure of the Afghanistan's state, as well as a number of constitutionally-mandated administrative institutions are not yet established; nor their constitutive laws are yet enacted. On the other hand, a number of administrative organizations exist extraconstitutionally. And the legal basis of some administrative organizations in existence are still being debated. A number of constitutionally-mandated administrative organizations that in existence are subject to extensive debates.

As it was alluded to in the previous discussions, a number of constitutionally-mandated administrative organizations are not yet established due to a variety of reasons. For example, none of the local councils, with exception of provincial councils, are yet established. Although the elections of district councils were scheduled, and postponed later on, security and technical problems raises doubts as to whether the election will actually take place. Similarly, the Constitution requires mayors to be elected by the direct vote of the city residents, however, no mayoral election has taken place yet. The Constitution also provides for elected city councils; however, these constitutionally-mandated councils are not yet formed. The sustained failure to establish a number of important constitutionally-mandated institutions not only leaves the basic structure of Afghanistan's state incomplete but also renders the attainment of some of basic goals of the Constitution impossible. While a limited textual interpretation of the constitution might suggest that these absentee institutions only provide advice and participate in attainment of development goals,¹¹² but a more holistic interpretation of the Constitution, which draws upon the spirit of the Constitution and its ethical goals, better highlights the significance of these absentee institutions in the constitutional system of Afghanistan.¹¹³ It is only through these institutions that participatory governance and good governance can actualize in practice.¹¹⁴

For the purpose of improving the legality of public administration in Afghanistan and closing the gap between the *de facto* structure of public administration and its constitutional model, enactment of the basic administrative laws is crucial. These laws which include the Law of Basic Structure of State, Law of Local Governance, Law of Local Councils, and Law of Municipalities are vital for operationalizing the constitutional model of public administration in Afghanistan. These laws can be called organic laws; in the sense that they expand the basic rulings of the constitution transforming broad constitutional mandate to a workable legal framework. Therefore, implementation of the constitution, in absence of these organic laws, is impossible. These laws should have been enacted soon after the adaption of the constitution (as the constitution requires the Law of Basic Structure of State to be enacted within one year); however, this has not happened.¹¹⁵ A number of reasons have been given as to why these laws are not yet enacted. The National Unity Government

112 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., Chapter 8.

113 KII, ex-member of ICOIC.

114 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., preamble and arts. 6 and 137.

115 KII, senior official in the government.

(NUG) claims that the existence of the extraconstitutional entity of Reyasat Ijraee (CEO) renders the enactment of the basic structure of the state politically impractical.¹¹⁶ While the position of CEO may explain the failure to adopt organic laws by the NUG, the question is what reason could explain the failure to adopt this law in more than a decade during which the extraconstitutional position of CEO did not exist?

In addition to the failure to create the constitutionally-required administrative institutions, a number of institutions have been created whose constitutionality is either suspect or rejected by the majority of constitutional scholars interviewed here. Of these administrative institutions with dubious constitutional basis, one can name increasing number of “independent” general directorates (the word independent is recently being removed from the name of these institutions following an advisory ruling from the Constitutional Oversight Commission), increasing number of executive councils, and of course the position of CEO created under the Agreement of NUG. These constitutionally dubious administrative organizations are most often created through presidential decrees without the approval of National Assembly and lack legislations that would regulate their structure or operation. Under article 90 of the Constitution, the National Assembly has the duty to create, modify and/or abrogate administrative units. Additionally, article 142 of the Constitution empowers the state to create necessary administrative offices in order to “implement the provisions” and “attain the values” enshrined in the Constitution. State, in the later article, encompasses the legislative branch as well. Article 64(20) is the sole constitutional basis that is often invoked to justify the presidential power to create these constitutionally dubious administrative organization through presidential decrees. However, on the one hand, under this provision the presidential power is limited by ordinary legislations, and on the other hand, this provision seems to provide for an exception to a well-established constitutional rule (articles 90 and 142).¹¹⁷ Thus, establishment of, by one count more than twenty-five “independent” commission and directorate through presidential decree, is believed to be unconstitutional.¹¹⁸ The possible efficiency or effectiveness of these unconstitutional entities cannot override the provisions of the Constitution. If the implementation of the *de jure* administrative structure required by the Constitution is impractical the solution should be to either bring the *de facto* administrative structure closer to its *de jure* model or to revise the *de jure* model to render it more practical. The solution cannot be to increasingly diverge from the *de jure* administrative structure and commit to a pattern of violation of constitution.

The most controversial of extraconstitutional institution in Afghanistan currently is the position of CEO of NUG. In order to find a way out of severe electoral crisis, this extraconstitutional institution was created based on the agreement of the NUG and was implemented by the presidential decree. Under the agreement of NUG, it was agreed to that the position CEO is going to morph into the position of prime minister through constitutional amendment and changing the political system of Afghanistan; however, this agreement has not been yet implemented. While some constitutional scholars have argued that the position of CEO was constitutional during its first two years (employing an expansive notion of constitutional law which incorporates the broad public consensus as the basis of constitutional law), the continued existence of the CEO position after these two years is considered unconstitutional by virtually all interviewees. Those who justify the short-term constitutionality of this institution, invoke two arguments. First, article 64 of the Constitution empowers the president to create independent offices.¹¹⁹ Second, this institution helped avoid an electoral

116 Ibid

117 KII, senior member of Asia F.

118 KII, senior member of Asia F.

119 KII, senior official in the government.

crisis, ensured the creation of a more ethnically inclusive government, and helped attain paramount public utilities. In this regards, a senior official says, “although this position does not have a place in the constitution, but, since it ensured political participation, and helped the realization of ethical goals of the political system, in my opinion, it has legal legitimacy. In my opinion, avoidance of severe crisis and avoidance of war are of the primary goals of constitutional. The agreement of NUG attained these goals, therefore, I think, it is legally legitimate”, one interviewee said.¹²⁰

While the position of CEO is given constitutionality albeit temporary on the ground that it helped avoid a national crisis, other reasons are given to justify other councils and “independent” offices. It is argued that the government has created more than 25 “independent” offices and more than 10 councils (such as national security council, national council of rule of law, and national economic council). The formers (“independent” offices) are created outside the constitutional ministry-based administrative structure while the latter (national councils) stand above the ministries at least in areas of policymaking. Before addressing the motives behind creation of these institutions, it should be noted that some argue that these institutions are both legal and necessary.

The supports of extra-ministerial institutions argue that they are created using the presidential power enshrined in article 64(20) of the Constitution. They argue that these institutions are constitutional. Since the President has the authority to issue legislative decrees that have created these extra-ministerial institutions they enjoy constitutional standing. According to article 79(2) of the Constitution, “Legislative decrees, after endorsement by the President, shall acquire the force of law. Legislative decrees shall be presented to the National Assembly within thirty days of convening its first session, and if rejected by the National Assembly, they become void.” The last sentence of this provision, they argue, only considers legislative decrees void if the National Assembly rejects them. However, they argue, if the legislative decree is presented to the National Assembly but for any reason the National Assembly does not render a decision with regard to the legislative decree, the decree continues to be legal until such a time that the National Assembly rejects it. This is because, they argue, that the Constitution does not say that unverified but unrejected legislative decrees become void after expiration of 30 days period. This legal justification is considered a way for the government to bypass the administrative and legislative power of the National Assembly.

In addition to this procedural argument, the supporters of extra-ministerial institutions argue that they are very effective and serve necessary functions. They argue that public administration in Afghanistan has not been able to break free of negative political influences which they believe most often are exerted through the National Assembly. They argue these negative political influences are the main challenge against administrative reform in Afghanistan.¹²¹ According to this view, politically influential actors, who are most often members of National Assembly, use the institutional powers of the National Assembly (such as the power to approve the nomination of a minister, or remove a minister through vote of no-confidence) to interfere in the process of hiring and distribution of contracts by the ministers creating formidable challenges against administrative reforms. Proponent of extra-ministerial institutions opine that creation of extra-ministerial institutions can ameliorate the negative effects of politics over public administration because members of National Assembly cannot exert the same influence over these non-ministerial administrative institutions.¹²² Since these non-ministerial administrative are created as expert organization they can function free of negative political influences. The proponents of non-ministerial

120 KII, ex-member of ICOIC.

121 KII, Senior official, IARCSC.

122 *Id.*

administrative institutions refute the argument that these institutions add to parallel administrative structures and administrative redundancies increasing inefficiency and undermining accountability by claiming that these non-ministerial administrative bodies are only policymaking bodies and do not interfere with policy-implementation authorities of the ministries. In other words, “commissions and independent directorates function as technical policy advisors for leaders of the government in the policy areas.”¹²³ Similarly, the supporters of non-ministerial administrative bodies argue that it is easier to transfer authorities to these bodies than reform ministries which have vast administrative structure and represent a lot of vested interest.¹²⁴ Furthermore, with regard to the councils, their supporters argue that these councils promote necessary inter-ministerial coordination and cooperation.¹²⁵ Despite these legal and practical justifications, the current trend of creating non-ministerial administrative bodies has caused widespread concerns among the majority of the interviewees. The critics argue that to solution to depoliticizing the public administration and protecting it against negative influence of ethnic politics cannot be bypassing them. The critics argue that the non-ministerial-approach adds to parallel structure and creates increasing administrative redundancies while running against the prescriptions of the Constitution. The current approach also undermines the principle of accountability by creating overlapping jurisdictions.¹²⁶ For example, the creation of National Economic Council in addition to the Council of Ministers, or High Council of Affairs of Immigrants and Refugees in addition to the Ministry of Refugees and Returnees are not justifiable.¹²⁷ The critics claim that the current approach is motivated by the “exclusionary politics”.¹²⁸ The dual structure of the NUG has made the matters worse creating the conditions that led to the side stepping of the ministries. It should be noted, however, that the ministries and constitutionally-mandated independent directorates also suffer from overlapping jurisdictions and administrative redundancies. For example, by one count, there are more than six administrative bodies tasked with fighting corruption in addition to the general attorney’s office.¹²⁹ Or creation of the Office of Inspector in addition to the High Office of Oversight, or creation of Governmental Ministry for Tourism in addition to the Deputy Ministry of Tourism within the Ministry of Information and Culture.¹³⁰

Criticism of parallel structure is not limited to central administration but encompasses the entirety of public administration system. As one interviewee opined,¹³¹

Instead of strengthening the administrative institutions, parallel structures are created. For example, eight development economic zones are recently created which in effect bypass the local province-based administration. Similarly, instead of strengthening or creating the village councils, district councils, or other local administrative bodies, the ten-year program of Citizen Charter is implemented. In the past too, instead of creating [constitutionally-mandated] local councils, village development project was implemented. Creation of project-based institutions undermines local administrative institutions.

123 KII, senior official, MoJ

124 KII, senior official in the government.

125 KII, senior official, IARCSC.

126 KII, commissioner of IEC and ex-commissioner of IDLG.

127 KII, senior official, council of ministers secretariat.

128 KII, senior member of Asia F.

129 KII, senior advisor, MoI

130 KII, advisor, Herat, USAID.

131 KII, senior official, IDLG.

3.5 From centralization to decentralizing

As it was discussed above, there is no consensus on the constitutionally-mandated level of administrative centralization and decentralization in Afghanistan. However, virtually all interviewees agreed that the existing level of administrative centralization and concentration is inconsistent with the constitutional model.¹³² The centralizing tendency has been a constant of history of Afghanistan's administrative law. This deeply imbedded centralizing tendency, on the one hand, shows a wide diverge between the *de jure* and *de facto* structure of public administration, and on the other hand, reflects a widening divide between the state and society. The divergence between *de jure* rules and *de facto* reality of Afghan society is due several factors: state-society relations in Afghanistan have not been institutionalized under a formal system; and Afghanistan has a tradition of top-down policymaking. This structural rapture has been partly responsible for the fragility of the Afghan states and backwardness of Afghan society.¹³³

In the current climate, while a number of justifications have been put forward in favor of preservation of centralized administration in Afghanistan, the criticisms of the centralized system are also stronger than ever. Before turning to the opinions of the proponents and opponents of administrative centralization in Afghanistan, it should be noted that public administration suffers from a number of systemic problems which cannot be either explained or remedied through centralization-decentralization discussion. These systemic problems include scarcity of useful administrative knowledge, divided and unorganized administrations, ambiguity of the broad goals of public administration, to name a few. One can easily observe the low level of administrative knowledge inside and outside Afghanistan's academic institutions. Public administration needs to make and implement policies and generate innovative solutions; these functions all require expert knowledge and understanding of the Afghan context.¹³⁴ The need for administrative knowledge is even more pronounced in countries that experiencing high level of conflicts while rebuilding their administrative system. Ambiguity in broad goals of public administration in Afghanistan also overshadows all administrative policies, actions, and processes. As one interviewee explained,¹³⁵

*"Afghanistan's Constitution does not specify the goals of public administration. Therefore, it is not clear whether the general goal of public administration in Afghanistan is delivery of public services or economic development? Or do we have a liberal public administration or a bureaucratic-authoritarian public administration? From a historical perspective, public administration in Afghanistan during the communist and Taliban regimes was in the service of those regimes' ideologies; during the Mujahedeen regime it did not serve a specific purpose; post-2001, while the constitution has clarified the basic structure and organization of public administration in a more complete way, it does not specify its general direction or general goals."*¹³⁶

Despite lack of clear constitutional prescription on the purpose of public administration, the Constitution does enshrine the principles of democracy, public participation, popular sovereignty, social justice, and good governance. These principles collectively make up the basic goals of the Constitution and its ethical underpinnings; therefore, they must serve as a guide when determining the structure of public administration and structuring the state-society relationships.

132 KII, ex-member of ICOIC.

133 Yaqob Ebrahimi, Shekaf Miyan Dawlat Markaz Gara wa Jama Markaz Gouriz dar Afghanistan [The Gap Between Centralizing State and a Decentralized Society in Afghanistan] (Kabul: 8am, 1395 [2016]), <https://8am.af/x8am/1395/11/06/political-afghanistan-policy>

134 KII, commissioner of IEC and ex-commissioner of IDLG.

135 KII, senior official, IARCSC.

136 KII, senior official, IARCSC.

While acknowledging that the current level of administrative concentration is inconsistent with ethical goals of the constitution, some still believe it is justifiable out of necessity. They argue that organization of public administration and its legal framework in Afghanistan cannot support an effective local administration. From the sociopolitical perspective, they argue, Afghanistan has not yet developed a participatory and citizen-based political culture, and the existing traditional political culture is not conducive for an effective decentralized public administration.¹³⁷ “The existing traditional political culture does not have the necessary capacity to sustain effective public participation in governance; as the experience of provincial councils has shown that these institutions are unable to exercise oversight authority, which requires some level of expertise.”¹³⁸ Administration also cannot effectively perform its function under the existing traditional political culture. As one interviewee opined,¹³⁹

In Afghanistan, public administration is a tool in the service of exercising personal power and whims; not a tool in the service of exercising collective sovereignty. This is why administrative actions are taken based on personal preferences of those in power rather than the provisions of the law. Afghanistan’s political culture is a traditional-ethnic one, and therefore, exhibits strong authoritarian tendencies. This culture fosters personal dominance not dominance of an institution or the law.

In addition to these sociopolitical conditions whose changes requires long-term efforts and strategies, some interviewees believed that local administrations lack the necessary capacity to effectively exercise administrative authority. This has led local officials to avoid exercising the authorities they currently possess without consultation and guidance from the center. This orientation toward center is likely due to the historical legacies of public administrative and the fear of accepting responsibility.¹⁴⁰ In addition to low capacity of local administration, the continued influence of local strongmen has deterred the allocation of more authorities to the local administration. The argument is that increasing the authority and power of local administration under the conditions where local strongmen enjoy significant power will exacerbate corruption, and illegal behaviors.¹⁴¹

The majority of interviewees, 75%, on the other hand, do not find these justifications convincing. They are not convinced that these problems are severe enough that would justify the suspension of clear constitutional mandates. On the capacity argument, they believe that limited local capacity is the result of centralization not its cause. In order to build the local capacity, it is imperative that authorities and resources transfer to the local administration. Currently, financial, hiring, policymaking, planning, executive, and oversight authorities are highly concentrated in the center, they argue.¹⁴² Local administrations have very limited authorities.¹⁴³ This situation, about half of the interviewees argue, has created distance between people and the government, has made people indifferent towards their responsibilities as citizens, and slowed down development projects. For example, given the mountainous nature of Afghanistan, some provinces of Afghanistan only receive resources after long delays. Afghanistan not only is a mountainous country but also lacks well-developed roads and good security; in such environment concentration of authorities and resources in the center can seriously reduce the responsiveness of the government to the local needs.¹⁴⁴

137 KII, MP and Uni Prof.

138 KII, senior official, Herat province.

139 KII, MP and Uni Prof.

140 KII, senior official in the government.

141 KII, senior official, council of ministers secretariat.

142 KII, senior official, IDLG.

143 KII, advisor, Herat, USAID.

144 KII, senior official, IARCSC.

3.6 Legal persons of public law

Nowadays, an important topic of debate in administrative law is the theory of legal personhood of public law. On this issue, based on the existing needs, there are a number of insufficient, sporadic provisions in the Constitution and other laws of Afghanistan. The issue of legal personhood of administrative bodies is a very important issue and should not have been left unaddressed. Under the 2004 Constitution, state, in a sense that includes all three branches of state, possess a legal personality and public administration can be made party to a legal dispute.¹⁴⁵ Furthermore, the Constitution provides for central and local units of public administration, and creates a number of commission, independent directorate, and elected local councils.¹⁴⁶ However, the Constitution is silent on the issue of legal personhood of these institutions. For example, it is not clear whether the Cabinet, Council of Ministers, and High Councils established within the Presidential Palace possess a public legal personality or not. If they do, the question is should they be subject to parliamentary oversight? if they do not, the question is can they exercise authority independent from their constitutive ministries?

The law that has addressed this issue in Afghanistan the most is the Afghanistan Civil Code (ACC). However, this ACC, on the one hand, takes a private law approach to the issue, and on the other hand, is more than thirty-years-old and is in great need of revision.¹⁴⁷ However, using ACC and a number of other legislation, one can find some legal provisions on the types of public legal personhood, its criteria, the people who can legally represent them, rules of their mergers, and finally rules that govern their dissolution.¹⁴⁸ Afghanistan has to go a long way until achieving a sufficient and modern legal framework for legal personhood under public law that could meet the administrative needs of the time.

ACC defines the legal personhood. It then divides legal persons into public and private legal persons. Under ACC, "Legal person is a virtual personality that has legal capacity and is established, for certain objectives, in the form of organization, company or association."¹⁴⁹ ACC also defines public and private legal personhood and provides some of their examples. Under ACC, public legal persons include state, its branches, public administrations and institutions and their subordinate administrative units.¹⁵⁰ ACC contains a number of provisions on the effects and features of public legal persons by defers the issue of determining whether an entity possess public legal personhood to the governing law.¹⁵¹ The features of public legal persons under ACC are independent financial rights and responsibilities, legal capacity, the right to sue and being sued, and residency.¹⁵² It is clear that these rules are very insufficient for determining the issues related to public legal persons. They cannot provide a sufficient legal framework for the regulation of public personhood under modern administrative laws. ACC does not provide a sufficient legal framework which would clearly define the types of public legal persons, and the nature of its interactions with other legal persons and individuals.

The reason for this legal gap is likely the continued enforcement of pre-2004-constitution laws. These pre-2004-constitution most often do not conform to the text and spirit of the current Constitution. It is self-evident that administrative organizations, their functions, and their relations with the public, civil society, and private sector has undergone fundamental

145 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., arts. 51 and 120.

146 *Id.* arts. 58 and 64.

147 Civil Code of Afghanistan (Official Gazette no. 353) 1355 (1975).

148 For example, *Id.* arts. 337 and 338, and the Law of Municipality, *supra* note 106, art. 2.

149 Civil Code of Afghanistan, *supra* note 147, art. 337.

150 *Id.* art. 338.

151 *Id.* art. 339.

152 *Id.* art.342.

changes over the last century. Contemporary administrative law which is characterized by the prevalence of market economy and paradigm of good government has experienced a complete transformation. The signs of this transformation can be clearly observed in the text of the 2004 Constitution as well as the post-2004-constitution laws and policies. However, the continued enforcement of pre-2004-constitution laws has caused a legal limbo where some important legal issues are either left unaddressed or are governed by potentially unconstitutional laws; the issue of legal personhood under public law is one those issues.

Granting legal personhood to administrative organizations and institutions Not only will determine the scope of their rights and responsibilities but it also clarifies their position in the general structure of the state. This way the state power is going to be structured by the legal system and exercised through the administrative apparatus.¹⁵³ Administrative actions are going to be taken through legal persons. These legal persons sometimes have widespread jurisdictions over national issues, sometimes they have limited jurisdiction within a portion of the country's territory over local issues, and sometimes they enjoy specialized jurisdiction over a specialized issue within the entire or part of the country's territory.¹⁵⁴ This is the reason why that administrative systems provide for local and specialized administrative institutions on the central and local levels. The level of independence, the type of legal personhood, and their relations to larger administrative-political structures in a country depend on the level of centralization and decentralization of that country's public administration system.

In Afghanistan, organization of public administration consists of central administration, local councils, non-governmental independent agencies, professional organizations, and other non-governmental associations. Administrative law of Afghanistan, for a variety of reasons, has failed to provide a comprehensive legal framework. For example, it is still not clear which of these administrative institutions possess legal personhood, how the relations between these institutions should be structured, whether the control of the central administration over local councils is a hierarchical control or mere guardianship. More particularly, what kind of relationships exist between municipalities and IDLG, Ministry of Urban Development, province, or high office of oversight? Answering these questions require a more in-dept study of the types of public legal personhood that are part of administrative law in Afghanistan. A common categorization of public legal persons is: geographical legal persons and public affairs legal persons; the latter is also referred to as independent agencies or professional institutions which can be divided into subcategories as well.¹⁵⁵

Geographical legal persons

Geographical legal persons are those administrative organizations which are created by the administrative law with rights and responsibilities and have geographical jurisdictions and identities. These legal persons are commonly divided into two categories based on having general or limited jurisdictions. If these legal persons have geographical jurisdictions over the entire country they are considered national or central organizations whereas if they only have geographical jurisdiction over a part of the country, they are considered local organizations or administrations. In Afghanistan while organizations of public administrations are divided to central and local administrations¹⁵⁶, it is not clear whether local administrations are part of the central administrations, as it is commonly the case in the centralized system, and therefore lack independent legal personhood or local administrations possess independent legal personhood, as it is commonly the case in decentralized administrative systems.

153 Abulfazl Qazi, *Bayestahai Huquq Assasi* [Essentials of Constitutional Law] (Tehran: Mizan, 1384 [2005]), p. 8.

154 Waliullah Ansari, *supra* note 11, p. 107.

155 Sarwar Danish, *supra* note 30, p. 109.

156 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., art. 136.

In Afghanistan's administrative system, central administration is equal to government or executive branch but when we talk about legal personhood of organizations of public administrations we are talking about all centralized administrations and government authorities which have jurisdiction over the entire country. In this way, these public organizations are headed by the state, in a sense that incorporates all its three branches.¹⁵⁷ The state, in this sense, can sue and be sued and possess unique rights and responsibilities. This is this independent legal personhood of the state that is recognized and operates on the international level as well.¹⁵⁸ What is important for this paper is the government; The government in Afghanistan is broader than organization of public administration in that organization of public administration is a part of the executive branch.

It should be noted that ministries do not have separate legal personhood because they are part of the government. In this way no ministry has an independent legal personhood it is part of government and cabinet and works under the chairmanship of the president. Thus, ministries and their subordinate organizations are part of the public legal personhood of the state. This analysis can be inferred from the constitution.¹⁵⁹ What needs clarification is the distinction between line departments of the ministries (which are their extension) and local institutions that are elected directly by the people thus are not extension of the ministries. These local institutions which are directly dependent on the local people, in decentralized administrative system, commonly enjoy independent legal personhood and can act in their own name.¹⁶⁰ In the centralized administrative systems, on the other hand, the existence of local institutions which would enjoy administrative autonomy and freedom to act on their own does not seem justified;¹⁶¹ this issue is subject to debate in the Afghanistan's public administration system.

Independent Agency

In addition to organization of central administrations, such as cabinet and independent commissions, and decentralized local institutions, such as municipalities, there are other public legal persons which enjoy public law personhood and assist the government in administration of public affairs.¹⁶² These institutions which are in generally called "independent agency" can exist under different names. In different countries, these agencies can be dependent of parliament, judicial branch, cabinet, ministries, municipalities, or other institutions that have independent legal personhood.¹⁶³ Since these agencies are part of the state, in addition to having independent legal personality, participate in the exercise of sovereignty and enjoy the benefits of public authority. These agencies initially emerged to deliver public services such as hospitals, libraries, and universities but then expanded their roles in areas of commerce, industry, and social services (for example as state-owned enterprises) and can take upon for-profit and non-profit forms.¹⁶⁴

In Afghanistan there is no clear definition of independent agencies, but a number of institutions are created by the law that exhibit the characteristics and features of public agencies. These agencies in Afghanistan include state-owned companies, and state banks, for example. A review of the laws and charters of these agencies reveal that these agencies do not follow a consistent model in Afghanistan. In other words, these agencies are not

157 *Id.* art. 136.

158 Sarwar Danish, *supra* note 30, p. 110.

159 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., arts. 51 and 120.

160 Manochehr Tabatabai-Motamini, *supra* note 8, pp. 61-62.

161 KII, ex-member of ICOIC.

162 Waliullah Ansari, *supra* note 11, p. 125.

163 Manochehr Tabatabai-Motamini, *supra* note 8, p. 123.

164 *Id.*

subject to strict and unified forms, therefore, do not need to consistently possess the traditional characteristic of public institutions. Given the flexibility that these agencies afford, despite the centralized system of public administration in Afghanistan, these agencies can theoretically be used to perform public functions in a decentralized way. To preserve the principle of centralized administration under the current constitution, the president and ministers can initiate the creation of these agencies. However, the establishment of these agencies requires legislations that would define their structure, jurisdictions, responsibilities, financial and hiring authorities, as well as their legal personhood. Ultimately, since these agencies enjoy financial and organizational independence from ministries and independent directorates, their creation requires the approval of the legislator which has the ultimate authority over the allocation of the state's revenues and spending.¹⁶⁵ It should be noted, however, in case of state-owned companies, although they possess independent legal personhood, the government has the authority over their creation, change, dissolution, and transfer of their properties.¹⁶⁶ In Afghanistan, a large number of agencies exist that enjoy different level of independence from the organizations of central administration, however, since no clear definition of public legal personhood exist, it is hard to discern their exact legal status under administrative law of Afghanistan. For example, although recently the Ministry of Higher Education has adopted the Directive of Financial Independence of Public Universities, but they are still dependent on this ministry from the organizational, hiring, procurement, and policymaking point of views, therefore, financial independence of public universities cannot be taken to mean that these universities enjoy complete legal personhood.

Professional and Union Systems

Professional and union system are those administrative systems which are created by the state to regulate the affairs of members of a profession. Although these unions are private law legal persons, regulation of their affairs fall under jurisdiction of organization and unions that enjoy public law legal personhood and can avail themselves of privileges of public authority. This hybrid nature of professional associations and unions is the reason that they are governed under a hybrid system meaning that the exercise of public authority by these unions are governed by the public law while their internal affairs (such as hiring, contracting, and lawsuits) are governed by the private law.¹⁶⁷

These systems, which are considered professional or union systems, have features that gives them public identity.¹⁶⁸ First, membership in these systems can be mandatory under the law. Second, these systems have legal personality and exercise administrative authority, although under auspices of the state. Third, the governing board of these systems or unions are elected by their members without state intervention.¹⁶⁹ Afghanistan Independent Bar Association is an example of professional association in Afghanistan. Article 4 of Law of Defense Attorneys states that “for the purpose of regulation and leadership of the affairs of defense attorneys, Independent Bar Association shall be established as an independent non-governmental entity.”¹⁷⁰ Similarly, Unions of Craftsmen is another example of professional associations which is established to regulate the affairs of craftsmen and operates under to a charter, directive, and other legislative documents.

165 2004 Constitution of Afghanistan, *supra* note Error! Bookmark not defined., arts. 64 and 124.

166 The decree of amending and adding some articles of Law on State Corporations, (Official Gazette no. 103) 1958 [1347], art. 66.

167 Manochehr Tabatabai-Motamini, *supra* note 8, p. 139.

168 Mohammad Imami, *Huquq Idari [Administrative Law]* (Tehran: Mizan, 1388 [2009]), p. 136.

169 Manochehr Tabatabai-Motamini, *supra* note 8, p. 139.

170 Law of Bar Association (Official Gazette no. 934) 2007 (1386).

3.7 The need for reforms in organization of public administration

Revision and reform are necessary and avoidable in most areas of human life. Development and improvement are not possible without change and reform; reform is even more important for the countries that are transitioning from traditionalism to modernism. Study of public administration in Afghanistan reveals that it suffers from *de jure* and *de facto* shortcomings and it needs revision and reform. It is this realization that has motivated a number of policies for reform, which are currently being considered.¹⁷¹ Study of primary and subsidiary sources, as well as interviews with administrative law experts conducted for this paper also highlight the need for reform. While everyone agrees on the need for reform, the type, extent, and method of reform is subject to disagreements. Some believe that the roots of the problems of public administration are in the failure to implement the constitution; they believe that if the constitution is fully implemented, it would solve the problems of public administration in Afghanistan.¹⁷² Others believe that the problem is not with implementation but the prescriptions of the constitution. They believe implementation of the constitutional provision on public administration is not going to solve the problem because the constitutional model of public administration cannot meet the existing public administration needs of the country and is not adaptable to the current conditions of Afghanistan; they advocate amending the constitution.¹⁷³ Some interviews advocate for limited, marginal reform, which they argue can be justified through a broad interpretation of existing constitutional provisions; while others propose broad reforms, which can only be justified through amending the constitution. Some interviews proposed very limited reform, which would be justifiable with a more limited textual interpretation of the constitution as well. Each of these positions has its own supporters and opposers.

Some found change in the administrative model premature because they believe the effectiveness of the current model has not fully been tested due to non-implementation. The supporters of this view argue, since the necessary political conditions for broad administrative reform are not present, it is better to focus on better implementation of existing constitutional model of public administration.¹⁷⁴ This point of view prioritizes strengthening of administrative bodies, institution-building, creating the necessary legal and material infrastructure of public administration, creating and improving the administrative capacity, and establishing the absentee administrative institutions, over constitutional amendment or broad changes in the new-founded administrative structure. They warn that attempting broad administrative reform without complete understanding of its consequences can be disastrous.¹⁷⁵

This camp argues that there are a lot that need to be done within the existing legal framework of public administration. The current laws not only do not prevent the delegation of more authorities to the local administration but also requires it, thus, policymaking, planning, budget implementing, some hiring authorities can be delegated to the local administration without the need for change in the laws. Delegation of administrative authorities, under existing laws, will ameliorate the negative effects of centralization. In the same vain, circumscribing the hiring authorities of the president, reduction of administrative redundancies, integration of parallel structures, establishment of local councils with the authority to exercise organization oversight, and creating the necessary conditions for creation of elected city councils and mayors can be done within the limits of the current

171 Such as the NGGPA (Draft) which is under the processing.

172 KII, MP and Uni Prof.

173 KII, ex-legal advisor of the president.

174 KII, senior official, council of ministers secretariat.

175 KII, ex-member of ICOIC.

constitution without constitutional amendment.¹⁷⁶ With regard to local administration, this interviewees argue that in order improve coordination and cooperation, there is a need for a unifying local administration policy that would improve the coordination on the local level. Currently, different units of local administration are not integrated into a unified provincial vision rather each unit is independently linked to a central administration. “It is argued that provincial governor and district governors are both representative of the president; then what is each of their scope of work and how should their relationship be defined?”¹⁷⁷ Currently, the scope of authority of a provincial governor is often set by his personal power not law; however, this would be applied to all 34 provinces. Lack of well-specified scope of legal authority has created a condition where the personal power of office holder determines the boundaries of that office’s authority.¹⁷⁸

Those who locate the source of administrative problems in the Constitution not its implementation are of the view that the constitutional gaps and shortcomings in areas of public administration are so severe that real improvement in areas of public administration without constitutional amendment is impossible. This was the dominant view amongst interviewees. This camp advocates for a more decentralized constitutional mode of public administration.¹⁷⁹ This camp argues that cultural, ethnic, and geographical diversity (and the fact that Afghanistan is a mountainous country) means that Afghanistan needs a decentralized system of public administration.¹⁸⁰ This camp discounts the fears of centripetal forces and empowerment of local strongmen by arguing that the continued existence of a unified political system will greatly reduce those fears. This is while realization of a democratic, participatory governance is only possible with a decentralized administration. The attainment of good governance also requires the reduction in the highly centralized system of administration so administrative institutions of different levels across the country can form meaningful relations with the local civil societies and private sectors.¹⁸¹

Within this camp, some believe that the decentralization efforts must begin with reforming the local councils. The current structure of local councils (village, district, and provincial councils) is the outcome of a historical process which aimed to create buy-in for the local elites in the political system (this is why that these councils is a conduit for joining the upper house of national assembly). Afghan rulers, throughout the history, including in the current time, have removed the administrative authorities of these local institutions but preserved their political functions. Currently, these local councils do not have administrative authorities. The historical process of creation of these councils did not prioritize good governance or participatory local governance. They are not designed to improve the local administration. They have, in principle, been established and maintained to create buy-in on the part of local elites. This is why, under the current highly centralized administrative system, the members of these councils are in constant conflict with the representative of central administrative authorities. The current political, non-administrative local councils are a main challenge against effecting local administration reform. Currently, the members of these councils are under political pressures from their constituents to represent them politically while the highly centralized political system does not allow for such a local political representation; as a result, provincial councils are in constant conflict with the provincial governor (who is the political representative of central government.)

176 KII, ex-legal advisor of the president.

177 KII, senior official, IDLG.

178 KII, senior official, IDLG.

179 KII, ex-member of ICOIC.

180 KII, senior official in the government.

181 KII, MP and Uni Prof.

Given this analysis, some interviewees believed that in order to create a working decentralized administrative system the current political structure of local councils must be removed. The proponents of this plan propose that instead of these old, problematic structures, elected city councils and mayors must be empowered. Traffic, police, and other local administrative units within a city must be incorporated within the municipalities. Under this proposal, municipalities assume the role of main local administrative institutions and provincial governors only remain as political representative of the central government. The provincial governor no longer will have administrative authorities. The supporters produce a number of examples from other countries which use the metropolitan models for administrating the affairs of the city and its neighboring areas (such as London and New York).

Under this model, elected city councils and mayors can best operationalize decentralized administration in Afghanistan; the main function of local administration is delivery of public services, and municipalities are the main institutions responsible for this delivery. Municipalities in cooperation with elected city council can produce plans for improvement of city life and implement them. Afghanistan needs to move towards improvement of cities, they argue. Rural development should follow suit, they argue.

The current approach within the government on reform of provincial councils, reflected in the draft National Policy for good Governance, aims to incorporate them in the development of province. The draft policy provides that members of provincial councils must be included in the high administrative and development councils in the province, so they can share their plans and advise on the provincial budget, development projects, and improvement of public service delivery. The policy also proposes that the law should require provincial governors to consult with the provincial councils. Under this draft policy, city councils and district councils will enjoy similar position with regard to the city and district, respectively. Municipalities, according to this draft policy, will remain as autonomous local administrative institutions tasked with raising and managing their revenues but are incorporate within a unified local administration vision. Provincial governor will exercise light oversight over municipalities.¹⁸²

Under this draft policy, units of central administration (ministers and general directorates) will morph into policymaking institutions with oversight over implementation of policies while local administration, under the leadership of provincial governor, will be policy-implementors. The draft policy proposes that the line departments should become integrated into the provincial structure and lose their independent hierarchical connection to the central administration. This way, the draft policy seems to push forward a unifying view of province as the main institution of public service delivery. On the provincial level, the administrative and development work will be leaded by inclusive bodies of high administrative and development councils. On the district level, the district level administrative units will work under direct control of the provincial leadership as subordinates of provincial administrative bodies. The district level administration can share their input through their membership in high administrative and development councils at the province level. It seems that implementation of this draft policy does not necessarily require constitutional amendment. The constitution defines central administration which comprises of government and ministries; it also defines local administration which comprises of provinces and districts. Therefore, line department of central administrations do not have constitutional standing. The constitutional model of public administration is closer to a unified province-based model of local administration compare to the current disjointed system of local administration.¹⁸³

182 NGGPA(Draft), July 2018.

183 *Id.*

4. Conclusion and Recommendations

4.1 Conclusion

According to majority of interviewees, the constitution provides for a deconcentrated centralized public administration. However, a significant minority rely on the values enshrined in the constitution such as participatory governance to argue that a holistic interpretation of the Constitution indicates that the Constitution provides for a semi-centralized or deconcentrated decentralized public administration. While over the past centuries different *de jure* model of public administration has been adopted in Afghanistan, in practice, actual delegation of authorities seldom has happened. It appears that the traditional Afghan society, and some often the state crafts, was not ready for a modern and rule-based decentralized administration. However, in the current environment it seems, on the one hand, the society is readier than ever for a rule-based decentralized administrative system, and on the other hand, the government is more serious about structural administrative reforms. Therefore, the conditions for structural reforms is now more potent than ever, despite the persistence of a number of serious challenges such as low capacity, local strongmen, and weak local administration.

What is undeniable about the *de facto* organization of public administration is that it widely diverges from its *de jure* constitutional model. This has led some to consider structural change premature and advocate for implementation of the existing constitutional model. However, the centralizing tendencies of the current government and their continued unwilling to delegate necessary authorities have created an environment of distrust of the current centralized model. While there is a consensus on the need for reform, this distrust has caused some stakeholders to only accept fundamental structural reforms. This group argues that the context of adoption of the constitution justified the centralization of public administration, however, the context has changed and there is pressing need for adjusting the “transitional” administrative model and transitioning towards a decentralized administrative system.

The policymakers inside the government do not share the same decentralizing views but they too appreciate the need for deconcentrating reforms. This is why there are a number of policies under work within the boundaries of the existing constitution while adopting a broader interpretation of constitution. These policies can be effective short-term steps since the necessary political conditions for constitutional amendments are not yet present.

4.2 Recommendations

In the short-run, the Afghan government should

- Enact or update organic laws of public administration, including Law of Basic Structure of the State, Law of Local Councils, Law of Local Governance, and Law of Municipalities;
- In order to close the gap between the de facto structure of public administration and its de jure constitutional model, extra-ministerial institutions should be integrated into the ministry-based model, so that they can act as technical policy advisors under the leadership of ministers;
- Necessary authorities in the areas of participation in policymaking, budgeting, planning, hiring, and procurements should be gradually delegated to the local administration;
- Constitutionally-mandated local councils must be established not only with the purpose of creating the necessary conditions for convening of the Loya Jirga but also to attain the ethical goals of the Constitution.
- Create effective mechanisms that would allow for a better implementation of consultative and supervisory role of local councils;
- Provincial and district governors must be empowered so they can lead, coordinate, and oversee the local administration in an integrated manner.

In the long-run, the constitution should be incrementally amended to:

- While the constitutionally-prescribed Afghan government has most of the features of a presidential system, the public administration is designed based on parliamentary system. This contradiction needs to be addressed;
- Create a real decentralized administrative system with all its political and institutional prerequisites;
- Currently, the de facto organization of public administration diverges from the basic structure outlined in the 2004 Constitution. This divergence has emerged due to a number of reasons: (1) persistence of institutional debris from the past regimes; (2) political expediency or desire to achieve quick results have been preferred over fundamental administrative reforms, which are neither politically convenient nor produce quick results; and (3) there is low level of capacity throughout administrative apparatus of the government. In order to ensure long-term stability and create a responsive and democratic public administration system, the Afghan government needs to bring the organization of central administration under the constitutional order, which would require fundamental administrative reform starting from central ministries;
- Promote an integrated approach to local administration by merging local councils—namely provincial and district councils—and city councils or clarify their relationships in a manner that elected local institutions can take charge of local administrative decision-making;
- At present, there is no unanimity on the model of public administration prescribed in the 2004 Constitution. This issue can be addressed through the passing of legislation that envisages the model of public administration for the Afghan state.

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