Ahmad Masood Amer has worked for many years on strengthening governance institutions and deepening of democracy in Afghanistan. Following the dissolution of the Taliban regime in 2001, a new phase begun in the contemporary history of the country. Reconstruction and state building started after the UN-sponsored Bonn Conference paved the way for establishing a modern democratic society in Afghanistan. The country embarked on a new journey to experience democracy and rule of law enshrined in a new constitution adopted in 2004. During this period, Masood has been involved in the core process of policy making, advocacy and provision of technical support for strengthening of governance institutions and practices in the country. He has served as assistant country director of the United Nations Development Programme where he led implementation of the legitimate and inclusive governance strategy aimed at building capacity of the various governance institutions at national and sub-national levels. He has extensive expertise in public sector governance management, conflict prevention and peace-building, fighting corruption, rule of law and parliamentary development.

To my late father, General Abdul Qadeer Amer, and my wife, Dr Aweed Dehyar whose patriotism and love of the country inspired me to write this book.

# Ahmad Masood Amer

# AFGHANISTAN: THE JOURNEY OF STATE BUILDING AND DEMOCRACY

## 2001–2020

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# Preface

Afghanistan is at a critical juncture in its contemporary history and faces many difficult challenges. The post-2001 political order in Afghanistan is a potent example of a young democratic society characterised by tribal and ethnic schisms, elite ruling and weak social contract. This situation is deeply entangled with the political economy of the international presence in the country and as such the geopolitical influence and any shift in global/regional power balance can have potentially destabilising effects on the political order and the nascent process of state building and democratisation in the country.

This book reviews the 2001 political development analysing the legal and institutional challenges of the current governance system, takes stock of the progress and challenges, highlights lessons learned and makes recommendations for reform and change: Chapter 1 provides a brief introduction to the objectives and summary of the key findings. Chapter 2 documents the historical context and political evolution since formation of the country. Chapter 3 analyses the existing governance structure based on 2004 Constitution highlighting key deficiencies and legal gaps in the system. Chapter 4 provides political economy analysis of the political development in the country with an historical perspective and shares analysis and views of different analysts. Chapter 5 contains summary of the key findings and conclusions and recommendations as well as references.

# Acronyms

| | |
|---|---|
| ABP | Afghan Border Police |
| AIA | Afghanistan Interim Authority |
| ANCOP | Afghan National Civil Order Police |
| ATA | Afghanistan Transitional Authority |
| ANDS | Afghanistan National Development Strategy |
| AIHRC | Afghanistan's Independent Human Rights Commission |
| ANA | Afghan National Assembly |
| ANA | Afghan National Army |
| ARTF | Afghanistan's Reconstruction Trust Fund |
| CM | Council of Ministers |
| CAO | Control and Audit Office |
| DDR | Disarmament Demobilisation and Reintegration |
| DIAG | Disbanding Illegal Armed Groups |
| GOIRA | Government of Islamic Republic of Afghanistan |
| HOO | High Office of Oversight |
| LJ | Loya Jirga |
| IDGL | Independent Directorate of Local Governance |
| ICOIC | Independent Commission for Oversight of Implementation of the Constitution |
| ISAF | International Security Assistance Forces |
| IMF | International Monetary Fund |
| MJ | Mishrano Jirga (House of Elders) |
| MOJ | Ministry of Justice |
| MOI | Ministry of Interior |
| MOD | Ministry of Defence |
| MOC | Ministry of Communication |

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| MOPA | Ministry of Parliamentary Affairs |
| MOWA | Ministry of Women Affairs |
| NATO | North Atlantic Treaty Organisation |
| NSP | National Solidarity Programme |
| NPPs | National Priority Programmes |
| NDS | National Security Directorate |
| OOP | Office of the Presidency |
| ROP | Rules of Procedure |
| SC | Supreme Court |
| PDPA | Peoples' Democratic Party of Afghanistan |
| SNTV | Single-None Transferable Vote |
| UN | United Nations |
| UNODC | United Nations Office for Drug and Crimes |
| UNDP | United Nations Development Programme |
| USA | United States of America |
| WB | World Bank |
| WJ | Wolesi Jirga |

# Introduction

Governance is a key aspect of the political economy and faces many difficult challenges in Afghanistan. One of these challenges is the upcoming political transitions from the current National Unity Government (NUG) to a new government and the uncertainty surrounding the US-led peace negotiations with the Taliban group[1]. A more, long-term and important challenge however, is the transition towards full Afghan ownership of the entire governance infrastructure, at a time when the country faces challenges in managing of security responsibilities and ultimate drawdown of the international security forces – a move which casts uncertainty over the political, economic and security outlook of the country over the next few years.

The 2004 Afghan Constitution puts in place a tri-partite system of government, each organ of State separate from, and a co-equal of, the two others, each organ superior within its own sphere, and each organ empowered by the Constitution to rein in any abuse of power by the two others under a system of checks and balances[2]. It is now close to two decades that Afghanistan has experienced this modern system of governance which was configured as a result of the elites bargaining at 2001 Bonn Conference on Afghanistan [3] and later on embodied in the 2004 Constitution[4].

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[1] The ongoing peace negotiations led by Zalmay Khalizad US special Envoy for Afghanistan
[2] Afghan Constitution 2004, Organs of State
[3] The 2001 Bonn Conference on Afghanistan, December 2001, (pp 4-8) http://mfa.gov.af/en/page/6588
[4] Ibid

Ethnic diversity and conflicting pressures for the demand for the recognition has taken the country to the brink of more turmoil and instability due to absence of institutions with the capacity to accommodate ethnic diversity and reconcile conflicting demands for the recognition of distinctive identities. Politics seems to have failed to mobilise people on the basis of ideology or clear agenda for reform and change. Instead political and elites deal have always been characterised by shifting alliances and extreme fluidity with the use of ethnic and subethnic solidarity to coordinate political action which has increased ethnic polarisation of Afghan society. While the continued dependence on elite bargains promotes short-term stability, it tends to impede longer-term progress and leaves the door open to power challenges, thereby weakening the government.

Thus, the need for system change and fundamental political reform has taken central stage in the political discourse on the future of the country. For instance, some political parties have adopted 'Federalism' or some form of decentralised government as their main 'manifesto' and it is often cited by them as the only panacea for the current plight of the country. There is little doubt that the country does require more inclusive political institutions with the capacity to not only accommodate ethnic diversity but to create effective mechanisms for addressing diverse interests while maintaining national unity. Ethnic heterogeneity rather than homogeneity characterises the populace of many countries around the world. More than 90% of the current 190 or so states in the world are ethnically plural in character; these states are home to almost 95% of the world's population.

With this background, this book reviews some of the key developments since the establishment of the new political order in Afghanistan and highlights the main legal and institutional challenges the modern democratic Afghanistan faces in its move towards nation building and establishing a democratic society. Further, it draws on specific lessons

learned during this period and puts forward recommendations for change.

i. *A history of political exclusion*: Violent contestation in Afghanistan has always resulted from the breakdown of an elite pact or 'grand bargain' involving rulers, external patrons, administrative elites and societal groups. Therefore, it is crucial that all segments of the society are provided with equal opportunity to participate in the political life and decisions that affect their lives. Particularly, the role of parliament as the body representing the people, needs to be strengthened in the political scheme to more effectively discharge its law making, oversight and representation functions

ii. *A history of weak centre-periphery relations*: Seldom has an incumbent government been able to mobilise sufficient capital to secure the loyalty of the periphery. A State's failure to provide basic rights, services and security not only contributes to growing inequality, it also creates a vacuum that allows non-state actors to take control over State sovereignty and territory. There is a risk that failed political transitions, with weak institutions, law enforcement and checks and balances provide a fertile ground for violent extremism. Weak States thus create opportunities for the physical location of extremist groups. Therefore, devolving power to local authorities and creating mechanisms for citizens to participate in the governance process and to hold government into account can lead to better service delivery and greater legitimacy of the government. In turn, it tightens up the social contract between state and citizens and contributes to improved security and stability

iii. *A preference for traditional over technical solutions*: Historically, reforms were not carried out through institutionalised processes but rather through reliance

on charismatic patrimonial leadership, coercion or externally provided capital. Established governance mechanisms and systems have often been co-opted or ignored through reliance on personalities and non-institutional mechanism to achieve certain political agendas. While in essence the tradition of Loya Jirga (Grand Assembly) is a unique practice and provides mechanism for participation and decision of national importance, experiences indicate that due to vagueness in procedures for selecting its members, in most cases, Loya Jirgas have provided avenue for ruling governments to enforce their political agendas through a system of control and manipulation. Further, it is seen as duplication of the existing legislature which is a representative body with members of the lower house directly elected by the people.

iv. *Implementing Rule of Law*: A governance system that is based on the principles of separation of power and rule of law is crucial for a pluralistic political system that derives its sovereignty from the votes of the citizens. Rule of Law is therefore, a fundamentally important aspect of a democratic system of government and serious efforts and political will is needed to strengthen rule of law and fighting corruption in police and the judiciary system.

v. The current system of state building is characterised as 'rentier' model of state building with its economy largely depending on donors' pocket. This is unsustainable and unconducive for creation of a cohesive society based on social contract. State needs to explore alternative options to promote social-economic development and create direct linkages with its citizens to strengthen social bonds and deepen social cohesion.[5]

[5] W. Verkoren & V. Kamphuis, "State Building in a Rentier State, How Development Policies Fail to Promote Democracy in Afghanistan" Institute of Social Studies, the Huge, pp 502-510

vi.   *Need for genuine consensus on issues of national importance to strengthen social cohesion: It is obvious that there is need for open dialogue among various groups in the society to build and strengthen both horizontal and vertical cohesion. Among others, issues such as single national identity, name of the country, certain words (so called national terminologies) and system of governance seem to be the core issues of difference among political elites which trickle down to create further fraction in the society. Afghans, as a nation, need to find a way to have open discourse around these issues in a transparent and democratic way and the state, as the custodian of the nation has the responsibility to provide suitable mechanisms so that the differences could be ironed out and people can live together.*

*Last but not least, to reach a resilient political settlement, the ongoing process of peace talks between the United States and the Taliban Group needs to become more inclusive and transparent. A lasting peace requires a whole of society approach and needs genuine leadership by the Afghans. There are deep misconceptions on a number of fundamental issues in the event that Taliban return or participate in a future government. These include preserving the socio-political development and gains of the last two decades, transition from the current government to a future settlement, the rights of women, freedom of speech etc. Furthermore, there seems to be no clarity on what happens after the initial agreements and reduction of violence (the term which is used in lieu of seize fire here), how the gains would be maintained and what would be the mechanisms for carrying on a prospective peace process. Experiences from other countries, suggest that in order to ensure continued success in any peace process, it is crucial to invest on infrastructure for peace which involves establishing suitable mechanisms at national, sub-national and local levels to take forward the peace agenda.*

# Historical Background

The area that is now called 'Afghanistan' has long had a hybrid system of governance, consisting of a central government with varying degrees of control over the centres of population, operating in parallel with regional power brokers as well as decentralised structures organised along tribal lines and within local communities.[6] Recent studies suggest that the country has never in its history been ruled by a central government. The majority of the population, living in rural areas, has rarely had contact with the central government officials, and has tended to rely on local strong men or collective action for the provision of public goods[7]. Rather than using formal, state institutions to adjudicate disputes and deter crime, most have turned to traditional dispute resolution mechanisms based on interpretations of *Sharia* law and on local and tribal customs.

Amir Abdur Rahman (reign 1880–1901) was the first to undertake steps to control the land in order to establish a monopoly of power in the hands of the state authorities although largely through coercion and brutality which in the long run created more fraction and social divide. Whether this enduring rural-urban divide and *de facto* delegation of significant aspects of governance to traditional bodies is a result of the weak capacity and legitimacy of the central

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[6] Miles Smith "Legitimizing the de facto decentralized Afghan Government", p1

[7] Refers to provision of any services or goods by public sector

government, or its cause, is subject to differing interpretations.[8]

Modern attempts to increase the reach of the central government began in the late 19th Century under the reigns of Adbur Rahman Khan and his successors: Habibullah Khan and Amanullah Khan. The coexistence of the central authorities and the *ulema* became seriously shaken under the rule of Amanullah Khan, who came to power in 1919. His rule was characterised by major changes, the most important of which was the formal independence of Afghanistan from the United Kingdom after the end of the rather short 'Third Anglo-Afghan War' (Treaty of Rawalpindi of 8 August 1919). Having formally established an independent state, Amanullah Khan tried to transform the tribal society of Afghanistan into a nation state as an example to the Islamic world. The reforms by Amanullah Khan were certainly by far the most ambitious and radical reforms Afghanistan had seen so far. They included the introduction of female education, the abolition of child marriage and restrictions on polygamy. Furthermore, he tried to radically change and modernise the economy of Afghanistan. He also introduced ambitious reforms in the legal sector. Following the example of Western countries, he tried to introduce a complete legal basis for the state in order to implement the rule of law, an idea formerly unknown in Afghanistan. In 1923, he gave Afghanistan its first constitution changing it into a constitutional monarchy.[9]

These efforts – including curbing the power of sub-national leaders, increased taxation and social reforms – clashed with a wide range of vested interests, especially in rural areas. Later reforms were also seen as inconsistent with conservative interpretations of the *Sharia*. In 1929, Amanullah[10] was forced to abdicate in the face of armed resistance and many of the reforms were rolled back.

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[8] S. Qasim Reshtya, Contemporary Afghanistan (1919-1979), Part I, Section 3 (pages 31-42)

[9] Ibid

[10] M. Ghulam Mohammad Gobar, "Afghanistan Dar Maseer Tarikh", 2nd edition, (pp 35-39)

Subsequent national rulers were more cautious about challenging traditional norms, and over the next 50 years rising economic opportunity and modernisation in the cities led to a widening divergence between urban and rural perceptions and priorities.[11]

Reaction and slow modernisation (1931-1964): The new ruler Habibullah Kalaqani took the throne in 1929 however; he was shortly thrown down by, a former general of the Anglo-Afghan War and member of the royal family, Nadershah. The short episode of Habibullah was marred with anarchy and internal upheavals. He returned the authority for administration of justice back to Ulama. As a reaction to the anarchy following the downfall of Amanullah Khan in 1929, the Nadershah enacted a new Constitution in 1931 which emphasised on the unity of Afghanistan and the supreme powers and competencies of the monarchy. Nadershah abrogated most of the controversial legislation, enacted at the time of Amanullah and confirmed the enforcement of religious laws via religious courts as reintroduced by Habibullah. Article 87, 88 of the Constitution of 1931, stated that general lawsuits had to be filed under *Sharia* law and that these suits had to be dealt with in accordance with the principles of the *Hanafi* jurisprudence. Recourse to statutory law was not mentioned.

After the assassination of Nadershah in 1933, his nineteen-year-old son Mohammad Zahir Shah followed him to the throne. In the following decades the various uncles and cousins of Zahir Shah (who served as Prime Ministers) dominated the politics of Afghanistan. The most prominent of them was Daoud Khan, later the first president of the Republic of Afghanistan (ruled 1973-1978).[12]

Daoud served as Prime Minister from 1953 until 1963. While on the one hand, Daoud's term as Prime Minister was characterised by many successful modernisations, on the other hand, these modernisations were accompanied by a

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[11] Ibid

[12] S. Qasim Reshtya, Contemporary Afghanistan (1919-1979), Part I, Section 3 (pages 31-42)

curtailment of civil rights and freedoms and by an increased concentration of power in the hands of the central government. Daoud's resignation resulted in a power vacuum, which provided a unique opportunity for the three major political forces (i.e. intelligentsia, traditional tribal elite and royal family) to join and reach a broadly based compromise for the sharing of power.[13]

The assumption of power by the Peoples' Democratic Party of Afghanistan (PDPA) in 1978 and the establishment of the Democratic Republic of Afghanistan signalled new challenges to the existing balance of power. [14] Communist-inspired economic and social reforms were enforced vigorously, and severe reprisals against religious and community leaders led provoked a violent response. With the government facing collapse, the Soviet Union invaded Afghanistan in support of the PDPA regime – an occupation which ended only in 1989, following armed resistance by Mujahedin forces with support from the United States, Saudi Arabia, Iran, and Pakistan. During the following decade, power was exercised mainly along regional and tribal lines by competing warlords, with a significant (but still incomplete) degree of central control occurring only during the period of Taliban rule in 1996-2001. [15]

In 1964 a new constitution was enacted implementing the compromises agreed upon and redistributing state powers. Contrary to the aims of the Constitution of 1931, its main objective was a separation and coordination of the different branches of power. Different to most of the other historic constitutions of Afghanistan, the Constitution of 1964 was a product of ample negotiations and compromises between the various factions. Therefore, the reform and modernisations accompanying the new constitutional order were much more

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[13] Report to US Congress, Progress Towards Security and Stability in Afghanistan, July 2013, http://www.defense.gov/pubs/Section_1230_Report_July_2013.pdf
[14] Ibid
[15] Ibid

realistic and less ambitious than the reforms of the 1920s and also more systematic and consistent. The widespread acceptance of the 1964 Constitution is underlined by the fact that the Bonn Agreement of 2001 chose this constitution as the legal framework of the transitional order.

# The 2004 Constitutional Structure of State Organs

The Afghan Constitution, adopted at a Constitutional Loya Jirga in January 2004, puts in place a representative system of government that concentrates political power in Kabul and in the hands of the President. However, the Parliament has also progressively adopted a more assertive role in relations with the executive.

The Constitution of the Islamic Republic of Afghanistan promulgates the elementary legal arrangement for the organisation of the state. Most important for a legal system based on the rule of law and the protection of human rights and dignity, as is stated in the preamble of the constitution, Art 22-42 promulgates a catalogue of basic rights and freedom. Besides the acknowledgement of fundamental rights, the constitution also introduces four constitutional principles, which have decisive consequences for the structure and the administration of Afghanistan. The first two of them are already mentioned in the very first article of the Constitution. [16] Art 1 of the constitution stipulates that Afghanistan is an "Islamic Republic, independent, unitary and indivisible state". [17]

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[16] J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N. Y. L. SCH. L. REV. 557 (2007),
[17] The Afghan Constitution, Art 13, pp 10
http://www.afghanembassy.com.pl/afg/images/pliki/TheConstituti on.pdf

## The Executive, the President and Government

The President, as the head of state and government as well as the country's Commander-in-Chief, is by far the most powerful political figure in the Afghan state. He is directly elected every five years,[18] for a maximum of two terms. The government is mainly an administrative body with little formal authority independent from the President. The President has direct control and supervision over the government constituted under Chapter IV of the Constitution, which functions mainly as an administrative body with little formal authority independent from the President. The President's powers extend substantially into the legislative and judiciary realm.[19] He can adopt regulations that are not contrary to the letter and the spirit of existing laws, issue legislative decrees whenever Parliament is in recess and assume broad powers in a state of emergency. He also appoints one third of the members of the upper house (Meshrano Jirga) of Parliament, thus having substantial influence over the make-up of one legislative body, and can exercise his veto power over the legislative enactments of Parliament.

With regards to the judiciary, the President approves the appointment of judges upon a proposal by the Supreme Court; he also appoints candidates to the Supreme Court with the endorsement of the lower house.

Despite these extensive powers in relation to other elements of the Constitution, within the executive the President does not exercise the same extensive degree of power found in some countries, including the United States (on which the Afghan system is to some extent based). There are various reasons for this. First, unlike many presidential systems, the Council of Ministers is not solely an advisory body. It meets weekly, considers significant issues and

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[18] Afghan Electoral Law, Article 10, pp9-15: http://www.afghan-web.com/politics/storage/election_law.pdf
[19]Ibid

exercises a semi-legislative role in the sense that it approves draft legislation for submission to the parliament and takes some other executive decisions. It also has seven committees which have the authority to decide some lesser issues on their own authority. The Council of Ministers' decision-making arrangements do not constitute the only form of cross-government decision-making; the system is bifurcated, with many issues going direct to the President to be decided by decree or order. Furthermore, the President himself chairs the weekly meeting of the council of ministers and also chairs the meetings of several committees. By this means and by his inherent political authority, he exercises great influence on debates and decisions. Nevertheless, the existence of a Council of Ministers with executive functions to some extent restricts the President's freedom of manoeuvre and means that the machinery supporting the Centre of Government has to support the President, the Council of Ministers and committees.[20]

Second in practice, Ministers seem to operate as autonomously as they can. This is exacerbated by poor exchange of information and poor cross-Ministry coordination. The President can (if he wishes) intervene in a particular issue or in the work of a particular Ministry, but obviously there are practical limits to how many issues he can involve himself in at any given moment.

Third, the two Vice Presidents have some executive roles. While the Constitution does not assign any particular executive functions to them, at the President's request they chair certain committees of the Council of Ministers and have the remit of coordinating the work of clusters of ministries. In practice the effectiveness of this arrangement is variable, but

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[20] C. Johnson & W. Maley, Afghanistan Political and Constitutional Development, Jan 2003, (pp 20-25) http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5888.pdf

the Vice-Presidents certainly provide a separate focus of coordination to the presidency.[21]

Fourth, the President has little machinery under his direct control capable of liaising with and influencing individual ministries. Compared to heads of government (Presidents and Prime Ministers) in many other countries, the President has fairly limited means of ensuring that he is informed about initiatives developing in ministries, gathering data, tracking progress, or ensuring coordination of the efforts of different institutions.

The President is supported by the two Vice-Presidents who are responsible for matters such as policy development, policy changes, implementation oversight and institutional coordination among government offices. However, the VPs' Offices lack basic capacities for planning, policy analysis, monitoring, coordination and communication within government to discharge their delegated duties.

## The First Vice-President

The office of the First Vice President holds the second highest political position in Afghanistan, according to article 60 of the 2004 Constitution, "In case of absence, resignation or death of the President, the first Vice-President shall act in accordance with the provisions of [the] Constitution." The office of the first Vice President is responsible for matters such as policy development, policy changes, implementation oversight and institutional coordination among government offices, in particular ministries. In other words, its role in ensuring that policy development and implementation are compatible with the Afghanistan National Development Strategies (ANDS)[22] is critical.

*Areas of Responsibilities under the First Vice President*: The legal decree which establishes the mandate and responsibilities of the first Vice President office is the

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[21] R. Moschatagi, Structure and Principle of State, (3rd Edition, 2009) PP 20-25

[22] Afghanistan National Development Strategy, www.ands.gov.af

Presidential decree number 62, issued March 19 2010. According to this decree, the following ministries/directorates are required to report their activities and work progress to the VP1: 1) Ministry of Defence (MOD) 2) Ministry of Interior Affairs (MOIA) 3) National Security Directorate (NSD) and 4) Independent Directorate of Local Governance (IDLG). Moreover, the decree establishes that the first Vice President oversees three permanent national committees of the Council of Ministers (CMs) and four ad hoc national commissions. The permanent committees include security committee, legal committee and cultural and educational committee. The commissions consist of commission on counter extortion, commission on Disbanding of Illegal Armed Groups (DIAG), commission on education and skills policy, and commission on reconstruction of Ghazni province. The durability of the ad hoc commissions depends on the pertinence of the issue in question.[23]

## The Second Vice-President

Article 60 of the Afghanistan Constitution states the responsibility of the second Vice President as such: "In the absence of the first Vice-President, the second Vice-President shall act in accordance with the provisions of this Constitution."[24] Like the first Vice President, the office of the second Vice President is also responsible for matters such as policy development, policy changes, implementation oversight and institutional coordination among government offices, in particular ministries. In other words, its role in ensuring that policy development and implementation are compatible with the Afghanistan National Development Strategies (ANDS) is critical.[25]

The legal decree which establishes the mandate and responsibilities of the second Vice President office is the

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[23] National State Governance Project, January 2010, UNDP Afghanistan, pp – 7-15
[24] 2004 Constitution, Art 60
[25] Ibid

Presidential decree number 62, issued March 19 2010. Moreover, a number of other decrees have also established the areas of responsibilities of the VP2 as following:

1. Permanent Committee on Economic Affairs (Decree No. 62)
2. National Committee on Disasters Prevention (Decree No. 62)
3. Committee on Obligatory Haj (Decree No. 62)
4. National Committee on Water Regulation (Decree No. 62)
5. High Council of Standardization (second article from the law on the Standardization and Decree No. 5816, dated January 5, 2011)
6. Council on the Information Technology (Decree No. 5076, dated November 25, 2010)
7. National Committee on Census and Enumeration (fourth article of the CoMs No. 28 Agreement, dated September 27, 2010 and Decree No. 4184, dated October 6, 2010)
8. Committee on National Solidarity Leadership (Decree No. 3117 dated November 2, 2006)

The definition of the remits of the Council of Ministers' (CoM) committees is not specific. There appears to be a lack of clarity over which issues should be addressed as Presidential orders or decrees, and which should go to CoM committees, or go direct to the CoM or the National Security Council for decision making. Arrangements at CoM committee level appear to be particularly confused (indeed sometimes dysfunctional) with instances of committees meeting erratically or not at all, poor quality papers from ministries, poor preparation of agenda leading to emphasis on small matters and the neglect of some important matters, and inadequacy in secretarial support.

# The Legislature

Afghanistan has a bicameral parliament, the National Assembly of Afghanistan, with its house of the people (the *Wolesi Jirga*)[26] and its house of elders (the *Meshrano Jirga*).[27] The Parliament exercises law making, oversight representation functions, and Article 90 of the Constitution enumerates its powers, thus: (i) Ratification, modification, or abrogation of laws and legislative decrees; (ii) Approval of plans for economic, social, cultural, and technological development; (iii) Approval of state budget, permission for obtaining and granting loans; (iv) Creation, modification, and abrogation of administrative units (v) Ratification of international treaties and agreements, or abrogation of the membership of Afghanistan to them; *and*, (vi) Other authorities specified in the Constitution.[28]

The system of governance that has evolved since 2005 concentrates political power in the hands of the executive branch, in a strong President asserting his, "authorities in the executive, legislative and judiciary branches" as ordained under Article 60 of the Constitution; to that extent that the President has exercised his vast powers, including control of the agenda and resources of the two other branches of government. These constitutional and political constraints pose challenges to the effective and efficient functioning of the parliament. Thus, parliament has not fully maximised its current mandate, and as a result has failed to adequately

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[26] WJ. Rules of Procedure, pp-5 http://wj.parliament.af/
[27] MJ. Rules of Procedure, pp-3 http://mj.parliament.af/
[28] N. Coburn, Political Economy of Wolesi Jirga, May 2011, pp-13-15

deliver on its core functions of law making, oversight and representation.[29]

The parliament is significantly constrained in the exercise of its powers. Most importantly, it lacks institutional autonomy and capacity: it is dependent on the executive branch for its resources to operate; its budgetary requirements are under the control of the executive branch; and it operates more like a ministry dependent on the application of laws and rules that govern the operations of the executive branch. So far, there has been no institutional reform or action initiated by parliament within the existing legal mandate to address these fundamental constraints. Thus, the lack of independence from the executive branch compounded by a weak institutional capacity to initiate and implement reform; places significant challenges for parliament to credibly and effectively discharge its constitutional role and provide effective checks and balances as the key accountability body within the Afghan governance structure.

Considering the central role of the legislature in the modern governance system, the section below focuses on issues surrounding the national assembly and analyses the main challenges the institution faces after its establishment in December 2005:[30]

As is the case with the vast majority of national legislatures worldwide, the national assembly of Afghanistan exercises law making, oversight, representation functions. It is a co-equal branch in the tri-partite system of government, with distinct and separate powers, including the checking function enshrined in the Constitution.

The issues surrounding the discharge of its core functions, the institutional functioning of parliament remains weak and Members of Parliament (MPs) lack core skills to analyse or draft legislation or hold the executive to account. While parliament (also) has limited institutional autonomy and it lacks the capacity to bid for and manage its operating budget,

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[29]The Afghanistan Constitution, 2004, Article 81

[30] A. Larsen, "The Wolesi Jirga in Flux", September 2010, pp-20-22

partly due to its extremely weak financial management and audit systems. Thus, the institution has not fully maximised its current mandate to effectively deliver on its core functions.

## On Law Making

Parliament has failed to clothe itself with and exercise, the powers inherent to democratic legislatures. Parliament continues to rely on the rules of procedure which is "inadequate" to empower the different institutions of Parliament to carry out the core functions. Most of the legal constraints stemming from the current RoP could have been overcome had the existing RoP been revised to provide a robust legal parameter for the institution to function. Such kind of reform is within the authority of every legislature to undertake; however, evidence suggests that Parliament has not fully utilised its authority in this regard.

In relation to the decree power of the President, Parliament has not responded in a timely fashion, to the urgent need for legislative enactments, allowing the President to himself exercise his powers under Article 79 of the Constitution. For instance, the 2008 gap analysis of anti-corruption laws [31] was followed by the President issuing executive issuances to address identified areas for legislation, but Parliament has not similarly responded. Why Parliament has not done so, despite the clamour for such legislation and the remit granted within its existing legal mandate, presents an interesting area for research.

The performance of its core functions (especially law making) being dependent in large part on how well Parliament interacts with different stakeholders, with the Afghan people principally; the lack of any prior assessment of relations with stakeholders has served as a deterrent to the effective and efficient discharge by Parliament of its functions. Simply, what the Afghan people expect by way of laws enacted by Parliament to address their needs have not come about. For

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[31] Anti-Corruption Gap Analysis Report, UNDP Afghanistan, June 2007

example, the issue of devolution of powers to the sub-governance units, to the provincial councils principally, has not been adequately addressed, on account of a lack of mechanism for interaction between Parliament and the sub-governance units. Why this delay has happened and why no such mechanism exists, do not speak well of the efficiency expected of Parliament and its effectiveness to enact laws.

## On Oversight

While Parliament has paid significant attention to its oversight responsibilities, attempting many times ever since 2005 to call the attention of ministers of the government to many lapses, violations even, on the observance of laws on governance, principally those dealing with anti-corruption, Parliament has not been entirely successful in removing by a vote of no confidence; all of those who have been established to have committed violations. Even worse, Parliament has failed to exercise its power of compulsory process, to bring to Parliament government officials who should properly be the subject of investigations pursuant to Article 89 [32] of the Constitution.[33]

The rules of procedure of Parliament governing the exercise of its oversight function and its duty to investigate government actions (already inadequate as they) have not been fully utilised.

According to a perception survey conducted on Parliament, [34] the report found that providing effective oversight remained the biggest challenge for the Parliament. The report further notes the following: "There seemed to be little understanding of the concept of oversight, the role of MPs, and the mechanisms available for the Parliament to hold the executive to account. Therefore, priority should be given to strengthening this aspect of the Parliament's work

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[32] The 2004 Constitution, Art 89

[33] Afghanistan's New Legislature, "Making Democracy Work", Asia Report No 115, May 2006

[34] A. Larsen, "The Wolesi Jirga in Flux", (September 2010), -20-22

especially in light of the link to anti-corruption activities and other key national initiatives."[35]

On the positive side (to the credit of Parliament) it continues to assert its powers as a functioning legislature through embarking on various fact-finding missions on matters of national importance including the conditions of prisoners and the circumstances of Afghan refugees. Parliament has been active in scrutinising the budget (although a more comprehensive budget cycle approach) from pre-budget consultations through budget scrutiny, to execution oversight and audit would both strengthen Parliament's role and ensure a better understanding of budgeting and budgetary responsibilities and constraints.

## On Representation

How Parliament exercises its representation function requires a serious look as to how it can effectively wield its powers to engage the Afghan people. Parliament-constituent relationships have necessarily been limited. As a result, public perception or understanding of the institution and of the MPs' functions and responsibilities is quite low. Parliamentary outreach efforts, including field visits, fact finding missions, web and media services and complaints mechanisms (to name a few) have been slow to develop, due to a mixture of funding, co-ordination and security issues. [36]

## Women in Parliament

Women parliamentarians represent 27% of the entire membership in both houses of Parliament. This is an important achievement gained during the past decade of democratic reforms. At the same time, it is well-known that

[35] M Hassan W & A Larsen, "The Wolesi Jirga in 2010 Pre-Election Politics and Appearance of Opposition" June 2010, pp-20-25. http://www.areu.org.af/EditionDetails.aspx?EditionId=472&ContentId=7&ParentId=7

[36] Institutional and Capacity Support to Afghan Parliament, March 2014, Kabul, pp-9-15

women MPs experience certain challenges that impact on the effective fulfilment of their functions, partly because of overall structural shortcomings as already described in the forgoing sections, and also due to cultural prejudices against the role and place of women leaders in the scheme of governance.[37]

One of the problems many women parliamentarians face is that they are not allocated enough time in the discussions and debates, either in plenary or in the commissions. They also find it extremely difficult to be selected for participation in key commissions; much less occupy leadership positions in such commission's chair. Thus, they are not able to effectively fulfil their functions; their contributions cannot be accurately assessed; and they suffer, perception-wise compared to male MPs, from a credibility problem as to their effectiveness as performers in Parliament.

## On Institutional Constraints

Parliament continues to be governed by issues applicable across the bureaucracy of the national government, on its financial and staffing resources for instance, which are actually restrictive of Parliament's unique operational requirements as an independent and co-equal branch of government.

Compounding the issue of shortfall in discharging its core functions is the inability of Parliament to pursue the institutional development of its secretariat, which remains burdened in particular by the lack of a coherent human resources development plan and an ineffective public finance management system. [38]

The effectiveness of Parliament is also undermined by fundamental weaknesses in its core systems and processes. The Ministry of Parliamentary Affairs (MOPA) controls the Parliament's budget, calendar, staffing resources and interaction with all government agencies. Parliament's

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[37] Ibid
[38] Ibid

secretariats have poor quality staff with an extremely high turnover at all levels. Despite efforts to recruit more female staff (who are currently only 17% of the total staffing complement), the recruitment process still favours men. The Parliament organisation continues to operate as an extension of the executive branch, dependent largely on observance of the standards, policies and rules that should only apply to the executive branch. For instance, the compensation scheme for members of Parliament follows what is being observed for other officials of the national government, despite the clear provision in the Constitution allowing the enactment of a law fixing "suitable salaries" [39] for members of the national assembly. Also, the recruitment, appointment, promotion and other personnel actions involving the secretariat staff, including their compensation, fall under the supervision of the civil service commission and the Ministry of Finance, making it impossible for Parliament to develop a corps of highly professional, dedicated and motivated parliamentary staff.

While lack of institutional independence (in principle) is the challenge that Parliament faces, there is also an internal dimension to the problem. Since 2005, Parliament has not been able to come up with clear vision for its institutional development and sustainability to negotiate its agenda for reform with the executive branch. In the absence of a robust analysis and a clear strategy for institutional development, it is highly unlikely for the Parliament to convincingly defend its position and negotiate to gain greater autonomy for managing its staff, finances and procurement. There is a Parliamentary strategic plan in place, but it has largely been seen as 'donor driven' and does not have full buy-in of key stakeholders at both technical and political levels.

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[39] Article 155, Constitution

## Parliament's Relationship with the Executive

The relationship between the national assembly and the President has grown increasingly testy over the past few years. As noted above, while the national assembly's powers are limited both constitutionally and in practice, it has shown signs that it does not want to be a rubber stamp for government policies. The lower house has become a key forum for various individuals and groups (particularly ethnic minorities) to influence presidential decisions. Major standoffs between the Parliament and President have taken place over the nomination of cabinet members, revision of the electoral law and many other instances.

The legal framework lacks both formal and informal linkages between the executive and legislature. Legislators cannot sit in the cabinet, and a system, which has downplayed the role of political parties, has no large blocs that straddle government and parliament and can shape policy and ensure that bills are passed. The impact of absence of political parties in the order and conduct of parliamentary business is huge. Parliament's internal organisation and control over its performance by constituencies is severely weak.

An area in which the hands of the national assembly are far more tied-up is budgetary oversight. While the upper house comments on and the lower house approves, amends or rejects the state budget and the separate budget for development programs, the Parliament's actual influence on these financial matters is severely limited. First, the international donor community provides the funds for the overwhelming majority of Afghanistan's budget. Second, budgetary oversight suffers from a lack of parliamentary expertise and resources.

Observers note that the national assembly is showing signs of improved performance and has demonstrated that it has the potential to become an effective check, on the power of the executive, if it manages to overcome the aforementioned challenges most notably changing the legal

framework to allow political parties to run in the election and address the internal deficiency of the institution.

# The Judiciary and Rule of Law

Rule of law is based on justice and security. The strengthening of the rule of law to prevent, mitigate or recover from conflict entails a complex set of interrelated problems: from concrete manifestations of violence and injustice to broader institutional gaps and socio-economic needs. [40] The breakdown of the rule of law is the most significant indicator of an escalating conflict, and thus critical to conflict prevention. In an ongoing conflict, the protection of civilians warrants empowerment of national capacities to counter the rule by force with the rule of law. In the aftermath of a conflict, the rule of law is paramount in creating a safe and secure environment in which human rights can be protected and restored. In the final analysis, the rule of law provides the very foundation for nation building and stabilisation.[41]

Chapter three provides an overview of the legal system of the justice sector illustrating historical context, challenges and progresses. Since rule of law combines justice and security, it is attempted to discuss both aspects in conjunction. In addition, themes such as corruption and human/women rights, while discussed in full length in other parts of the book, will be highlighted in this chapter to underline their critical importance in the context of rule of law and justice.

## The Judiciary

The Supreme Court is the country's highest judicial authority. It controls judicial budgets appoints disciplines and

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[40] Global Rule of Law Programme, UNDP
[41] Ibid

promotes judges from the lower courts. It also exercises limited powers of judicial review. Lower courts and the government are the only institutions able to challenge the constitutionality of a law before the Supreme Court. Individual complaints regarding violations of fundamental rights can only be made to an independent human rights commission, which can then decide to refer them to the courts. It is still however unclear how the division of labour between the Supreme Court and the independent commission for oversight of implementation of the Constitution (ICOIC) will work.[42]

To resolve disputes before them, the courts must apply the Constitution and the laws of Afghanistan. However, the Constitution also makes clear that Islamic jurisprudence will be used to adjudicate cases if provisions in the Constitution or other Afghan laws do not provide sufficient ground for them to rule on the case. Depending on whether the ruling affects Sunni or Shia Muslims, either Hanafi – a Sunni legal tradition – or Shia jurisprudence, will be used.[43]

The Afghan Constitution commits the government to observe the UN Charter, the universal declaration of human rights and other international human rights treaties which Afghanistan has ratified. It explicitly recognises a number of fundamental rights for its citizens, including the right to life, liberty and respect for human dignity, freedom of expression, prohibition of torture, the right to a fair trial, and non-discrimination. The Constitution established the Independent Human Rights Commission of Afghanistan (AIHRC) with the mandate to monitor respect for human rights as well as to foster and protect it. Moreover, the Afghanistan National Development Strategy (ANDS), the National Priority Program 5 (NPP5) and, in particular, the National Priority Program 6 (NPP6) have strong components and national mandates on justice and human rights.

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[42] D. Boroaha. J. Smith, A. Larsen, "Speaking from Evidence, Governance, Justice and Development" May 2010,

[43] R. Moschatagi, Structure and Principle of State, (3rd ed., PP 2009) 10-14

More than almost two decades after the fall of the Taliban regime, failure to establish the rule of law in Afghanistan remains a major obstacle to progress in social and economic development. Problems with governance and corruption, security and employment are typically cited in public opinion surveys as the top three concerns of the Afghan people.[44] While security conditions have improved in some parts of the country, corruption is becoming more widespread and deeply entrenched, and citizens feel that the formal justice system offers little recourse for either civil or criminal complaints.[45] This is particularly the case for women, who benefit from few if any meaningful opportunities for redress despite Afghanistan's commitments under the (ANDS) and (NPPs), relevant international conventions, and the enactment of the Elimination of Violence against Women (EVAW) law.[46] Indeed, there is a widespread perception that backsliding on women's rights is possible in the context of future political and reconciliation processes.

Afghanistan has a legal tradition with three distinct elements: Sharia law (derived from the Quran and the Sunna[47] with various interpretations, depending on different schools of Islamic jurisprudence); local customary practices (derived from cultural and ethical standards common to a region and/or a tribe) and the formal, state legal code (enacted through legislation or government decrees). While Sharia and customary practices have deep roots in the Afghan history, the emergence of state legal codes is a relatively recent phenomenon, implemented mainly over the past century.

As noted in the previous sections (since its emergence) the formal legal system has been a source of political controversy. Rulers were seen as using the formal system to strengthen their power and centralised control over society, with only a

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[44] The Asia Foundation, Afghanistan in 2012: A Survey of the Afghan People, November 2012

[45] UNODC, Corruption in Afghanistan: Recent Patterns and Trends, February 2013.

[46] Passed through Presidential Decree

[47] Sunna refers to the conduct of the Prophet Muhammad

limited sense of legitimacy. When regimes ended, new laws often came into force reflecting the ideology of the new ruler rather than mirroring broader societal values and norms. Thus, legal reforms under Amanullah Khan echoed king's views on modernisation and social change; his successor (Zahir Shah) at first favoured conservative *Sharia* interpretations but moved gradually toward more moderate *Sharia*-inspired laws, along the lines of the Turkish and Egyptian traditions. Successor communist regimes initially pursued radical secular reforms, but subsequently moved closer to the centre, in part to mitigate the public backlash. The Mujahedeen were in favour of moderate *Sharia* laws, while the Taliban eliminated the previous state laws altogether and applied only conservative *Sharia* law. At each stage of this complex history, courts have played a very minor role, as they generally lacked capacity and remained subservient to the executive authority.[48]

While there have been numerous changes in direction, typically these have had only a modest impact on the lives of majority of Afghans living in the rural areas. The formal legal system was largely applied in urban settings, and most Afghans continued to resolve their legal issues (both criminal and civil) through the traditional legal system. This reflected lack of capacity in the formal system to reach down to local levels, lack of trust in and familiarity with the formal system, and the unwillingness of the central government to apply inclusive law formulation methods taking into account public demands.

## Challenges and Progress

The justice sector faces tremendous challenges. Working conditions for those in the formal justice sector remain very poor. Judges, prosecutors and civil servants working in the justice sector are paid less than a living wage; they often do not have sufficient training or the required reference to laws and other legal materials to advise on, apply or enforce state

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[48] Rule of Law Strategy, May 2013, UNDP Afghanistan,

laws; and they often feel isolated from the central government and lacking the personal security necessary to reach independent decisions in local communities. Court houses and offices are either non-existent or badly dilapidated. Where they do exist, they often lack basic equipment such as desks, chairs and often even pens and paper. Many legal professionals also lack access to transportation to attend courts and offices in remote areas, of which there are many in Afghanistan. All these things undermine their efforts to deliver legal services to Afghan citizens. Citizens themselves lack confidence in the formal justice institutions and regard them as slow, ineffective and often corrupt. Access to courts and legal assistance is a right enshrined in the Afghan constitution, but it is a right that is very difficult for the majority of Afghans to realise. Public awareness of legal rights is very low, legal information is very difficult to access, and the majority of people cannot afford court fees or the transportation costs for attending court.

At the provincial and district level, the situation is even worse with violence and insecurity having a severe effect on the lives of Afghan people. One survey found that 69% of respondents reported that either they or a family member of theirs had been the direct victim of injustice or human rights violations during the over two decades of war. Many parts of Afghanistan cannot be called (post-conflict) as intense fighting between Taliban and International forces continues – fighting which claimed over 10,000 civilian lives in 2018, an increase of almost 40% compared to the first decade.

Since its establishment, the Government of Afghanistan, with international assistance, has largely invested in rebuilding the formal justice sector to the extent that it provides some level of service. A large number of legal and judicial officers have received vocational and on-the-job training, new laws have been passed, infrastructure has been rehabilitated or constructed in many parts of the country, public administration reform, and operational and organisational restructuring have been reviewed and updated at various levels. Legal aid organisations have been

established providing legal services for the poor. Over time justice reform and implementation has expanded beyond law enforcement and criminal justice to court administration and commercial law to curriculum development for law schools and the establishment of the national legal training centre. Support for vocational and continuing legal education is complimented by the development of professional standards, an independent bar association, the promotion of legal awareness and translation of substantive legal texts (including family law) into local Afghan languages.[49]

A large focus of the legal aid provision efforts has been on human rights and women's rights. Juvenile justice reform has made significant progress on the legislative and regulatory fronts. All of these achievements have contributed to the general body of knowledge of the Afghan justice sector, its performance and compliance with constitutional mandates and international obligations.

The international community has shown interest in supporting the government to address the challenges in the justice sector at various levels. However, lack of coordination and duplication of efforts has often been cited as a significant challenge. The focus of the 2008 Rome[50] Conference on Afghanistan was rebuilding the justice system and one of the themes was creating mechanisms for the international community to coordinate their programmes and prioritise based on the needs of the justice sector. Although some progress was seen however, the impact was limited and short term and coordination continued to remain challenging.

## Law Enforcement and Criminal Justice

Law enforcement is a critical component of the criminal justice system. The security forces include the Afghan National Security Department (which is the intelligence directorate), the Afghan police forces which includes the border force and the national civil order police with

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[49] UNDP report on strengthening the justice system of Afghanistan
[50] The 2008 Rome Conference, Rebuilding the Justice Sector,

jurisdiction over all 34 provinces of the country. The Afghan Border Police (ABP) is responsible for securing and maintaining the nation's borders with neighbouring states as well as airports within the country. The mission of the Afghan National Civil Order Police (ANCOP) is to provide civil order presence patrols, prevent violent public incidents, and provide crisis and anti-terror response in urban areas. Both ABP and ANCOP are under the Ministry of Interior (MOI).

The current Afghan police force has its roots in early 18th century and was modernised over time. In 1950, a group of army officers were reassigned to the police force to modernise police organisation. After the Saur revolution (1978-79) the police force still existed. In 1992, when Kabul fell to the hands of Mujahedeen (despite the country descending into civil war) police organisation and forces continued to survive and then came under the heel of the Taliban, who enforced a primitive and barbaric justice. After the collapse of the Taliban regime in late 2001, there was little in the nation resembling a functional police department as private armed militias of warlords quickly filled yet again the vacuum left behind by a lack of central governance. Since 2001 and after establishment of the new regime in Kabul, the Ministry of Interior exercised little control over provincial police structures and was unable to effectively secure the remote provinces. Most of these problems were established after the Mujahedeen concurred Kabul in 1993 and when the Soviet-backed government of Najibullah fell apart and the country entered into anarchy and chaos. From 1978 to 1992 the Afghan police had firm control over the country. Traditionally, police officers were poorly paid, recruited or conscripted from the poorest classes of society and frequently held in contempt by the communities they served. Compounding these factors, over two decades of unrest had also resulted in an illiteracy rate conservatively estimated at over 70% for police recruits.

After 2001, the new government and the international community (with Germany in lead) started to rebuild the Afghan police force. Initial, investments and training process

was slow with only 35, 000 policemen being trained between 2001-05. However, the Afghan government and its partners realised the need to step up their efforts. Changes led to increased impetus to implement significant reform programs, particularly the reform of higher staff levels at the Ministry of the Interior, the placement of police mentors throughout the country, substantial pay increases in the police salary plan and complete restructuring of the police payroll system.

One of the fundamental and yet unresolved challenges the police faces is its role in active combat which stretches its capacity to provide policing and order and confuses its role with the armed forces. This to some extent is inevitable given the ongoing, and in some areas, the expanding nature of conflict police comes under attack by the insurgents and as present-armed force in the region gets involved in armed conflict which is naturally supposed to be performed by the army. This one of the core problems which results in increased casualty of the forces.

There are also concerns about wide spread corruption among police forces which undermines its credibility to enforce laws and restore public order. In a national survey conducted by the Asia Foundation,[51] police were perceived as the most corrupt agency followed by the judiciary and the Attorney General Office.

While there have been numerous changes in direction, typically these have had only a modest impact on the lives of majority of Afghans living in the rural areas. The formal legal system was largely applied in urban settings, and most Afghans continued to resolve their legal issues (both criminal and civil) through the traditional legal system. This reflected lack of capacity in the formal system to reach down to local levels, lack of trust in and familiarity with the formal system, and the unwillingness of the central government to apply inclusive law formulation methods taking into account public demands.

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[51] The Asia Foundation 2012 report

## The Informal System

Informality and traditional systems of governance is a unique and often controversial aspect of justice system in Afghanistan. In areas where the formal system does not exist or is dysfunctional, the gap is filled by the informal system. In some cases, the two co-exist with different issues being referred to them as per the nature and content.

Independent assessments conducted by different organisations including CSOs and donor funded projects, indicated that far more people rely on the traditional justice system than on the formal justice system. As discussed above, there are many challenges facing the formal justice system in communities, particularly outside of major towns. In some parts of the country, people view the formal justice system as foreign, corrupt, ineffective, expensive or too geographically difficult to access. For these reasons, in many communities, traditional justice systems are used exclusively or at least far more frequently than the formal justice system.

Traditional justice can be an effective way of managing disputes and maintaining peace and stability within communities. The more that community members share values and relationships the more effectively traditional justice can operate. Even in relatively unbounded communities (such as in major towns), people may prefer to use traditional justice to deal with certain types of issues (such as family and personal status issues) while leaving the police to deal with criminal offences such as theft. Community-based mechanisms to resolve conflicts and other (restorative justice) measures are increasingly viewed as a best practice across all social contexts.

However, there is often a fundamental conflict between the values of the traditional justice system (which emphasises restitution and reconciliation) and a formal justice system which imposes sanctions and punishment. International and national human rights obligations require that there be limits to the scope of the traditional justice system's role, and fundamental rights to due process and fair punishment must be either respected by traditional justice systems or left to

formal justice systems. It is important to delineate the roles of formal justice systems and traditional justice systems – e.g. through determining appropriate substantive jurisdictions for each, processes to avoid double jeopardy (where an offender is punished by both the formal justice system and traditional justice system), and appropriate sanctions to be used by these respective justice systems.

Due to the weakness of the formal justice system in Afghanistan (in some parts of the country) communities' traditional justice systems operate by default as the only justice system or refer to Taliban for resolving their issues. Traditional justice mechanisms reflect the values of the communities in which they function. These values, however, are dynamic and change over time. Community leaders are sometimes uncertain about how certain practices have come to be accepted in their communities – elders will say that the values are religious values, and religious leaders identify the same values as cultural, coming from the elders. This can occur particularly with harmful cultural practices (such as forced marriage) or payment of a girl as compensation or restitution (known as '*bad'*).[52]

Village religious leaders, community leaders and elders have very rarely had any opportunity to learn about the Afghan legal system, or about legal and constitutional rights. Exposing community leaders to accurate information about rights can be very effective in removing misconceptions, both about Afghan laws and about the basis of traditional practices. Independent studies found that it is effective to approach these topics within the framework of the Afghan constitution and human rights according to Islam. This approach can create space for dialogue in communities about which values they should uphold and whether changes in practices are required. These community discussions take time, but ultimately allow communities to have ownership over the results.

In 2012, Ministry of Justice (with support from donor countries) initiated a process to create a legal framework for the informal justice system to guide them in their activities as

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[52] UNDP Justice and Human Rights Project, 2010-2012

well as educate them on certain human rights standards. However, concerns were raised by different human rights groups including the Afghan Independent Human Rights Commission, and others that such an effort could lead to implicit recognition of unacceptable practices such as "bad" by the authorities which over time could result in normalising harmful practices in communities. The issues were escalated to the cabinet level and the process was halted and today there seems no plan to utilise the potential of the informal mechanisms and bring changes so that it can coexist along the formal system to provide justice and resolve conflicts where the formal system is unable to reach.

## Women and Justice

Gender issues remain a very significant human rights concern in Afghanistan. Afghan society is strongly patriarchal and women frequently experience injustices. Women are often targeted by fundamentalist attacks for choosing to go to school or to work. Many girls are not permitted by their families to attend school, and many adult women are not permitted to work outside the home or even to leave the home at all. Arranged marriage is the norm and forced marriage is very common – including sometimes of girls who are far below the age of adulthood. Violence against women is very common, and honour killings and cases of self-immolation are disturbingly frequent. Women are commonly viewed as the property of their male relatives and there is very little acceptance of the idea that women are independent rights bearers.

The low numbers of women working and low literacy rates among women mean that there are very few women working in the justice sector and those who work face particular dangers; a senior female police official was recently assassinated and the only female chief provincial prosecutor in Afghanistan has a permanent police guard to protect her.

Afghanistan has (in essence) multiple justice systems, none of which adequately protect women's rights at present. Traditional justice systems continue with practices such as

exchange of girls as restitution. Afghanistan's system of *Sharia* includes interpretations of Islamic law that are more conservative than practices in virtually any other Islamic country; and while women face systemic discrimination within systems based on traditional and *Sharia* values, they do not easily find justice in the formal justice system either. Data collected during pilot activities and assessments by UN agencies in Afghanistan indicate that the most frequent charges leading to the incarceration of women are 'running away from home' (even though this is not a crime under Afghan law) and adultery (a charge often levelled against women who complain of sexual assault). Afghanistan's justice structures have failed to protect women's rights, sometimes as criminal defendants, but even more frequently in regard to violence against women and property and matrimonial rights.

A key gap in the provision of justice for women was lack of proper and clear legislation. In 2008, Afghanistan ratified the UN Convention on elimination of violence against women which by default necessitated bringing changes in the entirety of the legal framework to comply with the requirement of the aforementioned convention and create new legislations where necessary. The need for creating a new law for Elimination of Violence against Afghan Women (EVA) was felt and a group of Afghan women parliamentarians led by the Commission for Women Rights and Justice started the process in 2009. The process faced with immense resistance from within the parliament and regrettably the parliament was unable to pass such a vital legislation until 2018 and at that point President Ashraf Ghani signed off a Presidential decree to enforce the EVA Law.

Today the law exists but its enforcement will remain to be seen and would make a key priority for the Afghan Government in order to eliminate the wide spread violence against Afghan women and protect their basic human rights.

# Public Administration

When the Taliban regime was toppled in 2001, the new Afghan Government inherited public institutions in a dysfunctional state with empty public treasury. Today the Afghan Government is in a much better position with most of the public institutions functional (at national and sub-national levels) and over US$2billion per annum revenue generation. Provincial administrations are functional in all 34 provinces and district level administrations exist where districts are controlled by the government. [53] This is the hard-earned outcome of almost two decades of struggle and bloodshed that took significant human toll and resources from Afghans and their international partners.

Public administration good practice suggests that in order to ensure that line ministries are able to provide people-centred services in a timely and responsive manner. It is essential to ensure that core government functions are capacitated at the same time. Currently, capacity within the core ministries that comprise the `Machinery of Government' continues to be weak although over the last decade and a half, capacities of key institutions have been strengthened across the entire spectrum of public sector and public goods and services are being delivered with uneven degree of quality and effectiveness. This chapter discusses the progress in public sector capacity building with focus on policy, staffing and

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[53] It is debated that territorial presence of the Government is less than 60 per cent. Studies conducted by BBC in 2017 indicate a large part of districts fallen under Taliban control although the issue remains controversial and no concrete evidence is provided

budget as core elements of state machinery essential for service delivery to the citizens.

## Policy Formulation and Coordination

Article 71 of the Constitution clearly places the responsibility for the coordination of policy under the President and the co-office of the President,[54] assisted by two Vice Presidents who currently chair a total of six cabinet committees responsible for detailed policy development. As discussed in chapter 1, the two offices of the Vice Presidents and their cabinet committees lack basic capacity. Policy development still suffers from lack of technical capacities available to the Vice Presidents and the cabinet committee which they share. Ministerial coordination and policy/decree implementation monitoring systems also require continuing development.

After the 2014 presidential election which resulted in creation of the national unity government with Chief Executive Office established as part of the political agreement, ambiguity around policy coordination was further increased and greater confusion and duplication of functions was noticeable in areas of policy coordination and formulation.

At inception, policy formulation is the responsibility of line ministries and departments. Most of the institutions have designated departments headed by deputy ministers or director level responsible for policymaking and programme coordination. To a large part, the function is confused and the situation is exacerbated with injection of short-term donor funded project staff.

To date, a number of national development agendas (known as Poverty Reduction Strategies) have been prepared and partially implemented. These frameworks were essential to provide an overarching guiding strategy to align development and poverty reduction processes. In order to

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[54] Article 71: "The Government shall be comprised of Ministers who work under the chairmanship of the President".

align sectoral and programmatic strategies with the national development plans, ministries were required to align their policy and programmes with the goals and targets set in these documents. However, poor knowledge and understanding of the development agendas at ministerial levels often made it difficult for the policy makers to use these documents for their policy and programme formulation process. In most cases, the process of preparation of national development agendas were rushed towards certain external deadlines for seeking funding or meeting timelines for convention of international conferences on Afghanistan which were organised over specific timeframes over the last decade and a half. Further, in most cases development agendas were prepared by external experts in English with poor ownership or involvement of the civil servants in the processes.

In order to strengthen policy formulation and coordination as an essential element of the state machinery, it is important to capacitate the public institutions at various levels. As mentioned in previous chapters, the office of the President and the two vice presidents require(ed) substantial capacity to lead, guide and monitor the process. Similarly, efforts are required at ministerial levels and their provincial departments.

National ownership is vital in order to ensure success of development process and this principle has been emphasised globally and most strongly as part of the 'New Deal'[55] for fragile and conflict affected states. As mentioned above, in Afghanistan, national ownership of the development agendas has been compromised for various reasons. In order to restore national confidence and ownership of the actors who are responsible for implementation of national policies and programmes, national offices need to take the lead in preparation of development agendas. Such ownership would assist them during implementation and monitoring process and accordingly would feed positively in the entire chain of policy formulation.

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[55] The New Deal was an initiative by the donor countries signed in Busan City in Korea to reshape the process of provision of aid to fragile and conflict affected states.

## Staffing

In the area of human resources management, the Independent Administrative Reform and Civil Service Commission (IARCSC) has a lead role in ensuring merit-based recruitments and performance management, but capacity challenges continue to exist and cronyism continues to permeate the system at all levels.

Capacity development (CD) is complex, long-term and success often elusive. Limited capacity of the civil servant continues to be perhaps the most fundamental challenge to the country's development in spite of considerable capacity effort in past decades.

The explanation for the limited CD progress to date is first and foremost a function of 'time' as capacity development is an inter-generational phenomenon and it must be linked to progress in the primary, secondary and tertiary education. At the same time, lessons have been learned from the capacity development efforts to date which point that using a piece-meal approach is most often a fundamental challenge for fragile states. Although for long period of time, there was no holistic approach to capacity building, to some extent, the problem was addressed by launching of the Capacity Development for Results (CBR) in 2013 and the National Technical Assistance (NTA) programmes which were designed to harmonise capacity development and provision of externally funded staff to the Afghan bureaucracy and most importantly address the issue of sustainability.

Second, capacity development literature shows time and again that training alone does not bring results. Training must be accompanied by follow-up on-site coaching and inside mentors must be put in place to guide new learners. Third, training must be tied to a larger institutional development effort to reform rules, procedures and overall organisational structure so trainees can put their newly learned skills in practice. However, experiences in Afghanistan point that efforts for organisational and institutional reform were often slow or lacking and thus making training less effective.

To date, the Civil Service Reform Commission has spearheaded a number of Public Administration Reform Programmes. They are the Priority Reform and Restructuring Programme, and the first and second generations of the Public Administration Reform Programmes. In addition, it has implemented the Afghan Expatriate Programme (AEP) that funded Afghan expatriates to take up senior line or advisory posts in the government; the Lateral Entry Programme (LEP) that funds skilled and badly needed line posts in the government at enhanced compensation levels; and the Technical Assistance & Feasibility Studies Unit (TAFSU) that funded feasibility studies for major investments and programmes.

As part of renewing the national development agendas, in 2014, a number of detailed sectoral National Priority Programmes (NPP) were elaborated, which provided in-depth guiding to development agendas. To this end, the civil service reform process also owned renewed mandate. The commission launched new generation of public Administration reform programmes and its renewed mandate emphasised: to increase national self-sufficiency though strengthening of value-for-money and evidence-based government. It was built on lessons learned since 2002 and reflected the new drive towards increasing state effectiveness. In this context, the current public sector governance situation is characterised as follows[56]:

- New civil service, administrative reform, public finance and procurement laws and systems were enacted between 2002 and 2006 as central components of the state modernisation process, though many aspects including provincial budgeting have been delayed due to fiscal limitations and uncertainty over functional assignments at the sub-national level;

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[56] National Priority Programme, Effective and Efficient Government

- Cabinet restructuring (machinery of government reforms) was undertaken from 2002 largely through the Priority Reform and Restructuring (PRR) program. While this program aimed at re-centralising power and incentivising reforms through salary decompression the model was not properly costed and sector-based service delivery models were not defined;
- Merit-based recruitment systems were introduced, to attract, hire and promote talent, strengthening meritocratic systems and approximately 365,000 positions have been reformed and 305,000 positions employed under the pay and grading reform process. In total, 44 ministries and agencies have been restructured according to Eight Grade Pay System;
- The Capacity Building for Results (CBR) program was initiated in 2010, to build sustainable core functional capacities, and focuses on a three-tier graduation process for functional reforms based on preparing and implementing ministry capacity building programs, developing human resources and civil service training. CBR only focuses on 26 out of 52 government entities;
- The National Priority Program 3 on Efficient and Effective Government, under which CBR is a core program, has made many gains though a greater focus on linking public administration reforms with revenue mobilisation and improved service delivery has never been more critical;
- Gender mainstreaming efforts resulting in increasing female participation in civil service from 0% in 2001 to 21% currently;
- Functional capacities of line ministries improved by hiring, attracting and retaining approximately 500 Afghan qualified staff through several short to medium term capacity building programs/projects; and,

- To sum up, while progress is made on staffing and capacity development of the public administration, some of the key challenges still remaining and affecting effective service delivery, include the following:
- Over the past decade and half, a 'whole-of-government' reform focus with too many priorities undermined gains in critical areas. There was too great a focus on 'whole-of-government' reforms meaning that all structures were treated with similar priority. As a result, core ministries and agencies were not sufficiently enabled to make the core machinery of the government deliver.
- Insufficient focus on the relationship between reform and fiscal sustainability. Linkages between PAR and economic governance were obscured, with business process simplification and governance of municipalities (for example) rated far too low. Focus on revenue mobilisation has been insufficient;
- Ministry functional mandates were not linked to cost service delivery models: Outside of the basic package of health services, there are virtually no clearly defined service delivery models, undermining certainty over roles of central, sub-national government, vertical and horizontal structures.
- Administrative policy on sub-national governance remains confused: Lack of commitment to meaningful decentralisation, an over-focus on re-centralisation, and lack of subventions meant that provincial, district and municipal authorities continue to play a limited role in sub-national governance
- To enhance efforts to fight corruption, a new focus on alternative approaches including business process simplification and systems automation was badly needed.
- Municipal reforms linked to revenue accountability and improved service delivery has yet to start. Municipalities play a critical role in mobilising

revenues and delivering services. Yet, revenue management remains un-transparent and levels of corruption are known to be considerable;

– Pay and grading reforms have been implemented in all but five ministries/agencies: Implementation of pay and grading has not been conducted in the office of the President; Ministry of Foreign Affairs and Kabul Municipality and it has been partially implemented in the attorney general office [professional positions (attorneys) not covered under the program) and the Supreme Court (administrative division only]

– The creation of the second civil service [57] was inevitable but will have a lasting impact on long-term administrative capacities: Many of the most senior Afghan experts were absorbed into the aid community, and though lateral entry programs aimed to combat this, given the proliferation of aid projects across the country, transitioning these skills into government administration demands a new approach to be adopted including a new national technical assistance policy

– No senior executive service was established as the primary vehicle for change management and capacity development: Capacity development efforts fell short of expectations as the functional mandates of departments and civil servants remained unclear and driven by external aid projects not core government functions and

– No public private partnerships were established. Given the limitations of the state, and primary role played by the private sector, the absence of a PPP framework has undermined the potential contribution of the private sector in key economic activities at the municipal level, where concessions can be good for revenue and services.

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[57] National Technical Assistance Policy and Capacity Building for Results Programmes

## Finance

The Ministry of Finance (MOF) has made great strides in budget development and aid management, but there still remains considerable work to ensure budgets are accountably targeted towards poverty reduction, sustainable human development and gender equality outcomes. The last decade has been spent rebuilding the basic capacity of the government to develop and implement the national budget. At the same time, this capacity remains largely fragile and relatively weak, and focused largely at the individual, and somewhat at the institutional, levels. It is important to take move to the next level to ensure that reliable sources of funding are accountably provided and spent in support of human development objectives. Support to the Ministry of Finance should help enable government to use the budget as a tool of public policy (for example, by directing resources towards explicit poverty reduction goals), including through gender-responsive budgeting which supports ministries to properly disaggregate their performance management data and allocate funds to address gender gaps.

Accountable financial management should be one of the core priorities of the government to strengthen the government's capacity to audit and account for funds as part of its overall anti-corruption drive. Leakage of funds is rife, and it is even more important that this problem is addressed as the injection of external funds into the national budget is reduced over time. Over the decade of transformation, in support of efforts to ensure that national finances are directed towards poverty reduction priorities,

In addition to ensuring the proper management of domestic finances, it will also be essential for Ministry of Finance and other key government stakeholders to improve aid coordination in order to ensure maximum impact from development funding. Donor support to national budget priorities is likely to be smaller over the next decade, making it even more important that donors are coordinated to efficiently support Afghanistan's domestic priorities.

## The Way Forward

As Afghanistan continues its journey of state building and democracy, the government requires effective capacity to develop, manage and monitor implementation of national policies, laws and decrees, in particular following on from the election of a new president/government in 2019.

On policy, ministries and agencies are supported to efficiently manage their obligations for policy coordination and monitoring, and to ensure that policies better promote sustainable human development, poverty alleviation and broader peace-building and state-building goals.

National ownership of policy making is one of the key principles of sustainable development. Thus, with support of the donor agencies, government needs to take genuine lead in preparation and development of the national agendas. Priorities should not be placed around externally imposed timelines but rather the ownership of the development process should be ensured at various levels of the government.

At the cabinet level, civil servants should be capacitated to access or source expert advice within ministries and civil society in order to ensure that cabinet decisions are fully informed, evidence-based and support the long-term national interest. The executive offices continue to build on efforts to promote transparency of cabinet decision-making, including focused strengthening of the government communications unit and website and improving records management and access to information generally. Ideally, the executive office should be supported to implement the right to information law which would ensure maximum disclosure of government information. Furthermore, the executive offices develop policy processes which are widely participatory, bringing in not only line Ministries, but also sub-national leadership/officials as well as facilitating public inputs to policy development and monitoring of implementation.

Salary top-ups, capacity substitution and approaches to building sustainable capacity development remain core challenges facing the Afghanistan public service. To ensure that capable, trained staff can be deployed and their

performance managed and developed over time, accountable and merit-based management needs to be strengthened. While it was essential to accelerate reform process, creating second civil service with massive difference in pay and grade could lead to obscuring roles and responsibilities and undermine commitment of the regular civil servants who are not part of the programme and who live with very low wages. This in turn, would lead to greater challenges in service delivery as the regular civil servants who are not part of the donor-funded reform programmes are in charge of service delivery and are in regular contact with citizens.

On management of finances, while significant progress is made, accountability and transparency remains a key challenge. There is so far very little done on budget disclosure policies and public have very little knowledge about how public finances are managed. To ensure, greater accountability, public finance management needs to share information with the public on how funds are spent. The linkages between parliament and Ministry of Finances should be strengthened and public audit reports should be made public.

Budgets and audit reports are often not easy for ordinary citizens to digest. Hence, with support from civil society organisations, efforts need to be made to make these documents understandable for wider public. Another important challenge in this context is lack of access to information and in light of the access to information policy, it is important to ensure wider access to information by the public. Currently, there seems to be growing concerns over lack of access and transparency of the public finances. A small but rather practical example is the 10% tax on mobile phone usage introduced in 2015, which has led to public anxiety as while the tax is introduced; there has not been any noticeable improvement in mobile phone services.

# Corruption – The National Integrity System

Experiments in other parts of the world suggest that governments in countries that have experienced violent conflict are particularly vulnerable to corruption. Corruption threatens not only governance in general but also the establishment and stability of democracies. When the corrupt excesses of political leaders lead to lack of basic services and economic opportunities, this may generate public frustration which erodes state legitimacy at a time when it is most needed. In the post-conflict environment (especially where democracies are fragile) this may fuel renewed violent conflict.[58]

Corruption poses a grave threat not only to governance in general but also to the stability of fragile democracy in post-war countries. Governments in developing countries that have experienced violent conflict are particularly vulnerable to corruption.

In a democratic setting, the political legitimacy of a state derives in good part from the effectiveness of the institutions and practices that allow the public to hold state office holders accountable; the extent to which state institutions and customs guarantee that the rule of law will apply consistently to all of society; the state's ability to foster democratic participation in governance; and from its commitment and efforts to ensure that the inhabitants enjoy the fundamental civil, political, economic, social and cultural rights, including the rights to freedom of expression and association, within its borders.

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[58] UNDP Global Anti-corruption Strategy, 2014 pp 11-21

Four key factors lead to corruption after war ends, as seen in some countries. The first factor is the way the war ends and how the peace agreement is crafted. The second factor shaping the tendency towards corruption is the legacy of wartime corruption. This often results in the carry-over of agents, networks and practices of corruption that persist and may even challenge state control in peacetime. A third factor is the turmoil that the transitional government faces, or may in some cases, actually bring about. In these circumstances 'normal' incentives for corruption multiply as people seek ways to get things done. The fourth factor is resource wealth, and how new and often massive influxes of material wealth related to income from natural resources or from foreign aid are managed and distributed. All of these factors are closely correlated with the overall weakness of the state.

Effectively responding to corruption can be difficult because it nearly always requires taking political, economic and social power away from who benefit from the status quo. Therefore, as seen in conflict-affected countries, policymaking in corruption as well as other areas does not seem to follow the typical policymaking cycle seen in other developing democracies and there are many policy gaps and contradictions. Development partners cannot count on today's policy to be in place when implementing a programme tomorrow. There may be no policy, to begin with. In any case, it is clear that political decision-makers are important determinants of post-conflict anti-corruption reform. A country's political players determine what can be achieved programmatically, enabling reform or blocking it sometimes passively.

Considering the central importance of corruption in governance, this chapter identifies the main causes of corruption and examines the historical and political context and efforts made so far to fight corruption and promote transparency and accountability as part of strengthening national integrity system in post 2001 Afghanistan.

## Context

Existence of corruption is understood and can be identified in every society. It is about damaging the norms and principles of a given society. Societies always make the difference between acceptable or unacceptable behaviours or practices. Every society therefore tends to have a shared understanding of what constitutes corruption in each context. Therefore, the framing of corruption necessarily has to be context specific. This is particularly important in fragile post-war settings. The latter are uniquely prone to different and changing patterns of corruption in an environment with multiple, often competing sets of rules, norms and expectations of public office.

Afghanistan is a country in conflict. It continues to experience armed conflict across large extents of its territory. The Afghan Government is at a critical juncture in its state building and development effort. Combating corruption is a key to the development and prosperity of Afghanistan, as well as to increasing the legitimacy of the government. With nearly two decades of foreign aid influx in Afghanistan, it still remains among the five most corrupt countries in Transparency International Corruption Indices published yearly by Berlin based international watch dog monitoring countries' performance of transparency and accountability. Why corruption has been on rise and what has gone wrong in Afghanistan despite all the investments and bloodshed?

There is a fundamental misconception that pouring too much foreign aid, in absence of adequate capacity to manage, has been the main factor spreading corruption and putting the country on spot light. While there is some merits in this believe, which has to do with improving aid management and transparency, evidences suggest that weakness in governance system, power monopoly and lack of accountability are the main drive in pushing the country to crisis. Today, corruption not only affects foreign aid pledges to the country but it threatens stability and security.

Despite some progress in education, health, and other areas, the government has had difficulty in expanding its

control and connecting with the Afghans to win their support. In fact, absences of governance and rampant corruption have served to alienate many and have created openings for insurgents to exploit. Afghans' primary concerns remain inadequate security, the scarcity of employment opportunities and the generally poor state of the economy but corruption is still cited as a factor contributing to Afghans disillusionment with the government. A State's failure to provide basic rights, services and security not only contributes to growing inequality, it also creates a vacuum that allows non-state actors to take control over State sovereignty and territory. There is a risk that failure in governance, with weak institutions, law enforcement and checks and balances provide a fertile ground for violent extremism. Thus, the fight against corruption is not only important for social and economic development but more so for stability and security.

Corruption has multiple and deeply rooted causes in Afghanistan. The contemporary Afghan society has its own understanding of what constitutes corruption, which is often directly based on experience. It includes bribery, extortion, nepotism, co-optation of power holders and outright theft from state coffers.

The money spent on bribery and other forms of corruption is allegedly huge. According to the Integrity Watch Afghanistan[59] report, while in 2006 corruption amounted to an estimated US$400 to 600 million, this amount grew in 2009 and 2010. Although the average amount paid per bribe may have increased, a significant part of the before indicated increase is related to the expansion of bribery to almost all walks of Afghan life. The important amounts of money do not only affect the purse of citizens, but also the coffers of the state. In many cases, bribes are paid to avoid paying taxes to the state, to obtain a monopoly position in a specific sector, or to use utilities delivered by the state for free.

The fragmentation of society during the conflict (in particular along ethnic lines) also resulted in more reliance on

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[59] A watchdog organization set up in 2004 with assistance from international organizations to monitor corruption in the country

traditional and especially conflict-generated patronage networks, with associated corruption. The Afghan tradition of kinships, whereby those in privileged positions (from senior officials to lower level civil servants in the districts) are under pressure to support their kin (family or ethnic group) further exacerbates the problem. In this culture of kinship, patrons exert considerable social and political control on formal power structures, using their influence on public decision-making and services in order to reinforce their power base or to extract profits. Benefits derived from these relationships range from gaining access to preferential services, forgery of legal papers, nepotism in obtaining employment and securing business contracts. Kinships thus reinforce the notion that personal loyalties are more important than the rule of law.[60]

Rule of law is a fundamental pillar in a democratic society. In Afghanistan, as mentioned elsewhere in this book, the judiciary lacks independence. In many ways, this is not surprising. Three decades of war and political upheaval have taken an enormous toll on the judicial system. As mentioned in chapter 3, there are few buildings to house judges, prosecutors and attorneys, police or prisoners. There are equally few skilled professionals to fill the buildings. Until recently, few Afghan judges had copies of the country's laws, and most had not been trained in those laws. The judiciary does not have any communications infrastructure, file management system or libraries. Fundamentally, a political culture that respects the rule of law is also missing; for example, Afghan judges and prosecutors from around the country complain that government officials and militia commanders interfere with their decisions. At the same time, the level of corruption within the judicial system is reportedly quite high as well. As a result, citizens who want justice often cannot find it and those who want to evade justice can do so easily.

The integrity watch Afghanistan[61] attributed the multiple forms of corruption to the social and political realities and the

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[60] See Accountability and Transparency Project, March 2009.
[61] IWA 2009 corruption perception survey, Ibid

choices made when reconstructing the state and political system. Although the text of the Bonn Agreement insisted on the accountability of state institutions, the political process focused mainly on its representative character.

Integrity watch also documented how the participation of regional commanders in the political process had enabled them to retain most of the customs dues collected in the periphery, which amount to over US $1 billion annually, by sending less than 10% to the central government. Today no goods can be released from customs offices without bribing customs employees from top to bottom. The pillage of natural resources is also caused by the lack of authority of government in the periphery and the opportunities it offers for corruption. This has taken the form of local commanders dealing directly with timber mafia and gem smugglers.

In the Corruption Perception Index of Transparency International, Afghanistan fell from a ranking of 117 out of 159 countries in 2005, to 172 out of 180 in 2007, to 176 out of 180 in 2008, 175 out of 189 in 2009 and within 170-80 for succeeding years from 2009 onward to 2019. In its most recent index published, Afghanistan is ranked as the fourth most corrupt country in the world. In international corruption perception surveys, Afghanistan is ranked among the countries whose public sectors are perceived to be the most vulnerable to corruption.

While the giving and taking of *baksheesh* (small gifts) is generally considered to be acceptable, grand corruption is morally rejected as being against the basic principles of Islam. In fact, a large majority (81%) of respondents in a recent survey considered that the application of the *Sharia* would be an effective tool to combat corruption, while only a quarter believed that administrative reform could reduce it. The media and provincial councils were considered important mechanisms in the fight against corruption. [62] Corruption is an issue that is discussed widely on radio and television by political figures, intellectuals and opinion leaders. However,

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[62] Integrity Watch Afghanistan, 'Afghan Perceptions of Corruption – A Survey Across Thirteen Provinces', January 2007.

the coverage of corruption in the five main Afghan newspapers is reported to be limited.

The public perception of widespread corruption has resulted in disenchantment with the government. This applies particularly to corruption faced by people in their daily lives, e.g., corruption in gaining access to and paying for water and power services; paying more than the mandated fees for licenses and certificates; paying teachers for extra school time or for grade promotions and paying doctors for extra care. These perceptions undermine the government's credibility and legitimacy and more generally the state building agenda. This has been exacerbated by the popular perception that international assistance is being squandered.

## Progress and Challenges

The Constitution of Afghanistan (which came into force in 2004) states that the government is "responsible for maintaining public law and order and the elimination of administrative corruption" (Article 75).[63] The Constitution was drafted by a joint panel of Afghan and international scholars. The term 'administrative corruption', as distinct from 'moral corruption', refers to the misuse of their public position by government employees for private gain.

Corruption being a global phenomenon plummeting accountability and transparency in many parts of the world in particular fragile and conflict affected countries, there are global frameworks and conventions in place to guide national governments to measure their actions and required them to comply with certain principles. The overcharging global conventions for fighting corruption is the United Nations Convention against Corruption known as UNCAC which Afghanistan as a member state has ratified it in 2007.

The approach to fight corruption as introduced in the convention requires the government to strengthen law enforcement agencies, promote access to information, raise awareness of the public on corruption and take measures to

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[63] The Afghan Constitution 2004, Article 75

prevent corruption in the first place. As a distinct measure, national government are further required to establish a dedicated agency for fighting corruption. This section will identify the progresses made and challenges ahead:

## Special Agency to Fight Corruption

On 14 December 2003, President Karzai established by decree the General Independent Administration for Anti-Corruption (GIAAC). The law on the campaign against bribery and official corruption designated GIAAC as the principal body to 'investigate' bribery and corruption offences and 'introduce suspects to face judicial prosecution'. These were powers vested by the Constitution in the attorney general and could therefore, not have been exercised by GIAAC. GIAAC did not have the capacity to carry out its mandate. In 2006, following concerns over the leadership of GIAAC, donors ceased providing support to the organisation and in 2011 it was replaced by High Office of Oversight (HOO). The latter however, suffered from the same syndrome of weakness in leadership and ambiguity in mandate and over time lost donors' support.

Alongside HOO, in response to growing pressure from the donor community, in 2009, a joint monitoring and evaluation commission was established with 3 national and 3 international members to provide oversight and conduct independent assessment of corruption. MEC issued a number of general and more specific sectoral reports on existing of corruption across different areas. Mostly, MEC reports were perceived credible. However, their recommendations were not taken forward and remained only in paper. HOO suffered from lack of credibility and allegation of internal corruption and was finally abolished in 2015. MEC however, still retains its credibility but in order to make a meaningful use of its existence, it is utmost important for the government to take concrete action and share progress in fighting corruption with the public.

While establishing dedicated anti-corruption agencies was a welcomed step and showed government's response to

the UNCAC, however they had limited impact so far to eliminate or at least reduce it.

On law Enforcement: as discussed in chapter 3, overall law enforcement remains weak and law enforcement agencies face multiple challenges in performing their day to day functions.

A special department responsible for detection of corruption cases, the Criminal Investigation Department (CID) is operational under the Ministry of Interior. The police are only mandated to detect cases and must submit all cases to the Attorney General Office for further investigation, but there is no mandate to follow up on cases submitted. In addition to the CID the department for economic crimes also plays a role in detecting corruption related crime and the detection department is involved in surveillance aimed at detecting corruption related crime. In addition, a Major Crimes Task Force was initiated in May 2009, the Major Crimes Task Force (MCTF) consists of a Kidnapping Investigation Unit and a Corruption Investigation Unit, and officer selection is underway to add an Organized Crime Unit and an Intelligence Unit. MCTF strength is currently 150 Afghan investigators from the Ministry of the Interior (MOI) and National Directorate of Security (NDS). The FBI, together with the UK Serious and Organized Crimes Agency (SOCA) and the Australian Federal Police are providing mentors, while the U.S. military is building intelligence capacity. INL provides funding. The launch of the MCTF was announced on November 16, 2009.

# The Attorney General's Office

The AGO is 'independent' under the Constitution, but forms part of the executive branch of government, with approximately 4,500 staff, including over 2,500 prosecutors. In theory, the AGO administration has offices in all 34 provinces and in over 300 districts. It is charged with investigation and prosecution of crime, in conjunction with the ANP. The AGO is establishing a specialist unit, the Anti-Corruption Unit (ACU), with responsibility for investigating and prosecuting cases related to corruption and fraud. The ACU has not yet reached a stage at which it can play an effective role in the fight against corruption.

*The Supreme Court:* The Jurisdiction of the Afghan courts is government by the 2004 Constitution and the 2005 Law on the Organization and Authority of the Courts of the Islamic Republic of Afghanistan. The Supreme Court is the highest judicial organ, and according to the Constitution is "an independent organ of the state". In early November 2009, an **Anti-Corruption Tribunal** was appointed by the Supreme Court to comply with a provision of the Afghan law on overseeing the implementation of the Anti-Corruption strategy. The court does not yet have offices, a courtroom, administrative staff, or technical support. The Anti-Corruption Tribunal is supported through USAID INL project.

## On Prevention of Corruption

Corruption prevention concerns detection and elimination of cause and condition of corruption through development of a system of appropriate measures as well as deterrence of

persons from committing crime of corruption. In Afghanistan, similar to law enforcement aspects, scattered and disjointed efforts are made so far in prevention of corruption and mobilising communities to eliminate corruption causes.

*The Independent Administration Reform and Civil Service Commission* is mandated with reforming the civil service to ensure the effective delivery of services and ensuring the transparent and accountable provision of government services. The IARCSC is also charged with ensuring a merit-based recruitment and appointment system through the independent appointments board and the independent appeals board. Through the Civil Service Training Institute (CSTI) the IARCSCS also has a key function to play in training and awareness-raising of civil servants on ethics, conflict of interest and the code of conduct for civil servants.

Another important aspect of the civil service reform process is improvement and simplification of service delivery procedures which directly contribute to prevention and detection of corruption. As part of the wider civil service reform programmes, key procedures that direct affect effective service delivery were mapped and prioritised for reform and simplification. Implementation however, has been slow and line ministries which are in the forefront of service delivery lack capacity and guidance. As a result, public service delivery is one of the poorest and most corrupt areas that contribute to public discontent with state.

## Control and Audit Office

Audit is the cornerstone of national integrity system in a country. In Afghanistan, the control and audit Office has the mandate to carry out financial and performance audits with financial audits providing assurance on financial statements and performance audits providing an assessment of the performance of government institutions. Performance audits are particularly important for minimising corruption and maladministration of public funds and maximising the limited resources available to the civil service. The effectiveness of the CAO in holding public officials accountable will also

depend on the degree of transparency of audit reports and their accessibility to other actors such as the National Assembly, media and civil society.

International best practices indicate the importance of transparency of audit institutions on carrying out their mandate and the public accessibility of audit reports in allowing audit institutions to effectively play a role in holding public officials accountable. The current legislation in Afghanistan however, does not provide for public access to audit reports. Additionally, the ability of the CAO to play an active role in the prevention of corruption will require that financial and auditing procedures are in place that are specifically designed to reduce the incidence of corruption and increase the likelihood of its detection. Existing financial and auditing procedures require thorough review and modernisation to assess their actual effectiveness in preventing and detecting corruption.

Over nearly past two decades, COA has received significant support in form of technical assistance, capacity building and staff trainings of its staff. Today, the institution has a professional cadre of auditors who have obtained high level of qualifications and can carry out their mandates. The institution has also been modernised and equipped with up to date technology and equipment. In order for the CAO to play is key role in prevention of corruption through its mandate to hold public officials accountable for their performance and use of public funds and assets, its success depends on political will and support by the political leaders both in parliament and government to grant the institutions proper legal autonomy so it can effectively contribute to promotion of transparency and accountability and thereby prevent and deter corruptions and misuse of public funds.

Another important link in the national integrity system in a country is the role the Civil Society Organizations, Media and as a whole the general public play. CSO actors (including youth and woman's organisations) and the media have a crucial role to play in the fight against corruption by holding the government and the donor community accountable for

their actions, as well as promoting the engagement of society as a whole in the fight against corruption. Civil society actors and the media are however, as of yet only involved in the fight against corruption to a limited extent. Furthermore, the capacity of these actors to engage in accountability and transparency initiatives is limited.

Last but not the least, as a permanent institution democratically elected to represent the citizen; national Parliaments and provincial councils have a fundamental role to play in fight against corruption by providing oversight and clear checks and balance to counter-weight the executive. However, for reasons discussed elsewhere in this book, the role of parliament and provincial councils have been limited in promoting transparency and accountability. They suffer credibility crisis overdue legitimisation and delays in elections as well as publicly perceived as corrupt and ineffective. In worst-case scenario, they are perceived as contributing to the vicious cycle of corruption rather being part of the virtuous circle to strengthen the national integrity system.

In summary, effective law enforcement is essential to ensure the corrupt elements are punished and break the cycle of impunity, or freedom from punishment or loss. Successful enforcement approaches are supported by a strong legal framework and law enforcement branches and an independent and effective court system. The Executive demonstrate clear political will in supporting reform of the civil service system to promote integrity and accountability. Service delivery procedures need immediate attention to deterrence are in place so that the public do not suffer from poor quality or are forced to pay bribes at various steps in the process. Key accountability institutions such as control and audit office would need genuine autonomy from the government to carry out its day-to-day mandate and prevent corruption in the pubic system. Similarly, the parliament and provincial councils have critical roles to play and can do so only after a credible election takes place and people can vote out those MPs and PC members who fail to perform their duties or are part of the

vicious cycle. Last but not least, awareness raising initiatives and campaigns against corruption are fundamental in raising awareness of the public and mobilising their potentials to understand their role and stop being part of it.

# Sub-National Administrations

In most countries, sub-national governance is the first point of contact between citizens and state and that is where citizens get their first-hand and day to day experience of government in practice. The topic is therefore, of vital importance in the discourse on state building in particular in fragile and conflict affected countries. In practice, however, it is often a forgotten and unattended area in post conflict reconstruction and development process. Donors seem to allocate resource to sub-national governance as secondary priority and national governments often hinder the process. Afghanistan is no exception and the process of state building at sub-national level was neglected in the initial programmes and allocation of resources only begun between 2002-2005.

The four decades of war, has severely destructed Afghanistan's social fabric and state institutions. Nevertheless, a resilient albeit dysfunctional bureaucratic structure has persisted at the sub-national level. Whereas many state institutions are highly centralised, the realities imposed by rugged topography and considerable ethnic diversity and related power traditions, resulted in *de facto* disconnected local societies, over which the central government has had only limited direct control. Power continues to be exercised in a personal and patronage-based manner albeit within a rules-based bureaucratic structure[64].This situation was further enhanced after the fall of the Taliban in 2001, when most civil servants came under the control of local leaders. Despite measures taken by the

[64] Lister, S 2007, Understanding State Building and Local Government in Afghanistan

central government to re-assert control over the provinces, the myriad of local power structures, in particular at the district level, remained to a large extent unaffected by the politics of the government in Kabul.[65]

After almost 19 years of reconstruction and state building process, sub-national governance seems to be taken the centre stage in debates around political reform and system change. Many prominent political parties have adopted their manifestos based on changing the current unitary system of government from Presidential to Parliamentary. Some political leaders and elites often refer to "federalism" as the alternative option to change the current constitution. Considering the importance of this discussion, this chapter is dedicated to elaborate on historical and legal basis of sub-national governance as well as discusses 'federalism' as a theory and whether or not that could be a viable alternative in light of the country's current context and socio-political realities.

## Legal Framework

According to the Constitution, the province is the main local administrative unit. Article 137 specifies that the government, while preserving the principles of centralism, shall transfer necessary powers, 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. The Constitution recognises and identifies three major objectives and obligations towards sub-national governance:[66]

1. The creation, promotion and implementation of democracy including representative elected bodies at national, provincial, district and village levels. Establishing effective democratic governance at all

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[65] United Nations Development Programme, Afghanistan Sub-National Governance Strategy, pp1-2
[66] Afghanistan constitution 2004

levels of the Afghan state is therefore, a fundamental objective and obligation.[67]

2. The creation, promotion and implementation of reform, development, and reconstruction, including major services and infrastructure. This includes a range of development and reconstruction programs that can only be properly implemented through the coordinated involvement of competent governmental institutions at all levels.[68]

3. The implementation of comprehensive administrative reforms generally and especially at sub national levels. The state must adopt all measures that are necessary to implement its wide constitutional objectives and obligations. This includes the creation of sub-national institutions and the transfer or delegation of authority to local administrations for promoting economic, social, and cultural development and increasing the participation of people in the development of the nation.[69]

Although limited in scope, the 2004 constitution did provide some prospects to allocate resources to rebuild Afghanistan's local administration. The Constitution obliges the government and the national assembly to promote and implement democracy and development, and to establish national and sub-national institutions and administrations with the structures, powers and resources needed to give effect to these objectives. These obligations clearly necessitate a broad and comprehensive range of discretionary actions that must be taken by the state. These include the creation of any institutions, and the making of any transfers or delegations that were needed to fulfil all of their obligations and objectives.

The type or extent of devolution or delegation that is permissible was not narrowly defined or circumscribed by the

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[67] Ibid

[68] Ibid

[69] Ibid

Constitution. It therefore, follows that the national government has considerable discretion in determining the scope and content of the policy for central-local relations. The development of effective democratic governance at sub-national levels has been a long and complex process. However, the Constitution did not oblige the government to implement it with immediate effect.

## Progress and Challenges

Give away power is inherently against human nature and politics is no exception. However, good practices around the world highlight that if power is devolved as close as possible to the place where people interact and experience government in their day to day lives, it can lead to people empowerment and result in greater responsiveness, accountability and efficiency in government services. Most developing countries have realised this fact and have allowed some level of sovereignty to the local bodies. For instance, in the Philippines, provinces propose three names to the President of the Republic to choose as governor. Local councils are directly elected and have significant power to hold governors to account. These bodies have significant independence in managing and controlling resources and finances. Similarity, in other developing countries, local elections are normally held and local executives are elected through direct votes. However, after almost two decades and strong involvement of the international community in Afghanistan, the country seems to have one of the most excessively centralised systems of governance in the world. Notwithstanding the above-mentioned prospects in the constitution, the central government has exercised considerable discretion on controlling the process and invoking the term "unitary system" to either hinder or show no political willingness in undertaking any initiative to identify entry points and take steps for reform and change. As a result, the state building project in Afghanistan has solely focused on some degree of administrative de-concentration.

In 2001, levels of basic services and social indicators in Afghanistan were amongst the worst in the world. Post-conflict Afghanistan had inherited a dire situation with public services largely non-functional. Hence, emphasis was put on the critical importance of ensuring adequate basic services for the population. While some progress has been made, the country still lags behind in terms of basic social services (e.g. education, health and water) and quality is far from satisfactory. Afghanistan lags behind other countries at the same level of development in most development indicators – further compounded by large gender gaps. The lack of basic infrastructure, e.g. health care facilities, schools, surfaced roads and power has been highlighted by local bodies as one of the main challenges faced in the delivery of services. In responding to this situation, the implementation of a strategy to move the public administration reform process out of the capital was initiated in 2005. The strategy focused on improving the existing deconcentrated administrations at the provincial level and at the same time strengthened central control over local operations. While the process of building national institutions had only begun to take hold, addressing the needs of the sub-national administration was still an essential part of the political process of institution-building which was required to enhance and sustain the legitimacy of the state throughout the country.

As a result of the aforementioned strategy, efforts continued to build strong central government with focusing on expanding government reach and building infrastructure. Although some efforts were made, little was done in terms of making local authorities accountable and responsive to the people, and to strengthen citizen participation in the political process and local decision-making. Strengthening local Government is seen as an essential instrument for eradicating poverty and thus building the foundations for strengthening local democracy but without addressing the accountability aspect, over time, centrally appointed local officials; tend to be less accountable to the local people. Thus, the system

becomes patronage based which is not conducive to promote development and fight poverty.

## Informal Governance

As mentioned in the previous chapters, informal bodies play a significant role in the delivery of public goods in Afghanistan. They have persisted years of conflict and external intervention and have showed incredible resilience over many centuries. It seems as if life in rural Afghanistan is entwined with the informal structures to the extent that some argue their existence is exogenous to state. But who are these bodies and how do they function? In the section that follows I try to provide a brief description of these organisations and explain how the state building and democracy journey has affected them since 2001. Further, I try to identify their potential role in the broader context of local governance in the country as well as highlight policy implications for future interventions to improve provision of public goods.

Informal or customary organisations are diverse and known with different names in different parts of the country. While they mainly operate in the rural Afghanistan where 80% of the population lives, they also exist in urban areas. For instance, 'Gozar' which means passage exists in urban settings as the smallest cluster of neighbourhoods and has its own representative in 'Nahia' or district which is a formal administrative unit in cities. While customary organisation operate with different names and titles, I try to focus on the role of three main bodies which are Shura, which means assembly, Malik which is the chief executive of a village, and Mullah which is the religious leader and also function as arbiter or judge for a village.[70]

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[70] Political Economy of customary organization in Afghanistan, Jennifer Brick, 2005

## Shura

**Shura or Jirga** is an assembly or council consisting of mainly elder people and function as legislative body at the village or Qaria level. Shura's membership is not fixed but it is mainly made of elderly. In some instance, Shura's members are as young as 20s but as a universal rule, it is the 'rishsafid' white beards who are members of Shuras as they seem to have gained position of respect and are known for their honesty and kindness among the people. Shura's meetings are also not fixed but they do meet as often as needed and mostly when there are issues for deliberation such as a conflict or decision on issue of importance for their neighbourhood.[71]

## Malik

Malik which is also known as village chief is an individual who is selected by Shura or villagers to represent them to the formal government at district level. The role is also known as Arbab, Qaryadar, Nomaynda or Kalantar, khan, etc. in different parts of the country. Malik however, is common title assigned to the individual who carries out executive functions and has its own signature and stamp. Maliks mainly come from wealthy families in a village and the position is hereditary; as since Malik is required to communicate with formal government, the person needs to be literate. Once a person is selected as Malik by Shura, a letter goes to Woleswal or district governor and district governor sends confirmation to district court which issues stamp for Malik.[72] The natures of functions Malik perform are mainly related to obtaining 'Tazkira' identity card, land ownership and deeds, tax and others.

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[71] Ibid
[72] Ibid

## Mullah or Imam

Mullah or Imam is the person who is appointed as religious leader for a village or Qaria to lead five times prayers and provide religious education to children. Besides this, the most important function a Mullah performs in provision of public goods is his role in interpretation of *sharia* laws and arbitration in resolving conflicts. Mullahs are selected based on their religious qualifications and remunerated based on contribution by community members.

The most distinct feature of these organisations in Afghanistan is their ability to constrain each other and some predictability and checks and balances. It is an embodiment of the principle of separation of power at village level and because of their distinct roles, there is certain level of checks and balance in particular on the role of the Malik who is in constant contact with formal system and handles daily executive functions. Another important characteristic of these organisations is their sustainability. These bodies are self-organised and function without any contribution from outside the communities. Members of communities provide material or other type of contribution to Mullahs and Maliks as required.

Throughout the history, governments have tried to intervene at village level to manipulate use Mullahs and Maliks to serve their own purposes. King Zahir Shah, (1930-1974) and Dawood Khan (1973-1979) tried to appoint their own Maliks to expand government tax collection system. After 1978 communist coup, the People Democratic Party, launched a land reform programme and tried to appoint Mullahs and Maliks to support their political agenda. Most of these attempts have failed and externally appointed Mullahs or Maliks were not able to survive as they lacked legitimacy. The Taliban have also tried to use Mullahs to extract 'Usher' wheat collection as part of *Sharia* law tax on peasants.

Since 2001, a number of community-based development projects have been delivered through Ministry of Rural Rehabilitation and Development. The National Solidarity Project (NSP) The Citizen Chart Project (CTP) funded by the

World Bank and the National Area Based (NABP) Project, a multi-donor funded programme implemented through the UNDP has made significant contributions in rebuilding community infrastructures. These projects have also formed their own community level organisation to enable project approvals and decision makings. The Community Development Councils formed through NSP and District Development Councils organised as part of the National Area Based Project (NABP) have been created at community levels. Unlike customary organisations, these councils relay on project contributions to survive. Hence, their future role in the context of provision of public goods at sub-national level is contingent on availability of project funds. Therefore, it is important to consider that projects related interventions do not lead to destructed self-governing and self-organised organisations that play a critical role in provision of public goods while the formal system does not seem to have the capacity to reach out to rural communities.

In summary, customary organisations play a critical part in the provision of public goods and order at sub national level. They are self-functioning and are not dependent on external intervention for surviving. They are involved in critical aspects of provision of public goods such as conflict resolution, community order, water management, resolving murder cases, land disputes, and so on. The role they play in local governance of communities and villages cannot be negligible however; intervening to regulate them has also proven harmful. Whenever the central government has attempted to co-opt them or provide resources for political exploitation, short-term political gains have been made however long-term sustainability and credibility of the customer organisations have been compromised. It is more or less the same in case of international organisations and projects or programmes funded by external sources such as the National Solidarity Project. On the other hand, leaving complete sovereignty and ignoring their existence and effect on local issues is also not an option. In particular, when basic human rights are infringed and women are used as objects to

exchange in order to subside a long-term enmity between communities. Thus, a fine balance needs to be struck to determine what level of intervention has to be made. As a first step, the work of the technical working group on developing of a guideline and or legislation should be revived to develop a clear guideline to provide some guidance and definition on roles and responsibilities. A second important step could involve developing a clear check list of basic human rights which could be compromised under no circumstances. These interventions should be carried out through extensive consultation and with great care to ensure sensitivities are addressed and there is no illusion about the formal government either tightening up control or intervening for the purpose of political exploitation. Relevant trainings and educational events at local scale and through local authorities could be organised to distribute materials and provide clarification and address concerns etc.

## Federalism

Federalism as a panacea to the current plight of the country has been extensively debated among political elites and some have presented it as the only way out of the current crisis the country is facing. No doubt that federalism is an optimal system of governance and there is sufficient evidence to claim that it is a system of Governance that works in other countries and prosperous nations have governed their affairs for centuries using a federal system of Governance but to what extent federalism would work in the context of Afghanistan is subject to different interpretations.

How federalism can be used to provide recognition and accommodate ethnic groups is an important topic in any multi-ethnic communities around the world. Examining how institutions of multi-ethnic states have been designed to accommodate ethnic diversity while at the same time maintaining national unity needs further in-depth studies in the context of Afghanistan to reconcile the conflicting pressures of the demand for the recognition of distinctive identities (on one hand) and the promotion of political and

territorial integrity, on the other. Ethnic heterogeneity rather than homogeneity characterises the populace of many countries around the world. More than 90% of the current 180 or so states in the world are ethnically plural in character; these states are home to almost 95% of the world's population.

For this reason and in order to reach some level of clarity, this part of the book provides general definition of the concept as well as how it has worked in other countries and discusses whether Afghanistan is ready for federalism?

As a concept "Federalism is defined as a system of government in which the same territory is controlled by two levels of government." Generally, an overarching national government is responsible for broader governance of larger territorial areas, while the smaller subdivisions, states and cities govern the issues of local concern. Both the local and national governments have the authority to make laws and both have certain level of autonomy from each other[73].

Federalism (as a normative concept) has two essential aspects: autonomy and union. Simply put, the autonomy aspect is a reference to self-government and about making self-rule possible for the constituent units. The union aspect is (on the other hand) a reference to the co-management of the whole society and about the desire of people and polities to come or stay together for common purposes.[74]

The legal basis for federalism is often constitution of countries which designates level of sovereignty and distribution of powers to different units of governments. In Unites States for example, there is dual sovereignty in which states have surrendered some of their sovereignty to the federal government. The most commonly cited characteristic of American federalism is 'dual federalism'. This refers to constitutionally delegated powers for the federal government and reserve powers for the states, with each level

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[73] Legal Information Institute:

https://www.law.cornell.edu/wex/federalism

[74] Institutional recognition and accommodation in South Africa and Eithopia, Yonatan Tesfaye Fessha, 2008

administering their own policies. In case of conflict, federal law is supreme so long as the federal government is authorised to act by the constitution. In **Germany**, "federalism is also sometimes described by German scholars as 'dual federalism', That is, it often means 'dualism' in the sense that the federal level is responsible for passing most legislation, and the states for implementing the legislation on their own responsibility, usually with only legal supervision by the federation".[75]

In **India**, federalism describes the distribution of legal authority across national, state and local governments. The Constitution of India establishes a federal structure to the Indian Government, declaring it to be a "Union of States". India's Constitution is aid to be federal structure only because it is said that it has clear demarcation of boundaries between central and the state government similar to the United States. India having legislative and executive authority divided between the centre and state.[76]

In case of **South Africa**, the 1996 Constitution adopted three distinctive, interdependent and interrelated levels of government. It is followed by the German model which emphasises concurrency, provincial delivery of national policies, and provincial representation at the centre. Implementing this model, with new institutions, actors and processes has proved difficult because the governing party is inclined to a relatively centralised polity and there is low level of administrative and fiscal capacity at the sub-national level. In short run, the system seems to have fairly established itself however; its success in the long run in institutionalising democratisation, good governance and conflict management is subject to further studies.

In 1991 **Ethiopia** established an ethnic federal system which granted full recognition to ethnic autonomy, while

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[75] Arthur B. Gunlicks, the German System of Federalism, July 2012
[76] M. Govinda Roa & Nirvikar Sing, "the political economy of federalism in India", Oxford University Press, 2005

maintaining the unity of the state. [77] Its new constitution created a federal system largely consisting of ethnic-based territorial units. The constitution aspires to achieve ethnic autonomy and equality while maintaining the state. The federal system is significant in that its Constitution provides for secession of any ethnic unit. It encourages political parties to organise along ethnic lines, and champions an ethicised federal state with a secession option.

Comparative case studies of South Africa and Ethiopia as the two federal systems could provide a contrasting approach to issues of ethnic diversity suggesting new ways in which federalism might work which will help to build an all-inclusive society which could be relevant in the context of Afghanistan. The Ethiopian federal system is unique in its constitutional marrying of political pluralism and the right of secession. But there is a mismatch between the liberal-democratic political-pluralist elements of the constitution and the political praxis of the dominant party; it is wedded to the modus operandi of democratic centralism, inhibiting effective decentralisation and democratisation. In the short run, the viability and stability of the political system is dependent on its flexibility and adaptability. In the long run, the success of ethnic federalism will be contingent (in good measure) on a more balanced share of power between the three major ethnic groups[78].

Afghanistan faces many issues and challenges in the development into a viable and self-reliant nation-state. Ethnic tensions and grievances, challenges in economic development and a growing insurgency has considerably increased over the last two decades and in particular after the formation of the national unity government which was concurrent with withdrawal of the international military forces. Improving Afghanistan's current political system has never been more urgent and would be a critical step towards stable and

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[77] Ethnic Federalism in Ethiopia, Background, Present Condition and Future Prospects, Alem Habtu, Centre for African Development policy Research, 2003
[78] Ibid

legitimate state capable of maintaining territorial integrity and inclusive society.

The country is ethnically diverse and made up of ethnic groups who identify themselves with the same ethnic groups in the neighbouring countries. In addition, to the ethno-centralism, the geography of the country lends itself to further ethnic isolation. In addition, Afghans historically and culturally see themselves in a reverse Western order of hierarchy of belonging which makes it difficult to discern a single national identify. Within the Western world, people generally see themselves as a member of their country, state, town, and then their unique family unit. Afghans understand this in a completely reverse order. They see themselves as first belonging to their family, their extended family, their clan, their tribe, their ethnic group and then part of Afghanistan. This further compound ethnic divisions within the country and creates an atmosphere of strong local governance. Historically, this has led to a strong desire for local leadership and a dislike of external influence upon the local authority[79].

One of the primary ideas behind Federalism is its ability to balance divergent interests. "One of these interests is to secure a peaceful, stable social environment and political order by creating a broad set of options for cooperation and mergers among nation-states [80]." Federalism, within this capacity, protects the cultural distinction of one people and the right of the nation state to have its own internal sovereignty.

Opponents of Federalism argue that it would lead the country to disintegration and division considering that major parts of the country are under so called illegal armed groups and insurgents. This is a valid concern and it has to be addressed. On the other hand, as seen in the cited examples from other countries, lack of space for political participation could lead to a gap that is filled by forces other than the

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[79] Afghanistan as a Federal system with Autonomous Regions, Major Bryan E Carrol, AY 2009

[80] Jurgen Rose, Johnannes Traut, Federalism and Decentralization, (Garmich, Germany George C Marshall Centre 2001)

national government. In addition, if the gap is not filled and space for equal participation of all ethnic groups is not provided, it creates space for external forces to intervene and would further lead to disintegration.

Another concern voiced by the opponents of federalism is ethno-centric federalism that could lead to disintegration. It is clear that federalism is not a panacea for all challenges of ethnic diversity. As institutional device and as a political philosophy, it is not enough to respond to the challenges of ethnic diversity. A federal design that is constructed to accommodate ethnic diversity must go beyond the traditional institutional features of a federation. It must include non-traditional institutional features of a federation and other non-federal features in order to give full effect to the institutional principles that respond to the challenges of ethnic plurality.

The way forward needs to encompass all these conflicting views into account and the discourse among political elites needs to deepen in order to reach political consensus on how to transform the country from the current situation into a future where all ethnic groups can have their desired autonomy and embrace peace and prosperity and enable socio-economic development. Economic development takes place and the future generations live free of fear and atrocity. This is a critical juncture for the country and its imperative for all parties specially political elites to accept that the current system of governance is in need of reform and whether out-right full fledge federal system or gradual decentralisation, the response needs to be found with great care and patience taking into account all aspects of any model that would best respond to the challenges the country is facing.

Considering the strong foreign intervention in Afghanistan, it is important for its international allies with the US in the lead to appreciate the reality and not only facilitate an intra-Afghan dialogue on this matter but to actively support a process of reform and transformation so that the country can have sustainable and viable system of governance.

# Political Economy of the Post 2001 Governance System

While analysis of the political economy could extend as far back as Ahmad Shah Durrani's tribal confederacy between 1747 and 1772 (given the focus on the contemporary relational structures) this analysis starts with the signature of the December 5ᵗʰ 2001 Bonn Agreement. Moreover, given that the Afghan state has often failed to be a trustee of people's common interest, it is important to understand that it is the internal and external power ambitions, coated with local traditions and mixed with conservative understanding of Islam emanating from low education, that has continued to claim the guardianship of universal values; not the state per se. As a result, this analysis focuses as much on non-state and patrimonial institutions as those of the formal state.

## State Legitimacy

The UN-sponsored 2001 Bonn Agreement created a sense of unity amongst Afghans following years of internecine conflict and international isolation that ended in the Taliban-run Islamic Emirate of Afghanistan (1996-2001). Not only did the agreement chalk out a timetable for bringing urgent political stability, security and rule of law to the country, it also outlined provisional arrangements for the re-establishment of permanent state institutions, which had been destroyed under a Taliban rule opposed to modernisation. However, because the Bonn Agreement was not a Peace Agreement per se and because the Taliban remain actively involved in the peripheral Afghan provinces, insecurity has

and continues to bedevil the state and peace building process. More than a decade after the fall of the Taliban regime, Afghanistan is far from having a strong, capable, or responsive system of government. Adding to the shortcomings of the formal system, the Communist regime, the Soviet invasion and subsequent episodes of armed resistance and civil war all contributed to a deterioration of the effectiveness of local and traditional governance structures. Regional differences in the nature and quality of governance persist, as does the rural-urban divide in Afghan society. Prospects for establishing a more legitimate and inclusive system of governance throughout Afghanistan are also conditioned by the upcoming presidential election in 2019 and peace agreement with Taliban. The upcoming political transition holds out possibilities for establishing a more authentic, Afghan trajectory but also the fear for giving up freedom for women and girls and return to a more autocratic religious regime.

The Afghan Government and the International donor community have devoted considerable effort to rebuilding the formal institutional structures of national government, in part reflecting the Constitution of Afghanistan adopted in 2004, which prescribes a unitary state in which key responsibilities (including revenue-raising and expenditure authority) are reserved for the central government. An Afghan Interim Administration was appointed in December 2001, followed by a Transitional Authority from mid-2002 and a Presidential election in late 2004. Hamid Karzai was first appointed and then elected, President in each of these periods and also won the controversial 2009 presidential election. The two Vice Presidents come from other important power groups, and members of the Council of Ministers are appointed along ethnic lines and across political fronts, reflecting bargains among ruling elites (mainly ex-warlords from the Mujahedeen and subsequent Northern Alliance) to preserve the peace and distribute the prerogatives of governing in a non-transparent system that depends more on personal

relationships than predictable rules.[81] The central government is generally perceived as unresponsive and unaccountable – doing a poor job of providing basic public services, unwilling or unable to establish the rule of law and subject to endemic cronyism and corruption.

The socio-economic situation in Afghanistan remains challenging. Efforts by government, with cooperation and massive assistance from development partners, have led to progress in many areas. Noteworthy examples are significant gains in access to education and health services, a substantial decline in the still-high maternal mortality rate, some improvement in the capacity of the public sector to conduct financial management and deliver public services, modest support to local economic development, staffing up of the national security forces, and steady increases in per capita GDP. Despite the apparent progress, Afghanistan still lags behind most other countries in terms of development outcomes. For example, it continues to have among the lowest human development outcomes in the world, ranking 175 out of 187 countries covered in UNDP's Human Development Report. Although, there was little prospect for the achievement of any of the Millennium Development Goals, even within the extended timeframe (2000-2020) Afghanistan achieved some economic and social progress from a very low base between 2003 and 2012. Economic growth averaged 9.4% per year during this period, with per capita GDP reaching US$688 having increased five-fold since 2002. Key social and infrastructure indicators including school enrolment, life expectancy and access to water improved markedly against a backdrop of: (i) an increase in revenues from 3% of GDP in 2002 to a peak of 11.6% in 2011; (ii) significant improvement in the Human Development Index including increased access to primary health care from 9% of the population to more than 57% ; (iii) enhanced

[81] N. Coburn, "Why Afghans Voted in 2009", May 2010, (pp-12-14)
http://www.areu.org.af/EditionDetails.aspx?EditionId=295&ContentId=7&ParentId=7

infrastructure connectivity through the construction of thousands of kilometres of national and regional highways and provincial roads, civil aviation services improvements and a more than doubling of access to electricity; (iv) increased agricultural production as a result of an increase in functional irrigated land from 1.2 to 1.8 million hectares; (v) a thriving Information Communication Technology (ICT) sector; and (vi) the emergence of a strong and vibrant private sector boosting foreign investment in various economic sectors.[82]

On September 2015, The Afghan Government approved to adopt universally approved Sustainable Development Goals for Afghanistan. This was a rational decision considering the progress made against the MDGs and as the World Leaders had adopted SDGs as the new framework for guiding development and poverty reduction to continue achieving the progress made in MDG era.

The Afghan Interim Administration (AIA) and Afghan Transitional Authorities (ATA) were Formed: following the Bonn Conference, the establishment of an Interim Administration, a Special Independent Commission for the Convening of an Emergency Loya Jirga (Grand Assembly) and new judicial power vested in an independent Supreme Court laid the foundation for the emergence of new state structures increasingly separated by appropriate checks and balances. Historically however, central governments often proved to be both unable and unwilling to enforce administrative and fiscal control over the periphery, with external support rather mobilised to bolster the authority of the centre. Whenever external support was withdrawn, the government faced an immediate or gradual fall, with the International community covering around 90% of recurrent and development expenditures between 2002 and 2012. [83]

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[82] Support to coordination of Sustainable Development Goals Project, UNDP 2016-2017

[83] K. Clark, "The Afghan Jungle's Big Beasts and Lively Debate" June 2010 (11-15)

The Interim administration was replaced by the Afghan transitional authority following the June 2002 Emergency Loya, Jirga and by late 2003 a Constitutional Loya Jirga (with some similarities to the 1964 Loya Jirga) had agreed a new Constitution which was enacted to law in January 2004. The Loya Jirga, according to the new Constitution, is the highest manifestation of the people of Afghanistan. Following years of state fragmentation, there was general agreement that re-centralising the state was essential to removing risks associated with potential Balkanization[84], and as a result, the Constitution saw the return of a highly centralised unitary and Presidential system and the abolition of decentralised regional structures governed by powerful Mujahedeen and resistance commanders. As has been seen in other parts of this book, the post 2001 development underlined that this assumption was flawed and unfounded in the contextual realities of the country. Excessive centralisation and aggregating power at the hands of political elites led to establishment of a political order that only served the interest of small group of power holders and was not responsive to the larger populace.

The establishment of the rule of law continues to be hampered by the slow pace of justice reform and pervasive corruption. Security remains a huge daily concern, impacting on governance and the government's ability to singularly focus on poverty reduction and promote human development. Growing insecurity and recurrence of violence affects service delivery and the ability of the government to implement sustainable strategies for growth and employment creation.

The International community's approach to governance in Afghanistan has evolved over the past 12-18 years. The initial focus has been on building up Central Institutions. However, efforts have often suffered from a lack of strategic vision, limited resources and insufficient co-ordination. Many of the initial shortcomings have been progressively corrected and

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[84] The Term Balkanization is used as reference to the dominant role of outside players and limited ownership of the domestic stakeholders during the reconstruction process in Balkan region in Europe.

current strategies provide a sound basis for moving forward. However, whether decisive progress is achieved in consolidating Governance will depend both on the Afghan authorities' determination to implement fundamental reforms and on the international community's resolve to support development and the nation building process as the country continues its journey forward.

The principle of equal rights for women and men is enshrined in a number of Afghanistan's laws, International commitments and national strategies, but implementation and enforcement are very weak. Gender equality and women's empowerment thus remains one of Afghanistan's foremost development challenges. Afghan women have a much lower level of access than men to health services, education and political and economic opportunity, and are subject to threats of violence with virtually no recourse to police protection or judicial redress. Women's representation in parliament is a relatively bright spot compared with other countries at a low level of human development, but this mainly reflects the impact of a formal requirement for designated seats (the quota system) and is not paralleled by a corresponding degree of political influence. Afghanistan is also coping with a demographic bulge, with roughly 68% of its population now under age 25 and a continued, high rate of population growth. Increased opportunities for employment, political engagement and social participation by youth will be essential for national stability. On the positive side, youth represent a huge potential for innovation, human development and economic progress and the rise of youth movements in recent years has added an important political voice as a counter-balance to less pluralistic political and social tendencies.[85]

In addition to the effects on government legitimacy of the short and controversial history of national elections and general lack of accountability, the institutional basis for a

[85] A. Wordsworth, "A Matter of Interest, Gender and the Politics of Presence in Afghanistan Wolesi Jirga" June 2007, (pp-23-28) http://www.areu.org.af/EditionDetails.aspx?EditionId=30&ContentId=7&ParentId=7

system of checks and balances among the executive, legislative, and judicial branches of government is almost entirely absent in practice, despite being spelled out in the Constitution. A bicameral Parliament was constituted in 2005, with a mix of appointed and elected members. Relations between the executive and legislative branches of government became more difficult following the 2010 parliamentary election, further complicating the normal business of government, including appointment of officials and passage of legislation. This situation is compounded by the rudimentary nature of parliamentary institutions and capacities. The judiciary and police have been identified by the public in recent opinion polls as the most corrupt and unresponsive institutions of government and despite considerable donor assistance over the past decade, lack basic organisational and human capacities.

Local government bodies at provincial, district and municipal levels offer another potential means to represent Afghans and respond to their needs, but these suffer from a severe lack of capacity, absence of budgetary independence, and confusion over their roles and authorities. Despite a constitutional requirement, at the local level only provincial council elections have been held, undermining the legitimacy of formal sub-national structures. In practice, provincial government is generally weak, with governors appointed from Kabul and having uncertain authority vis-à-vis provincial line departments and Kabul-based officials (although some exercise a great deal of control based on personal power and resources). District government is even weaker, with no clear role in public financial management or budget implementation and only vestigial responsibilities for local planning, monitoring of service delivery, and adjudication of disputes. Municipalities have independent revenue-raising capacity and thus a degree of effectiveness and independence. Given the weaknesses of these formal bodies, it is not surprising that traditional structures remain important to the Afghan system of governance, despite their own limitations and the weakening of their authority and

effectiveness arising from decades of conflict, migration, and internal displacement. Although, the informal actors play a significant role in provision of public goods and services and bridging the gap between centre and peripheries, formalising their status and co-opting them within the formal structure has proved to be a failed concept.[86]

Public financial management capacity in the central government has improved from the situation prevailing at end-2001. Afghanistan has been able to increase domestic tax and nontax revenues from under 3% of GDP to 11%, introduce modern budget concepts and public financial management systems in the Ministry of Finance and a few other line ministries, and install a thin wedge of skilled professional managers in public institutions. However, despite these improvements in modernisation and capacity development in public financial management sector, 'weak budget implementation capacity hinders effective and efficient service delivery. The bureaucracy is generally inclined toward not taking provincial budget breakdowns into account or to not involving sub national departments in the processes.[87] The problem appears to be a lack of technical financial capacity, but the undercurrents of this trend lie in fundamental legal contradictions and the reinter nature of the state, where bureaucracy functions to manage resource distribution processes rather than deliver good governance and efficient services.[88]

In addition, fiscal sustainability remains a longer-term goal, with at least 75% of public expenditures still financed by donor assistance. Improvements in capacity have not extended significantly into service delivery functions at sub-national levels. The durability of even these improvements is unclear, as much is provided through the 'second civil

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[86] A. Nijat, "Governance in Afghanistan an introduction", pp – 10-14, 2014

[87] Ibid

[88] Ibid

service'[89] through donor funding at very high, internationally competitive levels or remuneration. As mentioned in previous chapters, recognising the un-sustainability of the situation, the government has recently adopted a policy of limiting donor financing of permanent civil servants (*tashkeel* employees) and non-*tashkeel* staff to professional employees, with the intention of developing exit strategies from such support (the so-called CBR and NTA policies). This is expected to reduce the number of donor-supported staff gradually and to cap their remuneration at salary ranges corresponding to their official duties.

Added to these macroeconomic challenges for public sector management is the overriding problem that corruption and absence of security are seen by the Afghan people as the main challenges to Afghanistan's future stability and development. In the security domain, there is some positive momentum from efforts to build up the ranks of the Afghanistan National Army (ANA). Strengthening of the ANA has led to a moderately successful security transition in most of the country from International to Afghan control, alongside gradual improvements in professionalism. For the National and Local police, however, increased numbers have not been accompanied by commensurate moves toward professionalisation and police are generally seen as dedicated to counter-insurgency rather than rule of law and protection of the public.

Despite numerous official commitments to combat corruption and instil a culture of accountability in the public sector, most observers conclude that corruption has become more widespread and deeply rooted in recent years. In part this is a by-product of the donor 'surge' of 2009-2012, which showered the country with resources in amounts and forms far beyond its absorptive capacity and often appeared to prioritise quantity over quality of development assistance. Furthermore, Afghanistan's continued role as the world's primary source of illicit opiates, the importance of opium cultivation for much

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[89] Second Civil Servants refer to the short term externally funded consultants and advisors working in government offices

of Afghanistan's rural population, and the huge sums of money involved, undermine efforts to promote transparent governance and the rule of law. The handling of the Kabul Bank [90] crisis revealed additional weaknesses and fuelled public and donor perceptions of a culture of self-dealing and impunity in the public sector.

Electoral and legislative reforms provided the foundation for a legitimate state. The Transitional Authority, which lasted until the Presidential Elections of 2004 (Karzai was the first directly elected President in Afghan history), was followed by Parliamentary and Provincial Council elections, which were held on September 18 2005. With the Single Non-Transferable Voting (SNTV) system deployed as the electoral system of choice, minority representation was to some extent guaranteed although it is widely accepted that it favoured independent candidates, including former 'commanders' and their followers, and highly organised political parties. The SNTV system hindered political party development in Afghanistan.[91] Within such a system, and in the context of weak political parties, there has been little incentive for candidates to organise themselves in parties or coalitions because seats are won individually. The SNTV system is considered as the main hindrance to the formation, nurturing and growth of political parties which is a pre-requisite for a modern system of governance and the vehicle for inclusive and legitimate governance based on principles of rule of law and separation of power. [92]

The pervasiveness of ambiguity and instability throughout the 2010 Parliamentary election made it seem more like a long and sometimes violently negotiated political process, rather than an exercise to select genuine representatives. This election was viewed as undermining

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[90] Monitoring and Evaluation Committee 3rd Report, June 2012

[91] Legitimate and Inclusive Governance Strategy, Jan 2012, Kabul

[92] A. Reyolds, J. Carely, "Fixing Afghanistan's Election System, Arguments and Options for Reform" July 2013 (pp10-13) http://www.areu.org.af/EditionDetails.aspx?EditionId=593&ContentId=7&ParentId=7

democracy and people's trust in the democratic process. It was exacerbated by fraud and the wrangling over the release of results, establishment of a special court and inauguration of the new parliament. Overall, this has compounded an existing distrust of national institutions.[93]

While voter turn-out for the parliamentary elections was only around 50% (lower than the 80% of the 2004 Presidential Elections), under a dedicated quota, women won 28% of the seats in the lower house (Wolesi Jirga) – in addition to a women representation of 17% in the upper house (Meshrano Jirga)[94] – addressing perhaps the biggest element of political exclusion which had become the quintessential hallmark of Taliban rule. The (CEDAW) has been critical to overcoming such exclusion (in particular Article 22) which states that Afghan women and men are equal before the law.

The Presidential and Parliamentary elections gave birth to a legitimate executive, legislature and judiciary, allowing for the separation of powers, critical to a more accountable and transparent system of governance. In the process and even though national political parties were yet to be formed in earnest, the elections breathed new life into the concept of legitimate political opposition. By the end of 2005 and through a combination of mostly formal electoral and occasional informal patrimonial (*Loya Jirga and Shura*) processes, Afghanistan appeared to be on a course towards a more inclusive and legitimate polity, democratisation, rule of law and broader-based political representation. However, with stability seen as a necessary but insufficient pre-condition for progress and with the President not establishing his own political party, the President used his constitutional powers to co-opt friendly and more traditionalist former commanders from the Mujahedeen, the so-called 'Peshawar 7', at the expense of alienating the intelligentsia and reform-oriented Mujahedeenn whose role was crucial in state-building. This experiment created a zone of comfort for the

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[93] A. Larsen, "Afghan Election Further Undermines Democracy", AREU, 22 February 2011

[94] The Afghan Constitution, 2004, Art 23

President, but it also acted as a brake on progress in certain areas.

**Formal and Information Mechanisms**: Traditional Loya Jirgas were convened to agree on the Constitution, endorse the President's leadership and to discuss long-term strategic relations with the United States.[95] A consultative Jirga was formed in 2010 to discuss the peace process and on November 2013 to discuss signing of the Bilateral Security Agreement with the United States. On one hand, the Constitution formally recognises the Afghan Parliament as the Institution representing the nation will and on the other hand, it recognises the Loya Jirga as a superior institution for decision on issues of national interest. This duality in the 2004 Constitution has created confusion and provided space for manipulation and rather discretionary ruling by Government undermining rule of law and the position of parliament as elected representative body at National level. In addition, given that district councils, were never elected, and that the constitution requires the participation of their heads in the Loya Jirga, composition of Loya Jirgas have been rather discretionary and not constitutional which raises further confusion. Critics argue that after the enactment of the new Constitution, the Loya Jirga members could have still been selected according to Article 110 of the Constitution, rather than by Presidential appointment. An interim mechanism could have been established for selecting the missing heads of district councils. The Constitutional Loya Jirga (which was chaired by a prominent Islamic scholar, former interim Afghan leader and President Karzai's spiritual mentor Sibghatullah Mojadeddi) saw the establishment of a strong Presidency, pushing to one side a call by former members of the United Front to establish a Prime Ministerial position as a way to share power. Compromise was however, reached on wider powers provided to Parliament. Moreover, beside

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[95] Shura is an Arabic word mentioned in the Holy Quran many times. It means consultation. The term is used by most Afghan nationals describing the concept of traditional assembly. The term Jirga is the Pashtun equivalent.

Mujahedeen/Resistance dominance, traditional affiliations related to community and ethnic groupings remained a big driver in electoral outcomes. These include the three key customary organisations: Shuras (unelected village councils), Maliks (village executives), and Mullahs (village lawgivers) which continue to provide important public services in the absence of an effective state.[96]

A Five-Year Afghanistan Compact Emerged Alongside the Afghan National Development Strategy (ANDS) and National Priority Programs (NPPs). In January 2006, the democratically elected President and speakers of the lower house and the upper house (Mishrano Jirga) attended the International London Conference on Afghanistan and committed themselves to the terms of the Afghanistan Compact, which was supported in 2006 by an Interim Afghanistan National Development Strategy (IANDS) and a full ANDS in 2008. The Compact existed for 5 years and the current ANDS extends to 2013. While the Compact provided a road map for political, security and socio-economic reforms, including support for the Millennium Development Goals (MDGs), it's far too many benchmarks became difficult to monitor. While donor influence on the making of policy has generally been high, formal policies have proven to be very limited in the shaping subsequent action and are often quickly discarded or replaced. Thus, much policymaking at the National level is best understood as a means of representation and of negotiating donor-government relationships. The analysis also highlights that government ownership of policy does not equate to national ownership, since spaces for citizen representation and influence on the policy process have remained very limited in most instances.[97]

**Establishment of New Institutions**: While the period from 2001 to 2019 could be characterised by the

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[96] See Brick, J (2010) '*The Political Economy of Customary Village Organizations in Rural Afghanistan*',
[97] "Policy Making and State Building in Afghanistan" More Talk than Action, AREU 21 Nov, 2010

establishment of constitutional and legislative processes to secure political representation, during the same period National political parties, civil society and youth groups began to emerge in parallel with the spread of telecommunications systems across the entire country; partly addressing the significant problem of remote and otherwise isolated rural communities. During this period a number of technical commissions were established, and charged with mandates to improve the governance of formal state administration. These include:

i. The Independent Constitutional Oversight Commission
ii. A Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, International standards, the rule of law and Afghan legal traditions;
iii. An Independent Electoral Commission (IEC)
iv. An Independent Electoral Complaints Commission (IECC)
v. An Independent Administrative Reform and Civil Service Commission (IARCSC)
vi. An Afghanistan Independent Human Rights Commission (AIHRC)
vii. An Independent Directorate for Local Governance (IDLG) and,
viii. A High Office of Oversight and Anti-Corruption (HOO)

While some of these commissions have played an important role in furthering the accountability and transparency of government, most have fallen far short of their stated objectives. Nepotism, corruption, human rights abuses, political patronage and structural constraints to improved sub-national governance continue to undermine both state and Peacebuilding goals.

At sub-national level, governance systems remained fragile with weak legitimacy and capacity. Attempts to

strengthen centre-periphery relations have been systematically undermined due to lack of fiscal resources to buy peripheral loyalty and limited functional assignments provided to the elected provincial councils, all of which reflect the dependence on an overly centralised Presidency. A significant departure in political life, which emerged in the 2004 Constitutional Loya Jirga, was the former United Front's attempt to limit the power of the Presidency, in favour of a stronger parliament and locally elected governors, police chiefs and mayors. While critics claim that attempts to strengthen political, fiscal and administrative decentralisation have been pursued as a means to put in check the power of the predominantly Pashtun Presidency, the reality is that unless meaningful progress is made to strengthen sub-national governance, and with the rapid reduction in US military support and foreign aid, central government will struggle to even maintain its rather poor performance in creating bottom-up accountability structures necessary to drive essential services. Having elected provincial Governors could deflect from the failures of the centre and allow revenues that are not being remitted to the centre to be legally used to drive services locally.

During the period 2001-2020, compliance with constitution remained weak and often compromised based on political consensus among elites and powerful individuals and groups. According to many observers the Afghan Constitution has been breached on more than one occasion. Although the Afghan constitution provides for a constitutional Loya Jirga as the highest decision-making body, a number of grey areas have emerged. Examples cited include an extension of the President's first term in office, changing the scheduled dates of elections [98], Ministers remaining in their posts despite votes of no-confidence from parliament [99] and the unconstitutional role of International forces in national security issues, with formal complaints on the latter even filed by the Independent Commission for

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[98] The 2004 Afghan Constitution, Art 61
[99] The 2004 Afghan Constitution, Art 92

Overseeing Implementation of the Constitution. A far more vivid example is the extension of sitting parliament's term beyond its 5 years stipulated in the Constitution and creation of the National Unity Government which resulted in establishing the Chief Executive Office. Furthermore, because decisions taken by a Loya Jirga effectively superseded both cabinet and electoral processes, traditional forms of decision-making, generally involving around 1,500-2000 traditional leaders, have often overridden constitutional provisions; albeit legally. This has been the case while the legality of 'traditional' Loya Jirga itself has been in question. Similarly, senior government officials and law enforcement agencies have repeatedly breached other laws strengthening the culture of lawlessness and impunity, further compounding efforts to stop corruption.

'Free and Fair Elections' have been Replaced by 'Credible Elections': The 2004 Presidential Elections were postponed, missing the constitutional deadline, although Hamid Karzai still attracted some 55.4% of all votes even though he ran against 17 other opponents. However, allegations of widespread electoral fraud were seen in the 2009 and 2014 Presidential and 2010 Parliamentary Elections, uncertainty over the outcome of the 2018 parliamentary elections, substantial evidence suggest that unless there are major changes to electoral oversight, the 2019 elections risk being barely credible at best, possibly triggering a crisis of political legitimacy. The reasons behind the fraud were never pursued, even though with allegations highlighted, an unconstitutional special court, established by Presidential decree, made an unsuccessful attempt to challenge the outcome of the 2010 election and weakened the credibility of the Lower House. The fraud of 2009 and 2010, and the lack of interest in investigating it seriously damaged the credibility and legitimacy of the electoral process, and the government that emerged from this process has remained weak, with its reputation tainted by corruption. The objective for the 2014/15 election cycle is therefore, to conduct credible – i.e. meaningful and genuinely competitive – elections in line with

Afghanistan's international commitments and best practice. Although attempts are recently made to reach consensuses in appointment of new commissioners to the IEC, the institution has significantly suffered from lack of credibility and legitimacy after it failed to manage the 2018 parliamentary elections

The on-going peace process risks creating fractures and sliding the country backward once again unless significant changes are made over the approach and participation of the Afghan Government in the process led by Zalmay Khalizad the US special Envoy for Afghanistan: Peace and reconciliation with the Taliban always remained a government initiative with almost no consultation with the parliament, legitimate political opposition and civil society. Its aims were based on a "consultative" Jirga of 2010 and a "traditional" Loya Jirga of 2011, with most members' handpicked by the Presidency. The lengthy years of war, with its increasing human toll and high cost, has been a key factor behind international support of the process. Observers fear that the outcome of the talks will not reflect a national consensus, undermining their legitimacy and potentially undermining national unity in the process.

The need to learn lessons from the first decade has never been more important. Despite the undeniable gains made between late 2001 and 2008, and while a combination of constitutional and traditional processes of representation allowed the emergence of relative stability, a number of structural risks are beginning to emerge that call for an entirely new approach to both peace and state building. Such an approach will, therefore, need to reflect the following evolution:

- The emerging 2019 Presidential transition;
- The growing demand for both constitutional and electoral reforms;
- The emergence of new national political parties and coalitions;
- The deepening of the north – south political divide;

- The growing demand for more meaningful sub-national governance;
- The contraction of the economy as a result of the 2014 security transition;
- The emerging youth bulge, growing civil society and media presence;
- The existing youth bulge (42.3% under the age of 15) and an unemployment rate of 35% with the demand for jobs in a contracting economy set to escalate;
- The shifting urban and rural balance;
- The regional meddling in Afghan affairs and worsening situation in Pakistan and Iran;
- The need to urgently lay an economic foundation to drive revenues and services.

A key lesson emerging from this discussion is that the very objectives of both peace and state building need to be carefully calibrated to reflect actual on-the-ground realities. For example, reduced aid flows channelled through central government will inevitably allow the periphery to rise relative to the centre. Further, government will need to take anti-corruption much more seriously than it has, given increased fiscal pressures to meet wages and the likely increase in rent seeking behaviour in the opium economy as rents mobilised from the military complex decline.

Drawing early lessons is, therefore, essential for establishing Peace and State building. Efforts must seek to work in line with the evolution of political party dynamics, and strengthening of a system of governance firmly based on principles of plurality and democratic participation.

# Conclusions

The post-2001 political order in Afghanistan is a potent example of a young democratic society characterised by tribal and ethnic schisms, elite ruling and weak social contract. This situation is deeply entangled with the political economy of the international presence in the country and as such the security and donor transitions can have potentially destabilising effects on the political order. Historically, the country has experienced greater stability when elite bargains are combined with state-building reforms. Violent contestation in Afghanistan has often resulted from reforms that challenged powerful groups within or outside the state or from the breakdown of elite bargains involving rulers, external patrons, administrative elites, and societal groups. However, elites deal has always been characterised by shifting alliances and extreme fluidity with the use of ethnic and subethnic solidarity to coordinate political action which has increased ethnic polarisation of Afghan society. While the continued dependence on elite bargains promotes short-term stability, it tends to impede longer-term progress and leaves the door open to power challenges, thereby weakening the government.

In particular, the dependence on elite bargains has come at the expense of efforts to build a social contract which supports buy-in from groups throughout the country – and for that reason, has arguably impeded peace and reconciliation efforts. Another centrifugal force is the role of ethnicity. In a society where an individual's status, rights, and responsibilities are defined in large part by family ties going back many generations, ethnicity is inherently important.

In view of these centrifugal forces, it is not easy to discern a unifying concept of Afghan national identity or a single social contract, but rather multiple social contracts among power-holders (government, traditional and religious) and sub-groups of the people of Afghanistan. Strongmen/leaders/patrons benefit from a different contract with the state than the rest, with women and some disadvantaged groups at the opposite end of the power spectrum. Given the erratic nature or virtual absence of citizen interaction with the Afghan Government, many people have entered into pacts with patrons to whom they remain loyal and on whom they count to provide the necessary services. This situation reinforces the lack of trust in formal government structures.

The absence of organised political parties and the use of 'Single None Transferable Voting System' (SNTV) also contribute to low political coherence, helping to perpetuate the historical tendency toward a highly personalised governance system. Some modest improvement was seen in the wake of 2014 Presidential election to improve interparty dialogue and interface. For example, in 2013, the political parties came together for the first time as a coalition with Civil Society Organizations (CSOs) to demand clean elections. However, a lot more needs to be done to improve the enabling environment for political parties to operate that could lead to greater political coherence which is a prerequisite for a democratic society.

## Lessons

A number of key lessons emerge from the above analysis, which has direct implications for efforts to deliver practical improvements to legitimate political system that is based on the principles of the rule of law and democratic participation

- *A history of political exclusion*: Violent contestation in Afghanistan has always resulted from the breakdown of an elite pact or 'grand bargain' involving rulers, external patrons, administrative

elites and societal groups. Therefore, it is crucial that all segments of the society are provided with equal opportunity to participate in the political life and decisions that affect their lives. Particularly, the role of parliament as the body representing the people, needs to be strengthened in the political scheme to more effectively discharge its law making, oversight and representation functions

- *A history of weak centre-periphery relations*: Seldom has an incumbent government been able to mobilise sufficient capital to secure the loyalty of the periphery. A State's failure to provide basic rights, services and security not only contributes to growing inequality, it also creates a vacuum that allows non-state actors to take control over State sovereignty and territory. There is a risk that failed political transitions, with weak institutions, law enforcement and checks and balances provide a fertile ground for violent extremism. Weak States thus create opportunities for the physical location of extremist groups. Therefore, devolving power to local authorities and creating mechanisms for citizens to participate in the governance process and hold government accountable can lead to better service delivery and greater legitimacy of the government. In turn, it tightens up the social contract between state and citizens and contributes to improved security and stability through filling the gap which currently exists.

- *A preference for traditional over technical solutions*: Historically, reforms were not carried out through institutionalised processes but rather through reliance on charismatic patrimonial leadership, coercion or externally provided capital. Established governance mechanisms and systems have often been co-opted or ignored through reliance on personalities and non-institutional mechanism to achieve certain political agendas. While in essence the tradition of Loya Jirga

(Grand Assembly) is a unique practice and provides mechanism for participation and decision of national importance, experiences indicate that due to vagueness in procedures for selecting its members and implementing its decisions, in most cases in the past two decades, Loya Jirgas have provided avenue for ruling governments to enforce their political agendas through a system of control and manipulation. Further, it is seen as a duplication with the existing legislature which is a representative body with members of the lower house directly elected by the people.

- *Implementing Rule of Law*: A governance system that is based on the principles of separation of power and rule of law is crucial for a pluralistic political system that derives its sovereignty from the votes of the citizens. Rule of Law is therefore, a fundamentally important aspect of a democratic system of government and serious efforts and political will is needed to strengthen rule of law and fighting corruption in police and the judiciary system.

- The current system of state building is characterised as 'rentier' model of state building with its economy largely depending on donors' pocket. This is unsustainable and unconducive for creation of a cohesive society based on social contract. The government needs to explore alternative options to promote social- economic development and create direct linkages with its citizens to strengthen social bonds and deepen social cohesion.[100]

- *Need for genuine consensus on issues of national importance to strengthen social cohesion:* It is obvious that there is need for open dialogue among various groups in the society to build and strengthen both horizontal and vertical cohesion. Among others,

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[100] W. Verkoren & V. Kamphuis, "State Building in a Rentier State, How Development Policies Fail to Promote Democracy in Afghanistan" Institute of Social Studies, the Huge, pp 502-510

issues such as single national identity, constitutional reform, and change from presidential to parliamentary system of governance seem to have taken centre stage in political discourse which has trickled down and resulted further fraction in the society. Afghans, as a nation, needs to find a way to have open discourse around these issues in a transparent and democratic way and the state, as the custodian of the nation has the responsibility to provide suitable mechanisms so that the differences could be ironed out so the people can live together.

- Last but not least, to reach a resilient political settlement, the ongoing process of peace talks between the United States and the Taliban Group needs to become more inclusive and transparent. A lasting peace requires a whole of society approach and needs genuine leadership by the Afghans. Currently, there are deep misconceptions on a number of fundamental issues in the event that Taliban return or participate in a future government. These include preserving the socio-political development and gains of the last two decades, transition from the current government to a future settlement, the rights of women, freedom of speech etc. Furthermore, there seems to be no clarity on what happens after the initial agreements and reduction of violence (the term which is used in lieu of seize fire here), how the gains would be sustained and what would be mechanisms for carrying on a prospective peace process. Experiences from other countries, suggest that in order to ensure continued success in any peace process, it is crucial to invest on infrastructure for peace which involves establishing suitable mechanisms at national, sub-national and local levels to take forward peace agenda.

These observations are of particular significance given the potentially perverse effects of an intrusive external

engagement, which could risk blocking the path towards more meaningful progress in the interests of maintaining day-to-day stability. Clearly therefore, understanding how the political economy shapes political representation through new institutional arrangements (parliament, political parties, independent electoral commission, gender quotas and other measures) is critical to minimising the risk of elite capture, which potentially blocks legitimacy and inclusion and impedes progress in human development.

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