

DRAFT

An Options Paper for the Constitutional Commission of Afghanistan

The System of Government

I

Context in Afghanistan

Instead of discussing different systems of government in the abstract, this paper examines the different systems in relation to the situation and needs of Afghanistan. The salient features of Afghanistan for this purpose are:

- Afghanistan has grown through a long period of conflict and war which has produced deep antagonisms among the people, sharpened ideological differences (accentuated by the diasporic nature of its people, exposed to different values and systems), given rise to new centres of powers, often operating quite independently of central authorities;
- The country seems to be deeply divided ethnically; some ethnic groups are well armed; most are related to neighbouring states;
- Related to the above points, political authority is fragmented between the national government and warlords; state institutions are weak and often unable to impose central rule/discipline through the country;
- There is some geographical concentration of ethnic groups, but in several areas the population is mixed;
- Society is highly militarised, making political discourse and compromise difficult; Afghanistan has for long operated under authoritarianism governments and of recent decade, little practice of democracy and human rights; struggle for power outside any established norms, and factionalism, have characterised the past;
- Personal, and sometimes group, security is a major problem, and widely perceived to be so;
- There is great poverty and uneven development.

II

Functions of the system of government in Afghanistan

These features suggest that the system of government must perform the following functions:

- Reconciliation and developing national consensus on critical issues and programmes (recognising the limits of coercion, and difficulties of mobilising coercion, by the central authorities);
- Facilitate democratisation (the devices for which may be in some tension with democracy itself—hence some consideration of a more consensual and inclusive form of government for the first term); the Bonn formula of inclusiveness, broad based government, locking all parties into state structures;
- The political and to some extent the economic integration of the country;

- Democratisation and representative at all levels;
- Ensuring security;
- Transparency; accountability
- Effectiveness and capacity for development (stability)

III

Systems of Government

It is usual to divide systems of government into three major categories: parliamentary, presidential and mixed. Very briefly, they operate, in a formal sense, as follows:

The parliamentary system

- In a parliamentary system the head of state is separate from the head of government (although two posts have been combined in a parliamentary system in a few countries, such as South Africa, Kenya and Kiribati). The head of state in a parliamentary system is either a monarch as in Britain or a President as in India, the latter normally elected by the legislature. The head of government is the prime minister. The prime minister and the cabinet have to be appointed from among the members of Parliament (although in some constitutions allow for a limited number to be appointed from outside Parliament, while others require members of Parliament who become ministers to suspend their parliamentary membership).
- In most parliamentary systems the President appoints the prime minister, but must choose the member of Parliament who has the support of the majority of parliamentarians, which usually means the leader of the majority party or of a coalition of parties which together have the support of the majority. Some times the prime minister is appointed by or on the advice of the speaker of the legislature (as in Sweden), and occasionally the prime minister or 'parliamentary president' is directly elected by the legislature (as in Papua New Guinea, Solomon Islands, and South Africa). The prime minister appoints the members of the cabinet.
- The President may also in some circumstances have the power to remove a government, but otherwise his or her role is mainly ceremonial. The real power of government is vested in the cabinet, acting under the prime minister. The cabinet operates on the principle of collective responsibility, which means that decisions on policy must be made by the entire cabinet and defended by all ministers.
- The government is at all times responsible to Parliament and must explain and defend its policy to its members. Parliament can at any time remove a government by passing a vote of no confidence. In many parliamentary systems the prime minister can also ask for and secure the dissolution of Parliament (which results in a general election).

Presidential system

- The executive power is vested in the president. There is total separation between the executive, that is, the president, and the legislature. The president is elected directly by the people as is the legislature. Neither the president nor any member of his or her cabinet can be a member of the legislature (variations on this point

are noted below). The life of the president and the legislature are fixed. The president cannot be removed by the legislature on a vote of no confidence (but may be removed for serious misconduct by a formal process known as impeachment) and the president cannot dissolve the legislature. The president appoints his ministers and senior administrators, although their appointment requires the approval of the legislature. Normally all executive functions are vested in the president, and the role of the cabinet is merely to advise the president. The president and the majority of the legislature are not necessarily from the same political party, and the president has far less control over the legislature than is usually the case in a parliamentary system. But, since all laws, including the adoption of the budget, have to be passed by the legislature, the president has to work with the legislature to ensure that the president's policies and plans can be carried out.

Parliamentary and presidential systems compared

We can summarise the major differences between a parliamentary and a presidential system like this:

- in the parliamentary system there is no sharp separation between the composition of executive and the legislature as there is in the presidential system;
- there are more checks and balances in presidential system but there is continuing accountability of government to the legislature in the parliamentary system as the prime minister and ministers sit in Parliament, having constantly to defend their policies, and are subject to a vote of no confidence;
- ministers have to be members of Parliament in most parliamentary systems, but in a presidential system a member of the legislature cannot become a minister unless s/he resigns from Parliament, but apart from this the President has more choice of ministers;
- there will usually be a fixed term for both executive and legislature in a presidential system, producing a kind of stability, but system works more smoothly in the parliamentary, unless there is an acute fragmentation of parties, for the government has a majority in the legislature;
- in the parliamentary system there is a separate head of state from head of government;
- the head of government is elected directly in presidential systems, but appointed or elected by a small electoral college in parliamentary systems;
- the head of government in the parliamentary shares responsibility with the rest of the cabinet, but is sole authority in a presidential system;
- the principal form of control and accountability in the parliamentary system is political, although, since the constitution is the supreme law of the land, the

courts could declare that laws and policies which violate the constitution unconstitutional and void. In presidential systems there may be more use of the law to deal with political issues;

- the parliamentary system is in some ways more suited for accommodating diverse interests/groups; for example the position of head of state can be used to recognise minorities (perhaps by rotating the headship among groups which can never hope to control government) and by the distribution of ministries among different groups;
- On the other hand, in a presidential system where the president is not restricted in his choice of ministers, he can distribute portfolios among political and ethnic groups.

Mixed systems

- Some countries have tried to combine the strong and stable government which is often associated with the presidential system with the more democratic and accountable system of the parliamentary system. The best known example of this comes from France, which has been copied in its original form, as in Sri Lanka and many African francophone states, or in a modified form as in Portugal, Finland and East Timor. The French system was established in 1958 to stabilise the political system which was previously parliamentary when France experienced frequent changes of government. The powers of the executive are divided between the President, who is not responsible or accountable to the legislature, and the prime minister and his or her cabinet, who are responsible to the legislature. The president can dissolve the legislature, but only after consultation with the prime minister and the presiding officers of the National Assembly and the Senate and only once in a year. Parliament controls its own time table, but the president can convene extraordinary meetings.
- Most powers of government belong to the prime minister and the Council of Ministers, but the president has important (and somewhat vague) powers to defend the integrity of the republic and to safeguard the constitution. The president is elected directly by universal suffrage. The president appoints the prime minister, but the prime minister has to command majority support in the lower house, the National Assembly. The normal rules of the parliamentary rule apply in relation to the cabinet and the legislature, including the powers of the National Assembly to dismiss the government on a vote of no confidence (there is no such power in relation to the president). When the president and the prime minister come from the same party, the system works largely as a presidential system, and when they come from different parties, they frequently disagree and the system does not work well. Whether it operates more like a presidential or parliamentary system depends on the relative political strength of the president or prime minister, but the bias is towards the parliamentary, for despite the intention to create a strong executive, the powers of the president are regarded as exceptional to deal with

acute national crisis, while the normal working of government depends on continued support for it in the legislature.

Variations of these systems

However, it is not sufficiently appreciated that there are variations in each of them.

- For example the method of appointing the prime minister and the rules for the dissolution of the legislature can vary greatly between different parliamentary systems—with significant consequences.
- Some presidential systems operate on a complete separation of the executive and the legislature, as in the USA, while many presidential systems operate through some linkage, particularly when the president is required to exercise executive powers through a prime minister and cabinet drawn from, or at least accountable, to the legislature.
- Other variations on the presidential theme is provided by the Swiss model of rotating president and the Bosnia Herzegovina and Yemeni system of a collective presidency (also in former, post-Tito Yugoslavia)—the latter introducing thus an element of collective leadership characteristic of the parliamentary system.
- Among the mixed systems, the distribution of powers between the president and the prime minister (and the method of their exercise) varies somewhat, which significantly determines the orientation of the system (compare for example the French and Finnish systems).

In addition to these three systems, there are others which have a specific orientation or basis. There are still a large number of monarchies, organised differently, in some as largely dictatorial (Saudi Arabia), or as presidential in a mixed system (Morocco) or as ceremonial in a parliamentary system (Thailand, Malaysia, and most European monarchies).

Systems of power sharing

In all the three major systems, the powers of the executive go to the winning side ('winner takes all' systems), although the 'winning side' may be a more diversified group in a parliamentary system than the presidential and there may be a division in the mixed system. The losing party has at best the role of the official opposition, its task being to criticise government policies and activities. The parliamentary and presidential systems are adversarial, that is to say, that the winning and losing parties are locked into a conflict. Some times these systems are criticised for creating or reinforcing political divisions and excluding one group completely from access to power. It is said that such systems may be acceptable in states which are homogeneous, for it is likely that election victories will periodically swing from one party to another, so that the loser has merely to await its turn. However, in a state where people are divided by ethnicity or religion, the minority communities may be perpetually in the opposition and will therefore become dissatisfied and reject the system. In such situations, ways must be found to include all groups in the legislature and the executive, so that no group is left out. Various electoral systems have been proposed to ensure fair representation of minorities. The typical way to ensure the inclusion of all groups in the executive is power sharing in the cabinet.

Power sharing is often practised when a civil conflict has ended, to manage future relations between the 'warring' parties. The first government after the end of apartheid in South Africa, as established in its interim constitution, brought into the cabinet all parties which had at least 20% of the membership in the legislature, so that the ANC led by Mandela, the NP led by de Klerk, and Inkatha Party led by Buthelezi became partners in government. The constitution of Bosnia-Herzegovina, in which there are different major ethnic communities, is based on power sharing in all state institutions, including the judiciary. The current scheme for the restoration of democracy and normality in Burundi is based on power sharing, as is the agreement for peace in Northern Ireland. The 1997 Fiji constitution provides for power sharing by all parties which have 10% of parliamentary seats. For obvious reasons, power sharing is easier in a parliamentary system than in the presidential, for in the latter power is vested in one person, ministers being advisory. However, power sharing governments are not easy to operate, and may lead to the loss of the accountability of the executive as all leading parties are part of it. South Africa decided not to continue with power sharing when it adopted the final constitution, and serious difficulties have arisen in its operation in Bosnia-Herzegovina, Northern Ireland, and Fiji. It has therefore been suggested that while power sharing is useful, even necessary sometimes, to consolidate peace after the end of conflict, it should be a transitional rather than a permanent feature of the constitution.

Factors influencing the operation of systems

Similar systems can operate in different ways depending on the national context—some indication of which has already been given above. Some other factors are:

- The electoral system can have a great influence on the way a system works. The parliamentary system which has elections on a plurality or majoritarian system (i.e., where the candidate who wins in a single member constituency has the largest number or majority of votes), such as in the United Kingdom, France, Australia, and Bangladesh, operates in very different ways from parliamentary systems in European continental systems or Israel where elections are based on proportional representation systems. In the former case there are two or three major parties, and usually one party with a majority of seats in the legislature, and in the second case there are a number of parties, none with a clear majority. In the former case the government represents one type of interest, dominates the legislature, and ensure stable government. In the second case the government is composed of various parties, and tends to be unstable, with greater accountability to the legislature (in the former case the prime minister is more powerful than in the second, having, in the latter case, having to deal with leaders of other political parties). Presidential systems with legislatures elected on a majoritarian system (as in the US) tend to produce legislatures with a limited number of parties and to provide the possibility of stable relations with the executive, but a legislature elected on a proportional representation system tends to be very fragmented and leads to deadlocks between the executive and the legislature.
- The presence of other constitutional institutions can also affect the operation of the system. For example the formal powers and the effective influence of the president in a unitary system may be infinitely greater than in a federal system.

The powers and influence of governments in all the systems will depend on the existence of independent institutions like the Electoral Commission, an independent Civil Service Commission, the Ombudsman or Administrative Complaints Commission, an independent Central Bank, the mechanisms of the protection of human rights, and other safeguards against corruption and the abuse of power.

- The number, organisation and discipline of political parties have a great influence on the working of the legislature and the executive, as hinted above. To some extent the number and organisation of parties depend on the electoral system as shown above, and to some extent it depends on the law concerning political parties. A smaller number of parties tend to produce more stable legislatures and executives than a larger number. A parliamentary system is probably more dependent on well organised and disciplined parties than a presidential system.

The suitability of different systems in Afghanistan

It is necessary to make two general points before relating the options to the circumstances of Afghanistan. The first is that each of the systems discussed above can be modified to overcome its weaknesses—for example, ways can be found to ‘stabilise’ the parliamentary system or to promote ‘inclusiveness’ in the presidential system. There are of course limits to such modifications before the system loses its distinctiveness—and value.

The second point is that no single system is likely to answer all of Afghanistan’s problems, or to satisfy all shades of opinion. For example, a system which encourages inclusiveness may not very effective in decision making. Decision makers will have to prioritise and balance different needs. They will also have to balance short term needs (e.g., reconciliation requiring accommodation of currently dominant forces, with long term needs, a fully representative and effective).

The first of the goals of the system of government identified at the start of this paper is:

1. Reconciliation and developing national consensus on critical issues and programmes (recognising the limits of coercion, and difficulties of mobilising coercion, by the central authorities); inclusiveness.

There are two aspects to this; one is the distribution of powers between the national and sub-national levels (this is not discussed here as it is discussed in another options paper); and the other, discussed here, is the structure of government at the national level.

If this is the primary objective, then some formal power sharing arrangement is best.

Parliamentary system better adapted to these objectives

- The form of government is collective, in composition and decision making
- Alliances can be made before or after elections

- There may still be some ‘losers’ but a greater number of groups can be accommodated
- No one person can dominate

The mixed system can also accommodate different groups—both by having president and prime minister from different parties; and by the cabinet accommodating different parties/factions

The presidential system is the least inclusive, but at least electoral rule whereby the winner must secure a minimum level of support throughout the country as in Kenya, Nigeria, Indonesia is an incentive to broaden appeal across the country—but this is a somewhat different proposition; or by a system of voting which serves the same purpose, as in Sri Lanka.

2. Democratisation

Presidential system which vests all power in one person is not conducive to democracy—experience in Africa and Asia shows that an executive president reinforces traditional politics of patrimonialism; if the intention is to move away from authoritarianism, alternatives to presidentialism should be seriously considered.

Also the fixed term of the president means that a president who has forfeited public support cannot be removed

Ways in which presidentialism can be made more democratic/accountable: through

- Federalism or other forms of decentralisation
- Requiring parliamentary approval of key appointments (for officials and commissions)
- Requiring that the president is assisted by a prime minister and cabinet which is responsible to the legislature

The parliamentary system in which the government is constantly accountable to the Parliament is more democratic; also possibility of removing the government on a vote of no confidence. But in many parliamentary systems, a vote of confidence leads to the dissolution of the legislature at the discretion of the prime minister and therefore tends to discourage legislators from introducing or supporting motions of no confidence.

- Giving the president the discretion to dissolve the legislature can increase parliamentary control

On the other hand, dissolution means that the deadlock between the executive and the legislature is broken in a most democratic manner by the vote of the people

Power sharing systems are not so democratic/accountable because all key groups are in government and opposition to the government is muted

The mixed system is democratic and accountable so far as the prime minister and the cabinet is concerned, but not the irremovable president.

3. *National integration*

Principal means of integration are political parties; presidential campaigns, national in orientation, are in some sense better than parliamentary campaigns, which focus on localities, at integration. But

- Presidential rule may be less integrative than parliamentary rule since the cabinet can bring together politicians from different parts of the country
- Communication and other difficulties may make national campaigns difficult

4. *Accountability/checks and balances*

In the parliamentary system the government is constantly responsible to the legislature, but when the government has got a solid majority in the legislature, the legislature can easily become the rubber stamp for executive policies; on the other hand, there may be factions within the cabinet which provides some internal checks; and the role of the head of state (monarchy or president) can act as some kind of check

There are more formal checks and balances in a presidential system; also because the president cannot be removed by the legislature on a vote of no confidence, there is less need for firm party discipline and the legislature can play a more independent and active role.

5. *Stability and effectiveness*

Here presidential systems are considered to have an advantage: most executive powers are vested in one person, who is deemed to have national support; the term of the president is fixed; due to fixed term, the president is able to develop and implement long term policies;

But while there may be stability there is no guarantee of effectiveness, unlike the parliamentary system, there is no assurance that the executive can secure the support of the legislature (may be no deadlocks in the executive, but more chances of deadlocks with the legislature).

The stability in parliamentary systems depends on the support the executive enjoys in the legislature; in electoral systems as in Britain, there is normally dependable support, but not when a coalition is necessary for the formation of government; also long term policies may be harder to sustain;

Parliamentary system can be modified to give greater stability by

- constructive vote of no confidence (based on the German constitution, now adopted in several constitutions, whereby a motion of no confidence must nominate the successor prime minister)
- no motion of no confidence can be introduced in first year of a government

- legislators cannot ‘cross the floor’, that is legislators who got elected with the support of a party cannot leave it and join another, so the support of the government can be maintained;
- no dissolution of parliament on a vote of no confidence if alternative government can be formed (this has the effect of preserves parliament, and thus encourages them to remove an unpopular government (and eliminates need for elections)—facilitating parliamentary stability but it may produce instability in executive.

Two final points

1. Effective government depends less on the formal powers of the government (or their being vested in one person) than on the general support the government has, which depends on the degree of inclusiveness. On this score the parliamentary system has an edge over the presidential.

2. This paper does not deal directly with the legislature—but ways to strengthen the capacity of the legislature needs to be explored.