

Executive, Legislative, and Electoral Options for Afghanistan

William Maley

INTRODUCTION

1. The purpose of a constitution is to establish a formal framework for the exercise of governmental power through the creation, interpretation, and implementation of rules of behaviour. At the very least an effective constitution must do two things:

First, it must define the various *institutions* through which power is to be exercised, specifying the roles which they are to perform, and establishing workable *rules of priority* for resolving conflicts which may emerge between different institutions.

Second, it must specify how those who run the institutions are to be *chosen*.

2. The most politically stable and prosperous states have historically been those in which politicians trust each other sufficiently to accept (1) the basic framework of a constitution, and (2) the risk that from time to time they will be excluded from the exercise of governmental power. Such trust is easier to develop if governmental power is split between different agencies, rather than concentrated in one powerful body which can be used by 'winners' to crush 'losers'.

3. *The challenge is to devise a constitution which will prevent power from being so concentrated that it facilitates dictatorial government, but also prevent power from being so fragmented that it leads to ineffectual and unworkable government.*¹

4. Governmental power can be split on a number of different bases:

First, *territorial* splitting can occur, either through federal systems or through the empowerment of local government to deal with local issues.

Second, *functional* splitting can occur, with law-making (legislative) power granted to one institution, interpretive (judicial) power granted to another, and implementation (executive) power granted to another.

Third, *individual institutions can themselves be split*, for example through the establishment of two-chamber ('bicameral') parliaments, or through the establishment of both 'political' and 'professional' offices within the executive.

5. The long-run legitimacy of political office holders will to a considerable degree depend upon their being acceptable to key elements of the wider population. This therefore requires the development of mechanisms by which ordinary people can choose who will rule them, and the transformation of armed formations into political parties.²

6. *This will be much easier to achieve if a new constitution creates scope for a range of parties to see themselves as 'winners', rather than for one party to see itself as 'winner' while the rest are 'losers'.*

EXECUTIVE OPTIONS

Executive power

7. It is very important to consider just what powers the executive government (as opposed to legislature and judiciary) should have.

8. In ancient countries such as England, the powers of the 'Executive' originated as *prerogative* ('by right') powers of the king. These included the power to declare war, enter treaties with other rulers, and pardon criminals. Over time, further powers were granted to the executive under laws made by Parliament.

9. In younger states such as the United States and Australia, written constitutions granted 'Executive Power' to identified office-holders, sometimes alongside specific powers (such as the US President's role as 'Commander-in-Chief')³; the exact scope of such executive power has been determined by supreme judicial bodies (the Supreme Court of the United States, and the High Court of Australia).

10. In many countries, the exercise of executive power (either by ministers or officials) is subject to judicial scrutiny if individual interests could be adversely affected by the exercise of ministerial or bureaucratic discretion ('administrative decisions'). Courts can be empowered to quash decisions where those affected have not been given a proper hearing, or where decisions have been contaminated by bias, misapplication of law, or irrelevancy.⁴

Executive form

11. Two main options typically come immediately to mind when one is designing a 'government':

One is a *pure presidential* system, in which a president elected for a particular term appoints and leads a team of ministers, who exercise power until a new presidential election is held. The most famous modern example is the United States.

The other is a *parliamentary* system, headed by a prime minister who is the leader of that party or coalition of parties that can secure the support of a majority of members in a legislative assembly, but is subject to removal through a parliamentary vote of 'no-confidence'. To be a minister, one must be (or rapidly become) a member of parliament.⁵ Examples are the United Kingdom, Canada, Australia, and New Zealand.⁶

12. But between these two are many mixed systems in which either a prime minister effectively rules, but with a president performing purely symbolic functions as head of state (Singapore, Germany, Israel); or president and prime minister cohabit with each exercising real power, but over different issues (France).⁷

Presidential executives

13. The pure presidential system attracts supporters on a number of grounds:

First, a presidential system can satisfy demands for a 'strong leader': it is normally clear who the senior figure in the political system actually is.

Second, a ‘cleanly-elected’ president can claim a degree of legitimacy which might seem murkier in the case of a prime minister endorsed following secret bargaining behind closed doors in a post-election scramble for office.

Third, the fixed term for which a president is typically elected can permit a broad degree of certainty about the likely policy orientation of the government until the next election.

14. However, presidential systems have notable weaknesses as well:

First, if a successful presidential candidate is simply the candidate who received the largest number of votes, there is no guarantee that the victor will enjoy the support of a majority of voting population.

Second, where the *office* of president is powerful, but the *individual occupant* is personally weak, policy paralysis can result.⁸

Third, a presidential system can be a recipe for disaster where societies or political elites are deeply-divided: a pure presidential system effectively permits only one winner,⁹ while potentially generating many disgruntled losers.

15. Those who look to the American model for inspiration should note that it is virtually the only contemporary example of a smoothly-working pure presidential system,¹⁰ and that the process of evolution of this system included an agonising civil war. *In the long-run, it is better to build institutions that encourage ordinary people to rule well, rather than institutions that will only work if a ‘great leader’ appears.*

Parliamentary executives

16. A frequently-noted strength of a fairly-constituted parliamentary system is that it provides ‘constitutional means for removing deadlocked or inefficient governments’.¹¹ But parliamentary systems too come in many different types:¹²

In some, party discipline on members of parliament has become so strong that parliament is little more than a debating society: it is over sixty years since an Australian Government has been voted out by the House of Representatives.

In others, a fragmented electorate combined with proportional representation contributes gives disproportionate weight to ‘fringe’ parties with the ability to sabotage a government: this accounts for the influence of ultra-Orthodox religious parties in Israel. In such a system, wise or imaginative governments can find themselves paralysed.

17. A stronger case for basing the executive in the parliament is to guarantee *accountability*. If ministers must be drawn from the parliament, then they can be obliged to attend the parliament, and be regularly questioned about their actions, the actions of their personal staff, and the actions of the ministries which they head.¹³

A criticism of this approach is that fine potential ministers may be deterred from public service because they do not wish to become involved in party politics.

However, there are ways around this problem: in the United Kingdom, for example, individuals can be appointed as lifetime members of the 'House of Lords', which has much less power than the directly-elected 'House of Commons', but nonetheless provides a venue for distinguished figures to be drawn into public life.

Statutory officeholders

18. Some 'executive' offices are better filled by professionals who are independent of party politics. These include those who provide expert legal advice, organise elections, those who investigate crime and determine who should be subject to prosecution, those who investigate inefficiency and misconduct by officials, those who recruit officials for public service, and central bankers.

Recommendations: Executive power

19. In Afghanistan, it is important that the specific powers which the government can exercise by decree be identified as precisely as possible. One cannot rely on elite consensus or judicial determination to define executive power: the former is likely to be elusive, and the latter highly controversial.

20. Where powers must be exercised swiftly and decisively if they are to be useful at all, there is a case for giving them to an executive rather than legislative body. The power to commit forces to war in the event of external attack is an example. Other important executive responsibilities should be the conduct of foreign relations, the signing and ratification of treaties, public sector borrowing, and the issuing of currency.

21. However, where such powers could be subject to abuse, they should be carefully circumscribed: for example, time limits could be placed on the use of forces by executive decree without a supporting parliamentary resolution.

22. Discretionary decisions relating to specific individuals should be subject to the discipline of a system of judicial review.

Recommendations: Executive form

23. There is no 'perfect' executive form, but a pure presidential system should be avoided. The Executive Government should be based in a parliament, and accountable to it.

24. If a ceremonial Head of State were deemed necessary, it would be possible to have a President elected by a 'super-majority' (perhaps 75%) of the Parliament, to ensure a 'consensus' rather than controversial candidate.

25. The powers of such a President would need to be strictly limited, to avoid conflict and rivalry with a Prime Minister. The President should not be able to veto legislation passed by Parliament, but should have an automatic right to forward it to the country's highest court to determine whether or not it is constitutional.

26. There should only be as many ministers appointed as there are ‘real’ ministries to head. It is better for the government to do a small number of things well, rather than many things badly.

Recommendations: statutory offices

27. An Afghan constitution should provide for the following offices: (1) Solicitor-General, the senior independent legal adviser to the Government; (2) independent Electoral Commission, responsible for all aspects of the running of elections; (3) Director of Public Prosecutions, responsible for determining whether to bring prosecutions before courts; (4) an Ombudsman, empowered to investigate fully all complaints from individuals about the executive; (5) a Civil Service Commission, to prevent improper favoritism in recruitment; (6) a Central Bank, charged with issuing currency and preventing inflation; and (7) an Auditor-General to investigate whether government expenditure is properly authorised, and efficient in achieving proper objectives

28. Given the need for independence of these offices from politics, it might be worth considering whether the power to make appointments to these offices might be granted (perhaps for a 10-20 year period, if not in perpetuity) to independent international agencies (for example the President of the International Court of Justice, the Secretary-General of the International Institute for Democracy and Electoral Assistance, and the Managing Director of the International Monetary Fund).

LEGISLATIVE OPTIONS

Legislative power

29. The specific content of the law-making powers of the legislature can be determined only in the light of a profound debate amongst Afghan citizens over the specific nature of the political system which they wish to have.

30. If the choice is made to have a federal system, then several options are available:

As in Australia, the central government can be granted specific powers, with provinces exercising power in areas not granted to the centre.

As in Canada, the provinces can be granted specific powers, with the centre exercising power in areas not granted to the provinces.

But in either case, a supreme court would have to be empowered to determine which laws should prevail in the event that centrally-enacted laws conflicted with provincial laws.¹⁴

31. Even if a system is adopted with only a central legislature (that is, with local government that enjoys no protected constitutional status), a Constitution may usefully limit the power of the legislature through the identification of fundamental rights that no political authority can violate.

32. A key responsibility of a parliament is to approve provisions for *taxing* and *spending* ('The Budget'). The rejection by a parliament of a government's budget is the most severe sanction that it can exercise. For reasons of policy coherence, however, the parliament should not have the power to *amend* a budget: this would be a recipe for ceaseless demands for special favours for members or their supporters.

Legislative form

33. Legislatures are typically made up of either one House or Chamber ('unicameral legislatures') or two Houses or Chambers ('bicameral legislatures'). One-chamber parliaments are quite rare; New Zealand provides a contemporary example. The principal argument in favour of such parliaments is that they avoid deadlock between differently-constituted chambers.

34. Two-chamber parliaments are much more common: the United Kingdom, United States, Canada, Australia, France, Japan, India, and Afghanistan under the 1964 Constitution are examples. The more democratically-chosen chamber is usually called 'The Lower House', and the other 'The Upper House'. The strengths of two-chamber parliaments include the following:

They can prevent hasty or ill-considered laws from being made without proper reflection.

They provide scope for diverse interests to be injected into political debate.

They provide more space for the politically-committed to pursue their objectives in a peaceful way.

35. Deadlock can be avoided or managed in a number of different ways:

The approval of only one House may be required to pass the Budget. This would typically be the House in which the Prime Minister must enjoy majority support in order to be appointed to that office ('The Lower House').

The 'Upper House' may have no power to block the ultimate adoption of a law, but only to delay it. (This need not be a trivial power, since hastily-drafted laws are often bad laws, and delay more force reconsideration of the detail of legislative proposals.)

Provision can be made in the event of deadlock over truly urgent non-budgetary matters for a joint sitting of both Houses.

36. One strength of a parliamentary system is the scope it provides for members to cooperate through a *committee system*. Most established parliaments have significant 'standing' (permanent) and 'select' (ad hoc) committees, to address either enduring issues (such as public spending) or suddenly-arising issues (such as the government's handling of a particular issue).

37. It is possible in principle to limit the number of terms which an individual might serve,¹⁵ either in the Parliament, or as a member of the more powerful 'Lower House'.

The principal argument for term limits is to prevent the development of a ‘caste’ of professional politicians whose interests become remote from ordinary citizens.

The principal argument against limiting access to contested office is that those excluded may seek extra-legal or violent means of pursuing their interests.

Recommendations

38. The powers to be exercised by a parliament should be specified with considerable care. The risk of abuse of power should be kept in mind, and constitutional safeguards drafted to prevent such abuse from occurring.

39. The Parliament should not have power to amend the Constitution.

40. A two-chamber parliament should be established. The ‘Upper House’ should have power to delay but not reject draft laws. Each House should have its own committee system. The ‘Lower House’ should be popularly elected, with approximately 480 members. The more senior ministers should be obliged to be members of the ‘Lower House’. The ‘Upper House’ could include not simply elected figures, but former ministers and senior parliamentary officials.

41. Members of the ‘Lower House’ should be limited to serving three terms, but those who have served as ministers or senior parliamentary officials should be eligible for appointment to become members of the Upper House, for life (in the case of former Prime Ministers and former senior ministers) or for one or more terms (in the case of more junior ministers).

ELECTORAL OPTIONS

42. Different electoral systems give effect to different visions of what electoral participation involves:

One vision is *majoritarian*, focussed on choosing a particular group to rule for a specified period, and authorising it to prevail over minorities.

Another is *proportional*, focussed on reflecting in a legislature the diversity of opinion within the wider electorate, and authorising representatives of these opinions to produce policy by bargaining with each other.¹⁶

43. In divided societies emerging from conflict, the latter is the more realistic. It is consistent with a focus on creating room for ‘multiple winners’ as a contributor to stability.¹⁷

44. Severe practical considerations limit the scope for creative electoral engineering:

Without a detailed census and largely immobile population, it is impossible to establish a fair single-member system of electoral districts, such as was established by Article 43 of the 1964 *Constitution of Afghanistan* for Wolesi Jirga elections.

With substantial levels of non-numeracy, it is impossible to use otherwise-attractive systems such as preferential voting¹⁸ which require voters to rank candidates in order of preference.

45. It would be tempting to treat the entire country as a single constituency, and use some kind of 'list proportional' system, in which voters vote for 'blocs' or 'tickets', and seats are awarded in accordance with the overall proportion of the vote which the 'bloc' or 'ticket' received. Such a system, however, might leave voters with little sense of local identification with the successful candidates who made it into the parliament.

Recommendations

46. Voters should vote at *provincial* level.

47. The allocation of the actual number of seats to be filled in each province from the total of 480 would be based on the number of voters who actually voted in the province during the election, as a percentage of votes cast nationwide.

48. Two-thirds of a province's total seats should be filled using a 'list proportional' system to allocate them to different 'blocs' or 'tickets'.

49. To allow individual candidates to stand, one third of the seats from a province should be filled through a system of 'approval voting'. In this system, voters simply put a mark by the names on the ballot paper of *all* the candidates of whom they approve, and seats are allocated in strict order of the number of 'approvals' received.¹⁹

ENDNOTES

¹See Andrew MacIntyre, *The Power of Institutions: Political Architecture and Governance* (Ithaca: Cornell University Press, 2003).

²See Terrence Lyons, 'The Role of Postsettlement Elections', in Stephen John Stedman, Donald Rothchild and Elizabeth M. Cousins (eds), *Ending Civil Wars: The Implementation of Peace Agreements* (Boulder: Lynne Rienner, 2002) pp.215-235 at pp.227-228.

³*The Constitution of the United States of America*, Article II.1: 'The executive Power shall be vested in a President of the United States of America ...' Article II.2: 'The President shall be Commander in Chief of the Army and Navy of the United States ...'; The Australian *Constitution*, section 61: 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's Representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.'

⁴In common law systems, the mechanism for the exercise of judicial review was the issue by the courts of an order known as a 'writ'. The most important writs are *habeas corpus* (requiring a person under arrest to be brought before a court to be charged), *quo warranto* (requiring an official to prove his authority to act), *prohibition* (stopping an improper process in its tracks), *certiorari* (quashing an improper decision) and *mandamus* (requiring a decision to be properly reached according to law).

⁵The Australian *Constitution*, section 64: 'After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives'.

⁶These states are 'constitutional monarchies', whose head of state is a monarch whose powers are limited either by formal constitutional provisions or informal rules.

⁷See Matthew Soberg Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge: Cambridge University Press, 1992).

⁸This was precisely the problem that many observers identified during Boris Eltsin's second term as President of Russia.

⁹Juan Linz, 'The Perils of Presidentialism', *Journal of Democracy*, vol.1, no.1, 1990, pp 51-69.

¹⁰See Fred W. Riggs, 'Fragility of the Third World's regimes', *International Social Science Journal*, no.136, 1993, pp .199-243.

¹¹Alfred Stepan and Cindy Skatch, 'Constitutional Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism', *World Politics*, vol.46, no.1, 1993, pp.1-22 at p.18.

¹²Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (New York: Macmillan, 1996) p.101.

¹³The 1964 *Constitution of Afghanistan* prevented such accountability, through the provision in Article 86 that 'Any member of the Shura (Parliament) appointed as the Head or a member of the Government shall cease to be a member of the Shura (Parliament)'. See Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (Leiden: E.J. Brill, 1985) p 39.

¹⁴The Australian *Constitution*, section 109: 'When a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be

invalid'. Note, however, that the expression 'a law of the Commonwealth' has been (properly) interpreted by the High Court of Australia to mean a *constitutionally-valid* law of the Commonwealth. Thus, a Commonwealth 'law' which is made without proper constitutional authorisation will be no law at all, and will not prevail over state laws.

¹⁵The most famous 'term limit' is that contained in Amendment XXII to the *Constitution of the United States of America*: 'No person shall be elected to the office of the President more than twice'.

¹⁶See G. Bingham Powell, Jr., *Elections as Instruments of Democracy: Majoritarian and Proportional Visions* (New Haven: Yale University Press, 2000) pp.4-7.

¹⁷Ben Reilly and Andrew Reynolds, *Electoral Systems and Conflict in Divided Societies* (Washington DC: National Academy Press, 1999) p.55.

¹⁸See Benjamin Reilly, *Democracy in Divided Societies: Electoral Engineering for Conflict Management* (Cambridge: Cambridge University Press, 2001) pp.33-36.

¹⁹See Steven J. Brams and Peter C. Fishburn, *Approval Voting* (Boston: Birkhäuser, 1983).