Afghanistan's political and constitutional development

Chris Johnson, William Maley, Alexander Thier and Ali Wardak

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About this report

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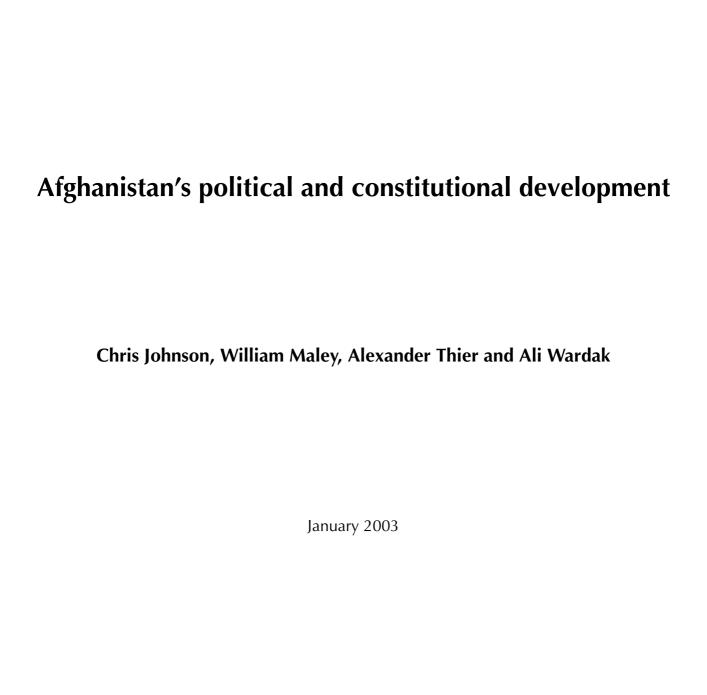Alexander Thier is an independent consultant. Between 1993 and 1996, he worked in Afghanistan for Oxfam, the International Organisation for Migration (IOM) and UNOCHA.

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Acronyms

AIA	Afghanistan Interim Authority (consisting of the Interim Administration, the Independent Commission for the ELJ and the Supreme Court)
ATA	Afghanistan Transitional Authority (which includes the Transitional Administration)
ATTA	Afghanistan Transit Trade Agreement
CLJ	Constitutional *loya jirga*
DDR	disarmament, demobilisation and reintegration
ELJ	Emergency *loya jirga*
FES	Friedrich Ebert Stiftung
FNS	Friedrich Nauman Stiftung
HRC	Human Rights Commission
IDLO	International Development Law Organisation
ISAF	International Security Assistance Force
NDI	National Democratic Institute
PR	proportional representation
SRSG	Special Representative of the Secretary-General
UNAMA	UN Assistance Mission in Afghanistan

Glossary of terms

Loya jirga	grand council
Shura–i–Nizar	Supervisory Council of the North
Northern Alliance	coalition of anti–Taliban forces
Shari'a	literally 'the path to follow'; in a jurisprudential context, the term denotes Islamic Law
hawala	money transfer system
shura (Dari)/*jirga* (Pashtu)	council
uluswal	district, administered by an *uluswali* (district governor)
Mahkama-i-Ibtedaia	district-level court
Mahkama-i-Morafa'a	provincial appeal court
Mahkama-i-Tameez	court dealing with cases at the highest level of the judicial system
kuchi	nomad
madrassa	school for Islamic studies
tanzim/hezb	organisation – refers to *mujahideen* parties
mujahideen (sing. mujahid)	one engaged in the struggle in defence of Islam
Jihad	holy war against the infidel
sazman	organisation
nizat	movement

Abstract

The events of 11 September brought dramatic changes to the political landscape of Afghanistan. For the first time in more than two decades, there was a real possibility of peace and stability in the country. Unlike in the wake of the Soviet withdrawal in 1989, this time the international community pledged not to walk away. Yet Afghanistan remains riven by factional power, and progress towards the broad-based and fully representative government envisaged in the Bonn agreement remains elusive.

This report – the product of hundreds of conversations with Afghans as well as key members of the international community – aims to identify 'the key issues underpinning Afghanistan's constitutional and political development' and the 'key policy options for the Afghan Transitional Administration (ATA) and other members of the international community'. It argues, however, that achieving the constitutional and electoral processes provided for under the Bonn Agreement will first and foremost depend upon improvements in security throughout the country. This will require substantially greater progress than has so far been seen in the formation of a professional, multi-ethnic national army; the demobilisation and reintegration of armed personnel; and measures to reduce warlord power and action on drugs.

At the heart of the debate on the constitution and elections is the wish to build a peaceful and stable state. To achieve this, the government must build a minimum level of legitimacy in the eyes of its citizens. The achievement of such legitimacy is a complex process. This report is concerned primarily with the formal systems of governance, including the constitutional and electoral processes. Equally important will be issues regarding fiscal policy and reform of the public administration.

This report argues that there is a need for a wide-ranging public consultation on the draft constitution, and that the lessons from the Emergency *loya jirga* must be acted upon in the organising of the Constitutional *loya jirga*. Getting the relationship between the centre and the provinces right will be one of the key challenges for those tasked with deciding upon the structures of government. More broadly, structures and systems of government that maximise representation and stability and reduce the tendency towards conflict will be vital if Afghanistan is not to return to war.

A key element of any state is its justice system, and this report considers both the formal system and its relationship with traditional mechanisms of dispute resolution. It argues that the two need to work together to produce a service that is accessible to all, fair and free of corruption. Justice also requires an ending of the long-standing climate of impunity in Afghanistan, and ensuring that human rights are both fully guaranteed within the constitution, and protected in practice. This must include the rights of women, so long denied under both the Taliban and previous administrations. As part of action on human rights, there needs to be political, financial and administrative support to the independent Human Rights Commission.

If elections are to be held according to the timetable agreed at Bonn, major improvements need to be made in security. Substantial and credible human, material and financial resources must be committed soon, and an independent electoral commission should be appointed in order to address the many complex questions associated with the election process. If security does not improve, and free and fair elections cannot be assured, the election timetable should be renegotiated.

In order to fulfil its pledge to Afghanistan's people, and to have any chance of seeing peace and stability, the international community needs to sustain its engagement in the country over the coming years. Specifically, it needs to maintain a long-term political engagement with the country; commit to long-term funding at an adequate level for reconstruction; ensure that this funding is provided in a principled, accountable and transparent fashion that supports the state rather than factional interests; and commit to a long-term presence for international security assistance forces.

1. Introduction: the Bonn Agreement and the legacy of 11 September

The attacks on the World Trade Center and the Pentagon on 11 September 2001 marked the start of a new political situation for Afghanistan. The US-led campaign in the country led to the collapse of the Taliban regime, the entry of Northern Alliance forces into Kabul and the eventual signing of the Bonn Agreement in December 2001. This provided for the setting up of an Afghanistan Interim Authority (AIA) and the convening within six months of an Emergency *loya jirga* (ELJ) to decide upon an Afghanistan Transitional Authority (ATA), including a broad-based transitional administration. A Constitutional *loya jirga* (CLJ) was then to be held within 18 months of the establishment of the ATA, in order to adopt a new constitution. Finally, elections are due no later than two years after the ELJ.

The wording of the Bonn Agreement left a number of important matters vague. The lack of clarity about exactly what was to be decided at the ELJ, the lack of detail about the path to be followed thereafter and the UN's role in relation to that, the ambiguities surrounding the various commissions, and the lack of specificity over which part of the UN would investigate human rights violations and whether the mandate included past as well as current violations, have all led to difficulties. The key to the problems faced by the negotiators was that the military process had run ahead of the political process. The fact that the Northern Alliance – or more specifically one part of it, the Shura-i-Nizar – took power in the capital before a political settlement was in place imposed constraints on the shape of the final settlement that could be forged.[1] Those in power were not readily going to give it up, and that inevitably meant a Bonn settlement where the cabinet was dominated by one faction. Marshal Fahim, who took over from Ahmed Shah Massoud as military commander of Jamiat-i-Islami upon the latter's death in September 2001, is now also the first vice-president, and is in many ways the most powerful man in Afghanistan. Two other prominent members of the Shura-i-Nizar occupied the posts of minister of foreign affairs and minister of interior. More generally, the cabinet contained a number of members with responsibility for serious human rights abuses. Although the ELJ brought about some changes to the cabinet, there was little reduction in the Shura-i-Nizar's dominance. Achieving a transition to a more broad-based government is one of the fundamental challenges of the current peace process.

The deal reached at Bonn has often been spoken of as a peace agreement, and Afghanistan as a country in a post-conflict situation. But the defeat of the Taliban was not the defeat of one unified force by another. The allies that the US chose were not united, and the Taliban's defeat has only laid bare the earlier conflict between them. The United Front, more commonly known as the Northern Alliance, was set up in 1996 by the groups opposed to the Taliban, but it never merged its command structures and the parties retained their various patrons amongst Afghanistan's neighbours; in turn, the varying interests of these patrons fuelled the divisions among the Afghan groups. Behind the mask of the Bonn Agreement lie many of the problems that enabled the Taliban to gain the control it did: the rivalries of the various groups making up the Northern Alliance, corruption in government, poor security, and the feeling of many Pashtuns that they are left out of power.[2] While outright fighting is at present muted by the presence of Coalition forces, the fear is that, unless meaningful progress is made towards establishing a more broad-based government, the conditions that gave rise to the Taliban will eventually also give rise to its successor.

The way in which the war was fought has exacerbated these problems. The United States' wish to minimise the use of its own ground troops led to a strategy of using the Afghan opposition as front-line fighters, which brought more arms into the country and empowered certain groups over others. The effects of increased arms and funding to factions have been seen at local level, with factions gaining in power at the very time when unity is needed. Many Afghans see the problem as having been exacerbated by events at the ELJ, which they believed sent the message to both warlords and lesser commanders that their power would not be challenged by the international community. This will make it harder to establish security and to create a judicial process that can begin to take some account of past crimes. Without this, there is a risk that people will take vengeance into their own hands; retributions have, for example, been meted out to Pashtun communities in the north, often for no more reason than their membership of the same ethnic group as the Taliban. The unresolved assassination of the (Pashtun) ATA Vice-President Haji Qadir in July 2002 increased tensions with the Pashtun community; until the killing is resolved, many Pashtuns will continue to blame Marshal Fahim.[3] Yet while there are certainly Tajik–Pashtun tensions, and a number of Pashtuns fear that Tajiks are trying to deprive them of power, the conflicts have more to do with the personal ambitions of individual leaders than with ethnicity, and alliances are created across ethnic groups as they have been throughout Afghan history. Given this situation, it is crucial to the long-term stability of the country that government is structured in a way that maximises the chances of locking the various parties into the state, and to non-violent means of resolving conflict.

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[1] The Shura-i-Nazar (Supervisory Council of the North) was set up in the late 1980s by Massoud as a regional administrative structure.

[2] Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (New Haven, CT: Yale University Press, 2000).

[3] No direct evidence has, however, emerged in support of this, and there are many other possibilities.

Rebuilding workable political institutions is an extraordinarily difficult task, for which the Afghan people require considerable and sustained external assistance. Yet even with such aid, it is a mistake to believe that there is a single 'magic solution' to this problem. It would be easy to suggest that the ultimate choice of which path to take is for 'the Afghan people' to make, and the sooner the better. However, such an argument presupposes the existence of genuine mechanisms by which it is possible to make a choice, while it is precisely this that ordinary Afghans have long been denied. The selection of *choice mechanism* is an unavoidable prerequisite for the exercise of choice, and this will necessarily arise from bargaining and deliberation within the current Afghan elite, and between that elite and key outside supporters of Afghanistan's transition process. Yet the history of the last two decades will make it hard to achieve a political space that is free from intimidation and in which choice can be exercised. One thing, though, is clear: a transition process, if it is to lead to anything like 'democratic consolidation',[4] must respect the Afghans' demand for 'ownership'. New institutions which fail to resonate with the demands and expectations of key Afghan groups will not take root.

Box 1: Historical context

State-building has passed through a number of phases in Afghanistan. A monarchical system prevailed from 1747 to 1973, when the last king, Mohammad Zahir Shah, was overthrown by his cousin Mohammad Daoud, who was himself deposed and killed in a communist coup in April 1978. However, it was only in the late nineteenth century that something resembling a bureaucratic state was established. During the reign of Abdur Rahman Khan (1880–1901), brutal thrusts into the countryside, complemented by the movement to the north of Pashtuns from the south and east, consolidated a degree of central power.[5] However, the state's redistributive capacity was limited by the crude tools at its disposal. By the mid-twentieth century, Afghanistan had moved in the direction of a classic 'rentier state', overly dependent on foreign aid and revenue from asset sales. In 1963, when the king inaugurated the 'New Democracy' period, 49% of state expenditure was funded by foreign aid; by the time of the communist coup, foreign aid was still funding over a third of state expenditure.[6]

The communist seizure of power resulted not from a mass demand for revolutionary change, but from severe divisions within the political elite in Kabul.[7] The radical policies of the new rulers rapidly alienated diverse groups in both rural and urban areas. This generated widening popular resistance by Islamic groups which came to be known as *mujahideen*, and precipitated acute tension within the communist regime. In December 1979, the Soviet Union invaded Afghanistan, killing the president and leader of the radical *Khalq* ('Masses') faction, Hafizullah Amin, and replacing him with the leader of the pro-Soviet *Parcham* ('Banner') faction, Babrak Karmal. The Soviet leadership had hoped that this assertion of power would stabilise the situation, but the opposite proved to be the case. Afghan refugees moved in vast numbers into neighbouring countries; by the beginning of the 1990s, there were 6.2 million Afghan refugees, out of a pre-war population of barely 13m.[8] The refugee camps in which they were based became fertile recruiting grounds for those forces opposing the Soviet presence.[9] The strategic significance of the Afghan struggle drew in large amounts of arms and money from the US, Saudi Arabia and other states, much of it channelled through the Inter-Services Intelligence Directorate (ISI) of the Pakistan armed forces. By the late 1980s, combined aid from the US and Saudi Arabia had reached about $1 billion a year; between 1986 and 1990, about $5bn-worth of weapons were sent to the *mujahideen,* including laser-guided Stinger anti-aircraft missiles. Aid tended to be given to those which inflicted most damage on the Soviets, which encouraged extremist groups. At the same time, the real expansion of the war economy, with its network of illegal trade in drugs and arms, also started.[10]

Change at the top of the Kabul regime, notably the 1986 replacement of Karmal by his long-time secret police chief Najibullah, added little to its popularity, and in November 1986, under the influence of new Soviet leader

[4] Larry Diamond, *Developing Democracy: Toward Consolidation* (Baltimore, MD: Johns Hopkins University Press, 1999).

[5] Nancy Tapper, 'Abd Al-Rahman's North-West Frontier: The Pashtun Colonisation of Afghan Turkistan' in Richard Tapper (ed.), *The Conflict of Tribe and State in Iran and Afghanistan* (London: Croom Helm, 1983), pp. 233–61.

[6] Barnett Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System* (New Haven, CT: Yale University Press, 2002), pp. 96–97.

[7] William Maley, *The Afghanistan Wars* (London: Palgrave Macmillan, 2002), pp. 25–27.

[8] Rupert Colville, 'The Biggest Case Load in the World', *Refugees*, no. 108, 1997, pp. 3–9.

[9] Fiona Terry, *Condemned to Repeat?: The Paradox of Humanitarian Action* (Ithaca, NY: Cornell University Press, 2002), pp. 55–82.

[10] John K. Cooley, *Unholy Wars: Afghanistan, America and International Terrorism* (London: Pluto Press, 2000).

Mikhail Gorbachev, the Soviet Politburo decided in principle to withdraw from Afghanistan. In April 1988, the so-called 'Geneva Accords' were finalised, providing for the troop withdrawal, which was completed in February 1989. Both the US and the Soviet Union continued to supply arms to the opposing sides. Najibullah's regime managed to outlive its Soviet patron, but only just. At the end of 1991, the resource transfers which kept the regime alive were cut off, and it collapsed in April 1992.

The new *mujahideen* government, cobbled together in a series of meetings in Pakistan, inherited the symbols but not the instrumentalities of a state. As the Afghan army fragmented, different groups asserted power in different parts of the country. In Kabul, forces commanded by the well-known resistance commander Ahmad Shah Massoud occupied the centre of the city in order to avert a seizure of power by the radical, Pakistan-backed Hezb-i Islami of Gulbuddin Hekmatyar. This prompted Hekmatyar to mount rocket attacks on Kabul, devastating the city's southern suburbs and killing thousands. In bitter fighting, out-of-control militias struck at civilians, but Hekmatyar proved unable to secure territory.

From 1994, Pakistan put its support behind an anti-modernist militia known as the Taliban. This group, which was overwhelmingly Pashtun in ethnicity, drew on students from Deobandi *madrassa* (Islamic colleges) in Pakistan. It also included former *mujahideen* commanders, assorted former communists from the largely-Pashtun *Khalq* faction and non-Afghan radicals. The Taliban took Kandahar in 1994, Herat in 1995 and – with financial backing from Osama bin Laden – Kabul in September 1996. Yet Pakistan soon found the Taliban to be a source of new problems.[11] Its antediluvian gender policies made it almost untouchable internationally; it failed to obtain Afghanistan's UN seat, and secured diplomatic recognition only from Pakistan, Saudi Arabia and the United Arab Emirates. It perpetrated grave human rights violations, notably in a gruesome massacre of some 2,000 *Shi'ite* Hazaras in Mazar-i Sharif in August 1998, and it increasingly served both as an inspiration to radicals within Pakistan itself and as a host to terrorist networks linked to bin Laden.[12] This was ultimately to prove its downfall.

2. Building peace and security

2.1 The need for security

Over the course of many interviews for this study, security was the issue that Afghans raised most often; the point was repeatedly made that, unless security improves, free and fair elections will be impossible. Yet in many parts of the country security is worse than it was under the Taliban, and is continuing to deteriorate. While the International Security Assistance Force (ISAF) has contributed to improved security in Kabul, the deaths of two ministers within the first six months of the transition show how fragile this is. Numerous security incidents in the city and increasing reports of kidnapping and extortion all point to a serious underlying problem, and few Afghans believe that security in Kabul could be maintained if ISAF left.

In the provinces, there is deep concern at the political and security situation, and at times outright anger. This tension is exacerbated by frustration at the slow pace of reconstruction. Dissatisfaction with the current regime is strongest in Pashtun regions, though it is by no means confined to these areas. Pashtuns firmly believe that they are in the majority, and that they have been disenfranchised. There is anger at what is seen as Panjshiri control of the ATA, accompanied by a belief that the Pashtuns in the government are powerless. The need for US troops to guard President Karzai underscores the point.[13] The resentment is evident in the stories that are recounted, of Pashtun professionals offering their services to government departments in Kabul only to be 'turned away by a Tajik', and in the protest over Massoud's picture being 'everywhere' in Kabul.

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[11] T. Judah, 'The Taliban Papers', *Survival*, vol. 44, no. 1, 2002, pp. 68–80.

[12] Peter L. Bergen, *Holy War, Inc.: Inside the Secret World of Osama Bin Laden* (New York: The Free Press, 2001).

[13] These have since been replaced by US private security guards, though the point remains.

Box 2: Afghanistan's social and ethnic composition

Afghanistan's social and ethnic complexity is striking. Whilst the overwhelming majority of Afghans are Muslims, and followers of the *Sunni Hanafi* School, the heterodox *Shi'ite* minority is strongly represented. Afghanistan is also multi-ethnic. While modern research on ethnicity emphasises the flexible and context-specific character of ethnic identifications, there is considerable anecdotal evidence that a large number of Afghans feel bound by strong norms of reciprocity linking them to their ethnic fellows.[14] The main ethnic groups are the Pashtuns, Tajiks, Hazaras and Uzbeks, but there are many others.[15] However, while most analysts would probably agree that Pashtuns constitute the largest single group, there are no reliable data on the relative numerical strengths of these groups.[16] Afghanistan is also multilingual: both Persian and Pashtu are widely spoken, alongside Turkic, Nuristani and even Dravidian languages.

Two other important bases of social division merit attention. First, there are striking differences between urban and rural areas. The bulk of the Afghan population live in the countryside, and are engaged in agricultural or horticultural production, or the management of herds or flocks, along with a range of off-farm activities. The poorer people are, the less agricultural production meets their needs and the more they rely on various forms of casual labour, remittances, charity and aid. While some elements of this population are nomadic, most work from farms or villages. These hamlets or settlements are often quite isolated: the combination of Afghanistan's harsh topography and the destruction or decay of roads during two decades of conflict has made them difficult to access. The urban population engages in a diverse range of economic activities. While there is no heavy industry, there is a great deal of entrepreneurialism, based on light industry and service delivery. This is, however, limited by the absence of either a functioning banking system or an efficient capital market. In addition, there are perhaps one million internally-displaced Afghans, as well as a comparable number of recent returnees seeking to reintegrate themselves into the economic life of the country. There are also stark divisions in Afghanistan based on gender, especially in rural areas, where men and women typically perform different social roles based on the conception of men as heads of household, and women as homemakers and mothers. There are, however, significant regional variations; in some parts of the country, women play a substantial role in agriculture. In urban Afghanistan, significant changes in the social roles of women occurred from the beginning of the 1960s, and the assault on these innovations by the radical Taliban movement from 1994 onwards helps to explain why the Taliban proved unacceptable to most of the wider world. Nonetheless, Afghanistan remains a very conservative society, although crudely patriarchal interpretations of social life tend to ignore the means by which women can influence the world around them.

There is also anger at events at the ELJ, particularly the way in which the king was prevented from standing for office. This comes not only from warlords but also from ordinary elders in villages: 'If they stopped the king from being elected,' they say, 'how can we believe in free and fair elections?' Opposition is most vocal in Khost and Gardez, with high levels of anger from the tribal leader Padsha Khan Zadran (one of the signatories to the Bonn Agreement) and his brother Amanullah (previously a minister in the AIA). Historically, this area has always kept a measure of independence from central control, in a similar way to the tribal areas of Pakistan, and attempts to solve the problem by force are likely to prompt further dissent. US troops remain active in the area, and caches of 'discovered' weapons are still being distributed among local warlords.

The death of Haji Qadir has also disrupted the political order in an already-tense Nangarhar. The ensuing power vacuum has fuelled rivalry between Din Mohammad, the relatively weak new governor (and brother of Haji Qadir), and Hazrat Ali, a Pashai military commander and supporter of Defence Minister Fahim. This region sits astride the main eastern trade routes, providing significant ready cash for whoever controls them. It was also a main staging point for Coalition military operations – and the military commanders in the region have benefited enormously from Coalition weaponry, training, communications, money and even firepower in conflicts with their rivals. It is also a major area for poppy growing. Given its strategic importance and many competing interests, the province is likely to remain tense and contested.

The continued war against al–Qa'eda and the Taliban in southern and eastern regions undermines efforts at building peace there. There have been numerous attacks on, and raids against, civilians, many thought to be a result of

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[14] See Anthony D. Smith, *The Ethnic Origins of Nations* (Oxford: Basil Blackwell, 1986); Russell Hardin, *One for All: The Logic of Group Conflict* (Princeton, NJ: Princeton University Press, 1995).

[15] Erwin Orywal (ed.) *Die ethnischen Gruppen Afghanistans: Fallstudien zu Gruppenidentität und Intergruppenbeziehungen* (Wiesbaden: Dr. Ludwig Reichert Verlag, 1986).

[16] Bernt Glatzer, 'Is Afghanistan on the Brink of Ethnic and Tribal Disintegration?', in William Maley (ed.), *Fundamentalism Reborn? Afghanistan and the Taliban* (London: Hurst & Co., 1998), p. 169.

mistaken intelligence. Heavy-handed search techniques in deeply conservative areas, during which foreign men enter areas of homes where women are present, increase resentment. In Uruzgan, the home of Mullah Omar, there is reportedly open hostility to Westerners. Large amounts of explosives have been smuggled into the city of Qandahar, and on the outskirts of the town unpaid soldiers hijack vehicles in broad daylight. Well-informed international workers spoke of the situation as being 'dangerous', with only US firepower keeping things under control. The Pakistani Inter-Services Intelligence Directorate (ISI) is reported to be very active in the area.

In the area from Qandahar to Herat there are numerous pockets of insecurity. Much of this is due to the struggle between Gul Agha of Kandahar and Ismael Khan of Herat for control of the lucrative trade routes that come through the west of the country, and to the shifting alliances that go with this. Helmand province is also a centre for opium growing. Herat province itself, in addition to parts of Farah, Ghor and Badghis, is under the control of Ismael Khan. There is tension in each of these provinces over disputed areas and due to long-standing feuds. Nonetheless, the majority of these areas, and Herat city in particular, are enjoying relative security and even some prosperity, and Ismael Khan has established a politically repressive yet economically liberal atmosphere.

In the north, Mazar-i Sharif and neighbouring areas are some of the most insecure parts of the country. There is an ongoing struggle for control between Mohammad Atta (Jamiat-i-Islami) and Rashid Dostum (Junbish-i-Milli). Although numerous agreements have been made in response to international pressure, tensions remain high, and there has even been fighting in the centre of the town. Everyone interviewed for this report stated that only the restraining power of Coalition forces prevented open warfare. Iran and Russia are accused of interfering, and there are many reports of new weapons flowing into the town. There is also a strong Hizb-i-Wahdat presence in Mazar town, as well as various other groups in the surrounding areas, including Hizb-i-Islami and, in Baghlan, a substantial Ismaeli community (though at present this has little political or military power). General Malik, the commander who split with Dostum in 1997 allowing the Taliban to take Mazar, is also reported to be trying to reassert himself.

In Hazarajat, many of the cleavages that existed before the Taliban took power have reopened, and security is poor in many areas, especially the more remote districts.

2.2 Establishing security

Establishing security will involve more than simply taking away the guns; it is about a total environment. The years of war have meant that in many places the old power structures have been replaced by new ones based on the commanders.[17] Command of resources has enabled warlords to acquire armed men, who in turn are used to acquire more resources. The loyalty between a warlord and his men is often based on this distribution of gains, and results in a complex pattern of shifting alliances, sometimes but not always linked to ethnicity. With no protection from the law, ordinary citizens have drawn on family and other networks to ensure protection.

In a society that has undergone two decades of conflict, and where guns can have important traditional functions, no disarmament programme is likely to remove all the weapons in the country. Better security will therefore depend upon wider social and political changes: re-establishing legitimate economic activity, creating jobs, establishing a professional national army and police force, and ending the war economy and the climate of impunity. There are, for instance, reports of members of the police, army and security forces showing no respect for the law, and of officials trying to restore law and order being assaulted by commanders directly linked with figures at the heart of the ATA. For as long as this protection continues the restoration of security will be impossible.

It will also be important to connect into local structures, such as *shura* and councils of elders, and to harness their energy and authority. While they are unable to do much about major warfare, elders and community groups have shown themselves capable of defusing the low-level insecurity that can make life a misery for ordinary citizens.[18] These measures will also need to be supported by the deployment of a credible international force to guarantee security. Disarming means taking a risk, and people will only do this if they feel someone else is going to guarantee their security. Indeed, forced disarmament without some protection raises the danger of further human rights abuses.

2.3 National dimensions: the army and police

According to Max Weber's classic definition, a state is an entity that exercises a monopoly of legitimate force over a given territory. On this basis, Afghanistan is currently struggling to achieve statehood. The country remains under the sway of a patchwork of warlord militias, and the president does not command a military force strong enough to control even one of them. In contravention of the Bonn Agreement, factional forces remained in Kabul after international troops were deployed to the city. While they may try to assume the mantle of a 'national army' given that they come under the command of Marshal Fahim as minister of defence, they have not been through the agreed

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[17] See Sayed Askar Mousavi, *The Hazaras of Afghanistan* (London: Palgrave Macmillan, 1997), for a detailed description of how this has worked in one area of the country.

[18] Many NGOs can give examples of this, and the authors have had personal experience of this in the course of their work in Afghanistan.

training and selection procedure, they are not part of the new national army structure produced as a result of this exercise, and their loyalty is to Fahim, rather than to President Karzai. The naming of Karzai as commander-in-chief of the armed forces is an important symbolic act, but it as yet remains just that.

The creation of a national army is an urgent priority. This is acknowledged by all parties; the US, for example, has allocated $50m to train and equip 18,000 Afghan soldiers over 18 months. Yet progress has been slow, and there have been numerous disagreements, for instance over the appropriate size of the force, its ethnic composition and how much military personnel should be paid and who should foot this bill. The infrastructure to support the formation of the army and police force, including such basic requirements as housing for trainees, is also absent. Given these difficulties, all the parties involved now recognise that this process will take much longer than originally envisaged – likely as long as five years.[19] Moreover, rebuilding the army cannot be done in isolation from wider changes. Unless the issues that divide the country are addressed through the emergence of a more broad-based government, a unified army will be impossible to achieve.

It is also critical that maintaining internal law and order becomes a function for the police, rather than the army, and that the police in turn act as part of the overall justice system. Although the military will continue to have a role in suppressing factional dissent, its primary function should be defending the country from outside attack. Keeping law and order is properly a role for the police. Currently, tensions persist between the army and police forces; the fact that police personnel are paid less than their army counterparts makes it more difficult to recruit good people into the police, and undermines their status. There are also serious problems of illegality and corruption in both forces, and their continued domination by Tajiks means that most citizens distrust them. Meanwhile, the police training programme is struggling for lack of donor funding, and there remains an over-concentration of resources in Kabul.[20]

It will also be necessary to bring the intelligence service under civilian control. Its power to intimidate is enormous – as evidenced during the ELJ, when its presence both during the election process and at the *jirga* itself caused a significant number of candidates to drop out, or delegates to be silenced. Establishing control of the service by legitimate civilian authorities unconnected to factional interests will be vital to restoring public confidence.

2.4 The National Defence Commission

In early June 2002, under intense pressure from the US and the UN, Marshal Fahim agreed to the creation of a National Defence Commission to coordinate the national military command and deal with controversial issues such as the disarmament and integration of militia armies into the new national military force. The commission attempts to bring together all the significant regional commanders – essentially forcing them into an ongoing dialogue. This commission could be a crucial tool for checking the power of any individual commander, and for providing a standing forum for easing tensions between rival factions. The commission has thus far focused on two issues: a disarmament strategy and the creation of the national army. These lie at the heart of the peace process. However, as a 'government' body chaired by the controversial defence minister, the commission highlights the fundamental challenge of the current peace process, namely its dominance by one faction. Thus, while all the major military figures are represented on the commission, progress has been difficult, mostly due to a lack of trust between the various factions.

2.5 Disarmament, demobilisation and reintegration

Traditional disarmament, demobilisation and reintegration (DDR) assumptions do not apply in Afghanistan.[21] It is not simply a question of dealing with the demobilisation of an armed force which is neatly separated from civil society, but rather of a society where guns are commonplace, and where their use is often unrelated to any command structure. Three broad groups of armed men can be identified, though these are not exclusive categories. The first are those who could be seen as regular forces, men who are uniformed and/or under clear command and control structures, with livelihoods tied to the military establishment. Second are those who are conscripted into regular forces for short periods, thereafter returning to their communities. Finally there are those who are part of irregular militias. The lines between all of these and between those who use the gun for banditry or other criminal activity are often blurred. In addition, many Afghans keep guns for self-defence.

The exact number of combatants in Afghanistan is not known, but current estimates are that there are some 70,000 men in the regular forces and another 100,000 irregular militia members. However, estimates are complicated because numbers can be inflated for reasons of prestige, and in a bid to maximise the resources that come with demobilisation programmes. Many soldiers are reported to have been recently mobilised as a result of the post-11 September

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[19] See Mark Sedra, *Challenging the Warlord Culture: Security Sector Reform in Post-Taliban Afghanistan* (Bonn: Bonn International Centre for Conversion, 2002).

[20] Interviews with staff at the German embassy. Germany is the lead country for police reform.

[21] Interviews with the Special Adviser to the SRSG on disarmament, demobilisation and reintegration (DDR). UNAMA and Japan are taking the lead on supporting the DDR process.

situation, and the new access of Western funds.[22] This suggests that not all of those under arms are long-term soldiers who have had no other means of survival. If released, some may therefore simply return to what they were doing prior to September 2001. While economic incentives may be needed, the recently mobilised may have few significant social and psychological barriers to demobilisation.

If the overall number of people under arms is unclear, it is even less clear how many of these might be 'child soldiers'. Indeed, the meaning of the term itself in the Afghan context is open to debate – UNICEF uses 18 years of age as the standard, but many Afghans would not think of a 17-year-old as a child. What seems to be generally agreed is that many of the younger fighters have returned home, either because they were no longer needed, or because their commanders themselves demobilised or fled. Some, however, are still under arms, either because they are attracted to this way of life or because they have no other means of livelihood.[23] Children and young people under 18 years should be a target for demobilisation immediately, including education and livelihoods support, and there should be an amnesty for all under-18s.[24]

In the main, DDR programmes have so far only collected old guns, or weapons left behind by the Taliban. Meanwhile, enormous caches uncovered by Coalition forces, including anti-tank guns and rockets as well as firearms, are being turned over to local, non-ATA forces working with the Coalition – precisely those groups that need to be disarmed most urgently. Most Afghans believe that the majority of those under arms would be prepared to give their weapons up if conditions were right; indeed, there have been reports of people simply handing over their arms because they are tired of war and want to find another way to live. Conditions conducive to this are likely to include confidence in one's own security, a belief that one's group can have representation and can solve conflict through peaceful means, and the presence of a reasonable economic alternative. Afghanistan is, however, far from those conditions. Across the country, interviewees for this study spoke of a lack of trust and of their fear of handing weapons in. As one elder put it: 'People are afraid of the Northern Alliance; if they attack our families and we are empty-handed what can we do?' One ELJ delegate put it like this: 'Why do people keep weapons? Because they have no job. They go to the commander and he feeds them'.

Disarmament needs to be accompanied by real alternatives in education and employment. These should as far as possible benefit whole communities, rather than individuals; if impoverished people see those who have lived by the gun benefit over those who have not, there will be conflict and resentment. If whole communities can be seen to benefit, then the community leadership will be able to play a key role

in managing this process. Crucially, such programmes will need to run in tandem with the training of the security forces to minimise the risk that those who are not selected for these new forces themselves become a security problem. Any disarmament strategy will also need to draw in commanders as well as those under them; to induce their men to give up their arms, commanders need to have confidence that their own security is not threatened. This requires a belief in the formation of a genuinely national army: commanders are unlikely to give up their arms to the leader of another faction.

Ultimately, achieving meaningful disarmament will entail political shifts as much as constructing a technical programme, and it will require international political pressure if there is to be a significant move forward. The technicalities are not, however, unimportant. What happens to the guns collected, who verifies collection and oversees storage or destruction, are all important questions. So too is the issue of whether the guns collected are simply being replaced by new weapons coming into the country; there is little point in spending money on a disarmament programme unless there is also some control of the weapons supply, and the evidence is that this is not the case at present. Afghans interviewed for this study were all clear that international forces should be used to encourage demobilisation, to verify what happens to the guns and to monitor their storage, and they are confused as to why the international community has not thrown its weight more forcefully behind a disarmament programme.

2.6 Confidence-building measures

Confidence-building measures are the mainstay of conflict de-escalation processes. Antagonists must be persuaded to trust the process in which they are engaged, and to trust the intentions of their adversaries. This trust will not be based on broad agreements, as so many have been broken in years of war, but on actions – large and small demonstrations of good faith and de-escalation of hostility and of the resources to attack. The UN political mission and the Coalition could work out a specific plan of confidence-building with rival factions as longer-term security measures are put in place. This could include specific steps such as informing rivals of troop movements; allowing for mutual or independent inspections; or ensuring and publicising fair ethnic distribution in new national army units.

At present, this trust is virtually non-existent, and neither the UN nor the US is in a favourable position to encourage it. The UN Assistance Mission in Afghanistan (UNAMA)'s belief is that the mandate of the mission is to support the government, but since the ATA is dominated by a single faction, this has in the eyes of many compromised the UN's ability to act as a neutral broker. Meanwhile, it is unclear whether the US military is actively building confidence between factions, or whether forces are deployed to threaten any faction that steps out of line. More importantly, the United States' ability to act as a third party is compromised by its continued conflict with al-Qa'eda.

[22] Ali A. Jalali, 'Rebuilding Afghanistan's National Army', *Parameters*, Autumn 2002, p. 78.

[23] *Suggested Issues Related to Children and Women to be Addressed by the JC* (UNICEF, 2002).

[24] *Ibid.*

Box 3: International interests

Afghanistan's politics are bound up with the wider politics of the region and beyond.

The United States
The key player is clearly the US. Initially, the US expressed a certain degree of support for the Taliban. However, attitudes towards the regime began to harden in the late 1990s, as concern about Osama bin Laden's use of Afghanistan as a sanctuary took centre stage. The US was key in pushing through UN sanctions in late 1999, followed by stronger measures in December 2000. In the aftermath of 11 September, the United States' military strategy in Afghanistan was to minimise risk to its own troops; the implications of this for the future settlement in Afghanistan went unheeded. After the fall of the Taliban regime, the US has remained strongly involved militarily in Afghanistan. It has taken over the airports at Qandahar and Bagram and there are US bases in many parts of the country. The United States' military objectives, however, seem to be split between the somewhat incompatible goals of building Afghanistan's peace and fighting al-Qa'eda – in pursuit of which it has formed alliances with the regional warlords who are destabilising the very government that the US is pledged to support. While many Afghans still do not want US troops to leave, without clear terms of engagement there is a real danger that, instead of welcome liberators, they will become unwanted occupiers. Already, there is anger over the rising numbers of civilian casualties, over intrusive searches of houses and over the detention of innocent people. It is also clear that US troops have at times become sucked into tribal conflicts.

Russia and post-Soviet Central Asia
Russia and the post-Soviet states in Central Asia bordering Afghanistan are also deeply involved in the country. In both Tajikistan and Uzbekistan, politicised Islam has been an important vehicle of protest, and both Russia and Uzbekistan supported anti-Taliban forces in Afghanistan as a 'buffer' against Taliban influence. Both countries reportedly continue to give military support to factional forces.

Pakistan
Pakistan's military support to Afghan parties dates back at least to the early 1970s, with backing to various factions, notably Gulbuddin Hekmatyar's Hizb-i-Islami. In the mid-1990s, Islamabad switched to the Taliban, providing logistical support, bankrolling the organisation, and supporting the open recruitment of Pakistani students. This backing ended in the aftermath of 11 September, though Pakistan's relationship with Afghanistan is complicated by the fragmented nature of its own power structures. The ISI has often acted with a considerable degree of independence, while powerful traders, particularly Pashtun trucking cartels, retain a major influence. The border areas, with their strong tribal links, are deeply enmeshed in Afghanistan's war economy. Meanwhile, al-Qa'eda forces appear to have regrouped in these border regions. Pakistan is also home to one of the world's largest Afghan refugee communities. Pressure for the return of refugees is strong, but the situation is complicated; many refugees grew up in Pakistan, there are strong tribal affiliations and migration across the border has been part of life for as long as there has been an Afghan and a Pakistani state.

Iran
Iran's current involvement in Afghanistan dates back to the Soviet occupation, when it took in some two million Afghan refugees (although the history of Afghan migration to Iran is much older). Traditionally, refugees tended to join existing Afghan communities, and unlike in Pakistan there were no large refugee camps and little international assistance. Registered refugees had access to education and health services in the same way as Iranians. As with Pakistan, however, there is now pressure for the return of refugees and there has been a recent hardening of the Iranian position.[25] Iran was at one time the chief source of military assistance to anti-Taliban forces, supplying cash, weapons and training. At different points in the long conflict, Tehran has used its diplomacy both to forge unity and, by providing support separately to the various factions, to contribute to fragmentation. Over recent years, the country's involvement in Afghanistan has, by all accounts, deepened. Iran recently approved $475m as financial aid to Afghanistan, to go to the Iranian contractors who will take part in reconstruction projects in Afghanistan, including funding the improvement of the road from Herat to the Iranian border.

Saudi Arabia and the UAE
Saudi Arabia has been a significant supplier of financial aid to various factions, including the Taliban.[26] The United Arab Emirates is also deeply involved in both the legal and the illegal economy through the numerous trading and financial networks centred on Dubai.

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[25] PHR, 8 August 2002.

[26] *Gulf News*, 6 August 2002, p. 31.

2.7 Warlords and the economy of war

Warlord power is inextricably tied to the economy of war that has developed over the last two decades. This war economy relies heavily on poppy cultivation and opium production (until the Taliban's ban on poppy cultivation in 2000, Afghanistan was the world's single largest source of opium); gems (mainly emeralds from the Panjshir Valley and lapis lazuli from Badakhshan);[27] arms smuggling; and the unregulated trade in legitimate goods.

This trade would normally be a source of revenue for the central exchequer, but customs dues largely remain with local power-holders. The trade includes goods to be smuggled into Pakistan, thus evading that country's high tariffs. Some of these goods are duty-free items from Dubai, which are transported through Afghanistan into Pakistan. Others enter Afghanistan under Pakistan's Afghanistan Transit Trade Agreement (ATTA) of 1950, which allows sealed trucks carrying goods for Afghanistan to transit Pakistan duty-free. Many of these goods are immediately smuggled back into Pakistan. The smuggling trade increased enormously after 1992, with the loss in customs revenues to Pakistan climbing from \$87.5m in 1992 to \$500m in 1995.[28] Today's clashes between commanders from different groups are essentially a fight for control of the trade routes running through their territory, and the lucrative taxation of goods passing along them. In the west of the country, the fighting between Ismael Khan and Gul Agha is a battle over transport routes to Iran and Central Asia. In Nangarhar, clashes in the wake of the assassination of Haji Qadir have been linked to control of trade routes for smuggling heroin and other goods into Pakistan.

Although President Karzai has reiterated the Taliban's ban on poppy growing, there is no Afghan security force capable of enforcing this edict, and the success of the ban therefore relies on the willingness of local warlords to destroy crops and punish growers. They have little incentive to do this as the crop provides them with a ready source of revenue through taxes on its growth and movement. And while the Taliban profited by the drugs trade, it did not take it over. Thus, the change in power in the country has left the structures controlling the industry largely intact, and well able to profit from the security vacuum. Cultivation has resumed on a large scale: opium production is at record levels, and poppies are being grown in districts that have never seen them before. In some places, this has been the result of a highly organised campaign by traders to extend growing areas. In Ghor province, for example, traders from Helmand arrived just before the planting season, when people were most in need of cash, and offered seeds and cash up front, with more to come on harvest. As a result, a

large area of Ghor was planted with poppy in 2002, transforming the economy of this once-poor province. At the same time, the amount of heroin produced in Afghanistan has reportedly increased dramatically.[29]

The drug traffic emanating from Afghanistan's poppy harvest undermines the security of the whole region, providing a ready source of cash for the activities of radical anti-state groups. While the trade is certainly profitable to some Afghans, the biggest profits are made outside the country, and state or quasi-state interests are involved in many places. Russian border guards maintain tight control over the major crossings on the Afghan–Tajik border,[30] and the governments of both Tajikistan and Turkmenistan have been credibly accused of profiting from the trade. Drugs are therefore not a separate issue from security, nor from the United States' declared goal of defeating terrorism; rather, they are an integral part of it. While cultivation is often a response to poverty, allowing it to continue transforms the problem of poverty into one of regional security.

Many Afghans believe the poppy trade to be against the teachings of Islam and do not want to become involved in cultivation. Others have had bitter experiences at the hands of drug dealers. Credit is offered against future crops, but penalties are harsh if a farmer cannot repay. Carriers to Iran, where there is a serious attempt to control the drug trade and penalties for smuggling are harsh, have sometimes lost their lives, leaving their families responsible for repaying the value of the drugs lost – a debt they have no way of discharging. There are stories of people who have lost all their possessions, even had their wives and daughters taken from them as a result of such debts, and there are many widows in the drug-smuggling districts near the Iranian border. There are also, encouragingly, reports of people who, emboldened by the promise of a return of law and order, have challenged the drug barons and refused to carry drugs any longer. There is also increasing concern in Afghanistan about the rising rate of addiction, a problem once known only in Badakhshan, where opium use has been traditional for many years.

The networks controlling the drug trade are intertwined with the local elite, and crop-substitution programmes will not work unless there is also a move to stop these elites from collecting taxes from the trade.[31] Drug dealers must be caught and punished, and the international community needs to help fund and organise a security force capable of

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[27] Before the war, high-quality tourmaline and amethyst were also exported.

[28] Ahmed Rashid, 'Pakistan and the Taliban', in Maley (ed.), *Fundamentalism Reborn?*

[29] Martha Brill Olcott, *Drugs, Terrorism, and Regional Security: The Risks from Afghanistan.* Testimony before the US Senate Judiciary Committee, March 2002; *New York Times,* 28 September 2002.

[30] Interviews with personnel from the UN Mission of Observers in Tajikistan (UNMOT), quoted in Human Rights Watch, *Crisis of Impunity: The Role of Pakistan, Russia and Iran in Fuelling the Civil War,* vol. 13, no. 3 (C), July 2001, p. 42.

[31] Olcott, *Drugs, Terrorism, and Regional Security.*

dealing with these problems. There also needs to be diplomatic pressure on other states, especially Russia, to combat the transit of drugs across their territory. Stores of opium and all heroin factories need to be found and destroyed. But the problem cannot be tackled simply by controls and punitive measures; moves against poverty are also required, and alternative forms of credit and of making a living are needed. It is possible to work with local communities on programmes, and barren land has been reclaimed and irrigation extended on the basis that it is not used for growing poppy. Whether such contracts can hold good in the long term will depend on the extent to which law enforcement can be restored.

To even begin to establish some control over warlord power and the war economy will require action on many levels. The stricter control over money which the new currency will allow should help, but financial flows will also need to be tracked in order to stem illegal activity; international support is needed for this. Control of borders will be both important and difficult, and will require a regional approach. A legal framework will need to be established, along with the law–enforcement capacity to make it a reality. One of the complications, however, is that many of the structures used in the war economy are also part of legitimate trade. The *hawala* money transfer system, for example, can certainly be used for illegal trade, but it is also the key way that remittances are transferred back to the country. Clamping down on it could thus further impoverish some of the country's poorest communities.[32]

Recommendations

Improvements in security are a precondition for the constitutional and electoral reform provided for under the Bonn Agreement. Measures to improve security must remain a priority. These should include:

- accelerating the formation of a multi-ethnic national army and police force and ensuring that these forces come under civilian control;

- establishing civilian control, unconnected to factional interests, of the intelligence services; and

- speeding up disarmament, demobilisation and reintegration. Responsibility for security needs to lie with the president and a broad-based National Security Council, rather than narrowly with the Ministry of Defence. The remit of international security assistance forces should be extended beyond Kabul, and their presence maintained for as long as is necessary.

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[32] Michael Bhatia and Jonathan Goodhand, et al. *Profits and Poverty: Aid, Livelihoods and Conflict in Afghanistan*, draft paper (London: ODI, 2002).

Strategies need to be developed to reduce warlords' power and control the illegal economy. These should include:

- supporting areas under civilian control and formally recognising non-warlord power through involving civilian representatives in all decision-making;

- halting all military alliances with and support to factions not actively integrating into the national government, and to those engaged in, or benefiting from, the trade in drugs and arms;

- taking steps to break the climate of impunity through law enforcement, protection measures and action against those who abuse human rights;

- developing a robust programme of drug control, including the destruction of stocks and heroin-making facilities. This should be linked to support for alternative livelihoods programmes, including clear contracts with communities; and

- beginning high-level diplomatic negotiations for a regional arms embargo and developing measures with neighbouring states to control all illegal cross-border trade.

3. Creating legitimacy and building the state

3.1 The need for legitimacy

At the heart of the debate on the constitution and elections is the wish to build a state that is peaceful and stable. To achieve this, the government must have a minimum level of legitimacy such that it can retain the active support of the powerful in society and at least the passive acceptance of the population in general. While many governments use coercive power to maintain control of the state, Afghanistan is too fragmented and competing factions have too ready an access to resources for this to be a real option. Achievement of legitimacy is a complex process. This report is concerned primarily with the formal systems of governance, including the constitutional and electoral processes. It will also be important to consider issues regarding fiscal policy and the reform of the public administration, including staffing and the pay of the civil service.

It is vital that the constitutional and electoral processes are seen to be designed and implemented in a transparent and representative fashion. The starting–point is positive. The Bonn Agreement enjoys a measure of legitimacy, is broadly accepted as an agreement negotiated in good faith, and as probably the best that could be achieved in the

circumstances. Part of its strength was, and still is, that it promised a transition to something that is clearly wanted: a broad-based government. Despite concerns that the AIA was less than representative, many Afghans believed that the ELJ would bring about a move towards a more broad-based successor administration. This did not happen.[33] The failure lay both in the process, which was seen to have been manipulated and thus of dubious legitimacy, and the result. Most Afghans believe that an individual responsible for war crimes should not be a member of government.[34] While the point was made (rarely by Afghans; more frequently by members of the international community) that many people have blood on their hands and that it is therefore difficult to know where to draw the line, there was no doubt in the eyes of Afghans that some members of the current ATA lie well to the wrong side of it.[35] As a result, while the country has a president whose acceptability for office is not contested, a number of key cabinet figures and local governors are deemed unacceptable in the eyes of many. The actions of the international community in dealing with these figures across a wide range of civilian issues serves to accord them a legitimacy that many Afghans find offensive. This has implications not only for the security transition, but also for the ability of the state to raise revenue, and for broader perceptions of legitimacy.

3.2 Providing services

Legitimacy will also require that the state be seen to deliver some benefits to its citizens. Years of war and, latterly, drought have devastated the Afghan economy and destroyed most of its service provision. After security, interviewees for this study identified jobs and a basic level of services, especially education, as their priority needs.[36] As President Karzai noted in an interview with Reuters news agency in July 2002: 'During my meetings [with officials and the people] so far, Afghans first asked for security and peace and to get rid of guns and then they asked for an improvement to education'.[37]

Yet there are clearly questions as to the extent to which the administration can undertake the activities needed to deliver tangible improvements. Capacity within the ATA is weak; staff are paid a pittance – around $35 to $40 a month – their skills have not been updated for over a decade, and many are not capable of the tasks now needed. Although the administration is not particularly large, and the ATA does not face the task of having to retrench thousands of public employees, reforming staffing structures and pay scales for the public sector is still a complex business. While the details are outside the compass of this report, it is clear that restoring a proper pay scale and a living wage, at least for senior staff, will be vital. Currently, the underlying salary is worth almost nothing, and what is of value – the food allowance – is the same for all employees. Donor funding has been used to improve the situation in some ministries, but in the absence of a systematic approach this has been done in a very *ad hoc* manner. Incentives have been paid in some sectors, notably health, and in some Kabul ministries there are a few highly paid staff completely outside the government payroll. Inevitably there are resentments, and a rationalisation of the various incentives and extraordinary payments is urgently needed. So too are other aspects of public administration reform, such as consideration of whether posts should be filled by merit (which many Afghans see as the ideal), or by a more pragmatic recognition of the various forces at play.

The administration needs a way of working which is accountable and transparent. Many Afghans speak with concern about the current levels of corruption. Connections are used to try and secure jobs – particularly well-paid UN and other agency posts – and bribes are required to accomplish many tasks. A World Bank paper notes that there is a danger that patronage-based appointments will become standard practice in Afghanistan's public sector.[38] Experience from elsewhere in the world shows that, unless corruption is dealt with, there is little reason for people to defend the state and a greater risk that conflict will resume.[39] Transparency is needed both at the centre and at local levels, where information should be posted in communities on what resources are coming in to projects and where they are going. Simple systems that reduce the scope for bribery in pursuit of a more advantageous position will be important. However, the problem of corruption is also bound up with the problem of pay: if the country's civil servants are not paid a living wage, graft is virtually inevitable.

Despite the obvious need, little progress has so far been made with the Civil Service Commission. In part this stems from the lack of clarity in the Bonn Agreement, where it was never established whether this body was meant to be a one-off initiative designed to tackle the inherited problems within the civil service, or a standing commission which would act as a brake on the executive, ensuring that appointments are not made on the basis of nepotism. Linked

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[33] This is not to deny that some good people came into the government. But overall, the transition that was required did not take place.

[34] This sense that such people should not be eligible for public office was also captured in the *loya jirga* rules.

[35] The same problem exists in all post-conflict situations; it did not, however, stop the international community from tackling the issue in, for example, the Balkans.

[36] The majority of interviewees were male. Had the sample included women it is possible that health would have ranked as high as education.

[37] *Reuters*, 11 July 2002. Afghanistan's education indicators are some of the worst in the world; in the southern provinces, less than one-tenth of the student population is female.

[38] *Rebuilding the Afghan Civil Service: Five Urgent Actions* (Washington DC: World Bank, 2002).

[39] William Reno, W*arlord Politics and African States* (Boulder, CO: Lynne Rienner, 1998).

to this is the question of its independence, or otherwise, from the government, including the ambiguous role of Vice-President Hedayat Amin Arsala, who is both a member of the executive and the chair of a body that arguably ought to be independent of government.

In addition to problems of capacity, there are also enormous challenges to service provision in such a large country with such difficult terrain. There is also an understandable urge to try to do many things in order to compensate for the years of neglect. This is a danger. The key to utilising limited capacity is to establish clear priorities. Everything cannot be tackled at once, and trying to do so wastes time and energy.

The ATA will need to be careful not to promise more than it can deliver. Two constraints will set the boundaries to what is possible: finance and capacity. Some hard decisions will have to be taken. To what extent does the government want basic services accessible to all, and to what extent will it allow inequality to develop? If the government wishes to have the resources to implement universal access to basic services, then it will be necessary to rule out some higher-level service development for which there will undoubtedly be political pressure. This is a question of human resources, as well as money. Unless clear decisions are taken, there will be an inevitable drift to better-quality services in urban areas, at the expense of the countryside.

The way in which aid resources are disbursed in Afghanistan will have important implications, both for long-term peacebuilding and for the immediate security situation. Increasing the coordination of such assistance, both among donors and between donors and the government, will be important. Strengthening support for the Ministry of Finance's attempts to centralise control of revenue and expenditure and to develop systems of accountability will be important in laying the foundations for a stronger and more legitimate central state, underpinned by an effective public administration. At present, separate lines of financing, to either individual ministries or to regional power-holders, undermine attempts to strengthen fiscal systems. As the ATA has requested, the national development budget should be the over-arching planning tool; all assistance should, again as has been requested, be recorded in the budget.[40] There is also a need for a much stricter prioritisation of measures that promote security and legitimacy. One of the problems this study identified was the common tendency to plan as if Afghanistan were already at peace. Attempts to develop comprehensive programmes across all sectors, in a country with limited capacity and still on the edge of war, have hindered progress on basic actions that would normally be a prerequisite for building confidence in the embryonic state.

Historically, the Afghan state has been highly dependent upon international resources to sustain itself. Its political vulnerability has in part derived from this dependence, which has obviated the need for successive governments to build legitimacy internally.[41] Currently, most of the potential state revenue that could be generated internally is from taxes on trade across borders. However, despite the government's attempts to negotiate for these customs to be remitted to the centre[42] most of this revenue remains with the regional power-holders who control the trade. Even with greater internal legitimacy, collecting these revenues would be difficult; as long as perceptions of illegitimacy prevail, however, the task may prove impossible. Without its own source of finance, the government will remain dependent on the largesse of the international community. The issue of relations between the centre and the regions in terms of respective responsibilities for raising and allocating public revenues will therefore be of critical importance in the design of the constitution, and will also have implications for the shape of political representation at central and regional levels.

Recommendations

Efforts should be made to broaden the political representation within the ATA.

UNAMA needs to retain a responsibility for the broader implementation of the Bonn Agreement.

The international community needs to fully support President Karzai as the legitimate leader of the ATA, and strengthen his position against factional interests.

Measures to improve the accountability of government and to limit corruption should be strengthened. These should include:

- developing simple and transparent procedures and systems for all state transactions, and making information on public expenditure publicly available;

- revitalising the Civil Service Commission and making civil service reform a priority;

- strengthening donor support for the Ministry of Finance's efforts to control public expenditure, including putting all donor contributions through the national budget; and

- ensuring that a diverse range of civil society groups have the freedom to operate. Greater efforts need

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[40] Ministries of Planning, Reconstruction and Finance *Working Draft, Plan and Budget, for 1381-82 National Development Programme,* 2002.

[41] Olivier Roy, *Islam and Resistance* (Cambridge: Cambridge Middle East Library, second edition, 1990), p. 17.

[42] Press briefing by Ashraf Ghani.

to be made to bring benefits to the provinces, particularly in basic services such as health and education. Donor assistance should support this by:

- much stricter prioritisation of the use of donor funds to ensure progress on basic services and job creation, and to support pro-poor development;

- ensuring that there is an equitable distribution of externally-supplied resources across the country; and

- maintaining a long-term commitment to funding at an adequate level to support reconstruction.

4. Designing and approving the constitution

The Bonn Agreement established a very tight timeline for the drafting and approval of Afghanistan's constitution. Under the Agreement, a Constitutional Commission was to be set up within two months of the establishment of the ATA to draft a new constitution. Within 18 months, a Constitutional *loya jirga* (CLJ) was to be convened to approve it.

4.1 The Constitutional Commission

At the time of writing, the Constitutional Commission has not been established; instead, the ATA has appointed only a technical drafting committee of nine members that will work for up to six months producing a draft of the new constitution. Once this initial draft is complete, a larger commission of up to 35 members will be appointed to revise it, before putting it to the CLJ. The first committee is to be composed of technical drafters, not 'politicians', but it is not clear how these technical drafters will decide on the major issues confronting the nation. It is important that they have the best possible access to experience from elsewhere in drafting constitutions and in implementing different structures. Possible areas to draw on would be experience in Kenya on constitution drafting, from South Africa on constitutional negotiations and from Colombia on federal options.

The exact functions and responsibilities of the Constitutional Commission are unclear, and the president's office has yet to issue a decree for it. It is clearly responsible for creating a draft of the constitution prior to the CLJ. Whether it will be responsible for aspects of the CLJ, public information and education or pre-constitutional consultation is unknown. Although this is not an independent commission, broad political representation is being promised. Once an ATA-approved draft is in place,

however, each change will be a battle. Ultimately, the CLJ will be responsible for approving the constitution, but it is far from assured that it will be a forum for meaningful decision-making.

4.2 The Constitutional *loya jirga*

The CLJ will be the second *loya jirga* to be held since the Bonn Agreement. The first, the ELJ held in June 2002, was mandated to complete three tasks: choose the head of state, decide the structure of the Transitional Authority and agree its key personnel. It was a mixed experience. The selection of delegates included a nationwide campaign of local nominations and secret balloting. This process came under significant pressure from local power-holders, frequently involving intimidation, the exclusion of women and, in some cases, violence. In the end, however, the 1,051 elected delegates to the *loya jirga* represented a diverse array across the political, religious and ethnic spectrums of Afghan society. This group was supplemented by approximately 550 appointed delegates. Many of these were also selected through equitable processes, such as elections of representatives from university faculties and refugee communities. The vast majority of female delegates were also selected. Many appointees, especially those added at the last minute, were representatives of military factions, who reduced the participatory potential of the *loya jirga* through intimidation.[43]

Ultimately, the ELJ delegates were given little opportunity seriously to address the issues before them. This disappointing result was largely due to behind-the-scenes orchestration, but was exacerbated by procedural confusion and poor chairing. The exact substance of decisions to be made had been vague since Bonn, most likely because many of the power-struggles evident at that conference were still unresolved. This lack of clarity was exploited by those wanting to expand or contract the agenda to suit their needs. In addition, the Loya Jirga Commission failed to produce clear or timely procedural rules. After weeks of delay, these rules were released only the day before the ELJ began. This delay, which was due to political wrangling, limited the ability of organisers and activists to learn and use the rules to their advantage. The result was several agenda-less days, chaotic speakers' lists and delegates frustrated at not knowing what, when or how they were to decide issues.[44]

Given the experience of the ELJ and the importance of the CLJ, four critical issues need to be addressed:

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[43] International Crisis Group, *The Afghan Transitional Administration: Prospects and Perils* (Washington DC: International Crisis Group, 2002).

[44] Interviews for this study. See also *ibid.*

1) the number of delegates and the means for their election, or selection;

2) the rules of procedure;

3) the structure, if any, of a pre-*loya jirga* consultative process; and

4) the body responsible for deciding and implementing these issues.

4.2.1 Selection of delegates

There has been serious suggestion in Kabul that, instead of fresh elections for the CLJ, members will be chosen from among the delegates of the ELJ. It is not clear whether this has been decided, or exactly why. Certainly the prospect of another nationwide delegate-election process would be daunting and would entail significant effort and expense. There is also concern that a new election would in fact be less fair than the first, given the deteriorating security situation and the increased confidence of commanders in the wake of the ELJ.[45] However, the UN itself declared the ELJ selection process flawed and subject to intensive intimidation, even before the additional, last-minute delegates were added.

If there is no new delegate election, how many delegates will be selected, and by what process? There will need to be some distribution criteria to ensure ethnic, regional and political diversity and gender equity. Overt ethnic quotas will be problematic, as there is a fundamental lack of agreement concerning the ethnic breakdown of the country. Geographic distribution can serve to some extent as a proxy for ethnic distribution, but not entirely; some parts of the country are very ethnically mixed, and there is already a struggle for control of some these areas.[46] An analysis of the ethnic breakdown of the delegate pool may be necessary to ensure that some parity exists. Attention also needs to be paid to issues of competence, and a number of seats should be reserved for representatives with specific expertise on some of the issues to be addressed.

The overall number of delegates to the CLJ will need to be reduced to create the possibility for effective debate, but selecting a reduced number of delegates from the existing pool of 1,051, plus the 550 appointees, could be difficult. Given that one of the accusations against the ATA is that it is not representative, allowing it simply to select all the delegates would be problematic. It may be better to have some system of elections by delegates

from within their own ranks, with some selections allowed by the ATA or the responsible body, such as the Constitutional Commission or an independent *loya jirga* commission.

In the event of voting among delegates, there should probably be a geographic division of the delegates for the election process. This could be either provincial or regional (based on the eight voting regions used for the ELJ selection process). In either case, each region or province would be assigned seats proportional to its total number in the overall pool. For example, if Herat province had 10% of all elected delegates at the ELJ (about 105), then it would be entitled to 10% of the elected delegates at the CLJ, whatever the size. According to this process, only those delegates who were elected at the district level for the ELJ – approximately 1,051 – would be eligible to be elected for the provincial/regional seats at the CLJ. The provincial governors, added to the delegate total at the last minute prior to the ELJ, could be added to the provincial election process or left to selection by the government, if it so chooses.

Holding elections from within each provincial delegation ensures that the delegates will know each other, and so their decision-making process will be very informed. It would also allow for regional/ethnic balancing within the province – thus utilising inter-communal negotiation and balancing to arrive at a politically equitable or 'accurate' solution. However, experience at the ELJ shows that the process of electing delegates from within each overall provincial delegation may be problematic. Many of the district-based elections were tainted by political intimidation, and there were attempts to compel provincial delegations to take certain positions. It may not be realistic, therefore, to believe that independent candidates will be able to have themselves elected by their provincial delegations to the few seats available to them. Several *loya jirga* delegates interviewed for this study stated emphatically that they and other independents would not get through a provincial voting process among the delegates. The majority of delegates, they assert, are already 'government' people (i.e., supported by local power-holders), and the likelihood of significant pressure by regional commanders would cause the remaining independents to drop out. If this were the outcome, would the ATA be willing to use its appointments to balance this?

Alternatively, the delegate election could be held on a regional basis, according to the nine electoral regions used for the ELJ. This could allow independent delegates to pool their votes to ensure that independents are elected. However, regionalising the approach without distribution requirements risks cutting out certain groups or provinces. The outcome would be dependent on the method of voting used.

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[45] Interviews for this study.

[46] For example, interviews for this study in Maimana and Mazar revealed a clear struggle between Jamiat and Junbish for control of a number of districts.

In either case, the remainder of the seats would be subject to selection by the ATA, the Constitutional Commission or a new Loya Jirga Commission. Given the substantially reduced number of appointments possible, it will be difficult for the selecting body to include key players and provide balance. As very few women were elected through the district polls, and so few would be likely to be elected for the CLJ, a substantial number (perhaps one-third) of the appointments would have to be women to at least maintain their minimal 11% representation from the ELJ. At the same time, the ATA will undoubtedly want its approximately 35 cabinet members, and the Constitutional Commission of perhaps another 35, present.

4.2.2 Rules of procedure

According to historical accounts,[47] the constitutional *loya jirga* convened to approve the 1964 constitution was a very open forum that debated and reviewed each article before amendment and passage. This *loya jirga*, which had 452 delegates, discussed and voted on its rules of procedure before the start of the debate. Among those rules, dissenters were allowed to submit written opinions for posterity.

The 2003 CLJ will require effective rules of procedure to ensure that an orderly debate allows constitutional issues to be fully aired, amended and voted on. The chair and secretariat of the CLJ must be thoroughly versed in these rules so that they may be enforced effectively, and delegates must have sufficient command of the rules to use them to their advantage, and to prevent their abuse. The experience of the ELJ demonstrates the importance of the enforcement of effective procedural rules. Ultimately, poor understanding and enforcement of the ELJ rules contributed to the exclusion of delegates from key decisions, and unbalanced representation on the dais.

4.2.3 The pre-*loya jirga consultative process*

There are competing views about whether the constitutional process should be opened to debate and wider participation within Afghan society. Some argue that the constitutional process must be broadened to incorporate diverse views and to allow for popular political participation. To that end, debate over fundamental constitutional issues should occur throughout Afghanistan. The process will be perceived as more legitimate when interested parties feel that they have had their say, even if there are tight controls on the outcome of the debate. Others argue that injecting confrontational issues into the political process could

be destabilising, or could undermine progress on sensitive issues. There is a perception that a few controversial issues could cause the forces of moderation to lose ground on a host of other matters. Therefore, the preference would be to keep debate on controversial issues out of the public sphere.

At present, it appears that neither the government nor UNAMA has plans to carry this debate to a broader group. Others, however, are planning to hold training sessions, consultations and even working groups to try to contribute to the process from the outside. They also plan to disseminate information about the constitutional process, including drafts and possibly commentary thereon. While the work of such independent groups is important, and could prove critical to expanding the debate, leaving this process to non-governmental groups, whether NGOs or political organisations, could provide an uneven and ultimately more polarising result. Ultimately, controversial issues will affect and infect the debate and its outcomes; how to deal with these issues is thus a key question.

If there is going to be a broader consultation aided by the ATA and the UN, the previous *loya jirga* representatives may have an important role to play. Information about the constitution, including a draft, could be disseminated broadly prior to the CLJ, and representatives and members of the Constitutional Commission could participate in public forums about the constitution. There is substantial experience that can be drawn upon, including the use of radio (such as BBC World Service programmes like *New Home, New Life*), mobile cinema, cassettes for use in mosques and newsletters with distribution based on existing transport networks, as was done for the ELJ.

4.2.4 A Loya Jirga *Commission?*

The previous sections raise fundamental questions about the organisation and conduct of the CLJ, including the selection of delegates, the establishment of rules of procedure and delegate training. An independent Loya Jirga Commission was responsible for these tasks in preparation for the ELJ. It remains unclear what entity will be responsible for these issues for the CLJ.

The Constitutional Commission will have a significant responsibility in taking care of the constitutional process. It is also not an independent commission. To ensure that the critical preparatory work for the CLJ is done well in advance, either an independent *loya jirga* commission should be appointed, or a *loya jirga* committee with a substantial secretariat should be created within the Constitutional Commission.

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[47] Louis Dupree, *Afghanistan* (Princeton, NJ: Princeton University Press, 1980).

Recommendations

Drafting committee
Consider bringing in specialists with experience from other countries to discuss the various constitutional options with the drafting team, and share experience from elsewhere of implementing these.

Constitutional Commission
There needs to be a clear delineation of the functions and responsibilities of the Constitutional Commission. The ATA should issue a detailed decree, as it did with the Human Rights and Judicial Commissions, laying out these duties. The primary tasks to be assigned to the Constitutional Commission, or delegated elsewhere, are:

- preparing the draft constitution;
- preparing and organising the CLJ, including the rules of procedure and delegate selection and training;
- conducting a national consultation process on the draft constitution; and
- conducting a public information and education campaign concerning the constitution.

It would be useful for the secretariat of the Constitutional Commission to undergo a planning exercise to ensure that its budget and staffing levels are sufficient to accomplish its assigned tasks within the timeframe presented.

Pre-loya jirga *consultative process*
The ATA and the UN should work together to establish a process of consultation throughout Afghanistan prior to the CLJ. This process should get under way at least six months before the CLJ.

Educational/informational materials regarding key issues should be produced in relevant languages. These should include a draft constitution, descriptions of the key issues at stake and the process itself, and for and against arguments concerning the key issues.

A public-information campaign should be developed, including extensive use of radio, cassettes, mobile cinema and newsletters. Funds should be directed to civil society initiatives to encourage dialogue on the constitutional process.

The CLJ
The process of deciding how to select CLJ representatives should be transparent and consultative. The selection of delegates will need to ensure a degree of diversity (ethnic, geographic, gender and political) reflecting Afghan society. Serious consideration should be given to having some form of election for a substantial portion of the delegates.

In order to allow for thorough debate on key issues, there should be a workable number of delegates, perhaps fewer than 500, as with the loya jirga convened to approve the 1964 constitution. These should be chosen well in advance of the CLJ in order to have sufficient time to familiarise themselves with the draft constitution and the rules of procedure, and to carry out extensive local consultations.

Rules of procedure should be produced well in advance of the CLJ, and a technical committee should be formed early on with responsibility for drafting these, which would then be approved by the appropriate authority. There should be intensive training for a CLJ secretariat that will advise the chair and deputy chairs on the rules during the CLJ, and the delegates should also receive training on the rules of procedure.

Loya jirga *organisation*
Either an independent Loya Jirga Commission or a Loya Jirga Committee with a substantial secretariat within the Constitutional Commission should be created early on in order to ensure that critical aspects of the planning for the CLJ are not subject to delay due to political wrangling or an overburdened Constitutional Commission. This entity should be given responsibility for developing a delegate-selection process.

5. The structure of the government

5.1 The degree of centralisation

A key element of Afghanistan's political future concerns the extent to which governmental authority will be centralised or decentralised. This question is critical in both a formal sense, as it will have an impact on decisions in the institutional design process, and in a practical sense, as ideas of a strong central government confront the reality of strong regional autonomy created by the turmoil of the last 23 years. Ethnic groups that were relatively disenfranchised in the past now have autonomous military, and to a lesser extent political, structures. The party structures that grew up in the *jihad* have at times functioned as mini-state governments, carrying on foreign relations, issuing visas and even printing currency.

Throughout Afghanistan, most people interviewed for this study expressed a desire for a strong central state. The reason they gave was related to the level of interference from Afghanistan's neighbours, who are seen as being responsible for much of the disintegration and destruction in the country. This wish was, however, always accompanied by demands that it be fair and not ethnically biased. Given the levels of dispute about the numbers of each ethnic group, it is highly unlikely that any central government will be able to satisfy all on this account. Defusing the tension thus created will in part rest on having alternative loci of power, where local and regional power-holders feel that they can exert a measure of control. Failure to create such loci risks causing those regions to seek alternative political arrangements through force.

The historical reality is that power in Afghanistan has almost always operated through a negotiation between the central authority and local power-holders – and tensions between these two levels have existed for as long as there has been a state. Even the Taliban, which exerted a greater measure of central control than its immediate predecessors, was forced to negotiate with local elites and accept a degree of local autonomy. Most of Afghanistan has always been remote from the centre, and the infrastructure is insufficient to impose high levels of central control. Moreover, centralisation has never been popular. This is due in part to strong local social organisation and a tradition of independence, which means that decisions imposed from outside are usually resented locally. Distrust of central government is also based on the experience of authoritarianism and brutality.

The concept of a 'strong' central state, therefore, needs refining. What does strength mean? Systems that work through power-sharing and negotiation can be stronger than those that seek to impose by decree and force. What exactly needs to be centralised, and how? In interviews with Afghans around the country, there was virtual unanimity that national defence, foreign affairs and finance

were all matters for the central state. Issues considered appropriate for the local level included police, health, education, the management of natural resources and cultural policy. The need to guarantee basic rights in the new constitution for each minority was often stressed.

Several of Afghanistan's minorities have argued for a federal-type system that would grant relative autonomy to various regions of the country. However, 'federal' options are seen by many as dangerous at the present time. Even advocates of federalism tend to argue that the state first needs to be consolidated, foreign interference brought to an end and fiscal control established; only then, they say, can one decentralise. Without an established centre to relate to, there is a danger that decentralisation will simply be a licence for continuing fragmentation. The election or appointment of provincial governors, mayors and district administrators was also a frequent topic. Historically, provincial governors were appointed from the centre and were often not from the area they governed. Central appointments often caused tensions with local leaders; indeed, some of the first armed clashes following the introduction of the AIA occurred over the appointment of a governor in Khost province. Interviews found opinion split on the issue of cross-province appointments. Many believed that it was necessary to have non-local governors and administrators to avoid corruption, especially in the current situation, while others felt that centrally-imposed governors tended to undermine local political dynamics. Yet others felt that, while in principle officials should be able to cross boundaries, in the current climate of uncertainty people not only needed 'their own person' in power, but also that those from outside would not be allowed to govern. In order to work through this issue in greater depth, the ATA may consider establishing an additional body – a Commission on Local Governance – to assess these issues. This could:

- build on what leadership is intact at the level of province or below;

- address the specific challenges of dividing responsibilities between the centre and the provinces and districts;

- foster local participation in national reconstruction; and

- ensure local participation in national institutions and decision-making.

In addition, the administrative staff of central authorities, such as governmental ministries, should be appointed in consultation with local authorities.

Because so much of Afghanistan is difficult to access, local structures and tribe and kinship networks remain important, and central power has always had to come to some form of accommodation with them. Among tribally-organised Pashtuns, the *jirga* or tribal assembly has long existed as a consensus-building device for resolving particular problems, and similar councils (*shura*) have existed among non-Pashtuns as well. To those schooled in such institutions, the central state was long a remote actor, and while it

developed a ubiquitous presence in rural areas, its agents tended to be cautious about contesting deeply-held local convictions. In addition, the Afghan state was corrupt and inefficient, and its provincial representatives little more than what one observer called 'weak links on a rusty chain'.[48]

The strength of the *jirga/shura*, how often these bodies meet and the range of issues they deal with vary from place to place. They can exist at all levels of society, from the village or sub-tribe up to the provincial and eventually, in the institution of the *loya jirga*, national levels. Membership depends both on place and on the issues being resolved. Sometimes all adult males participate; in other places representatives are chosen, usually including elders, religious figures and people with some education; in yet other situations the *shura* has been captured by the elite or by the local commander(s). In a few places (in pre-Taliban times) women would attend and speak, but this is rare and women usually assert influence through their husbands or other male relatives. Sometimes parallel women's *shura* have been set up, usually through the influence of assistance agencies. Decisions are reached by consensus, though it is not necessarily the case that everyone is involved in this process. The authority of the *shura* is usually well respected, even though they have no power of arms with which to enforce their decisions. Even in the case of armed conflict, they have often proved able to negotiate a cessation of local disputes, though they have little power in the face of a major offensive. Ordinary citizens' access to power has generally been through these channels. They form a core component of governance in Afghanistan, and have the potential to be an important resource in any recovery and reconstruction. Indeed, many NGOs and the UN have for years run local programmes through, or with the involvement of, these local institutions.

The lowest rung of government administration is the district (*uluswal*). Each has a governor (*uluswali*) appointed by the provincial governor and, in theory at least, ratified by central government. This structure mostly survives intact, although in some districts control has become fragmented. The departmental structure also exists at the district level, although the number of departments actually represented varies, depending in part on how remote the district is. At a minimum, districts have a finance office, with responsibility for collecting taxes and paying salaries, and a court. Departments do not have independent budgets at district level, and sometimes they exist in name only, having no staff except a nominal 'director'.

[48] Hasan Kakar, 'The Fall of the Afghan Monarchy in 1973', *International Journal of Middle East Studies*, vol. 9, 1978, pp. 195–214; Thomas J. Barfield, 'Weak Links on a Rusty Chain: Structural Weaknesses in Afghanistan's Provincial Government Administration', in M. Nazif Shahrani and Robert L. Canfield (eds), *Revolutions and Rebellions in Afghanistan: Anthropological Perspectives* (Berkeley, CA: Institute of International Studies, University of California, 1984), pp. 170–84.

At the provincial level, the extent and capacity of administration vary enormously across the country. In part this has a historical base, but it also relates to present-day levels of locally-generated resources. Central government has as yet given little in the way of resources to the provinces, with the result that those who sit astride lucrative trade routes do well, and those that do not suffer. Provincial governors were traditionally in a position of considerable authority as provincial department heads reported to them, and through them to central government. Budgets were agreed at the provincial level and then with the Ministry of Finance. Cities were treated separately as municipalities, although the degree of autonomy from the province is unclear. In many places technically well-qualified people have come back at this level, usually one-time refugees in Iran or Pakistan. Potentially, these individuals are a great resource for the development of Afghanistan.

In addition to the central–local dynamic that has always existed, the past two decades of war have seen the development of a third layer of power, that of the region, with some areas emerging as semi-autonomous zones. Although this autonomy was to some extent reined in by the Taliban, it has resurfaced since they lost control of the country. This is where warlord power is at its most obvious, with some of those in charge commanding very significant resources, currently far more than the government. In parts of the country there is conflict between regional warlords over control of resources. In practice, many provinces come under the control of regional centres. For example, the Governor of Herat, Ismael Khan, effectively controls not only Herat, but also parts of the neighbouring provinces, Badghis, Farah and Ghor. The same is true for the governors of Mazar, Qandahar and Jalalabad. The resources at stake are part of the war economy that has developed, and include drugs, arms and unregulated trade.

The years of war opened up a gap between the local and the central structures, with little connecting them. Central government ceased to have anything to offer provinces, let alone districts. Part of the political challenge will be re-establishing that connection, and doing so in a legitimate way. In this, one of the key issues will be whether central government relates directly to the provinces, or goes through a regional level. There are arguments for both. Many people at a provincial level preferred the idea of central government relating directly to them rather than through a regional layer, fearing that the latter would disadvantage them further. Others argued that there was illegitimacy at the centre as much as at the regional level, and that it was easier for a province to influence the region than the centre.

Strangely in some ways, alongside the *de facto* devolution of power there is a high degree of administrative centralisation. The payroll for government employees at local level comes from the centre, and before the state began to disintegrate all taxes were remitted to the centre. In theory at least, everyone interviewed at the local level still

appears to believe in this, even when their practice is quite different – a contradiction perhaps best understood as a sign of how, despite all the problems of the last 23 years, Afghans still believe in a unified state.

5.2 The executive and the legislature

The fragile political situation in Afghanistan suggests that the design of the government should be such as to maximise representation and stability and reduce the tendency towards conflict and the risk of capture by illegitimate means. The attempt on President Karzai's life in Qandahar in September 2002 all too clearly highlights how any structure must not only take into account Afghanistan's possible political evolution, but also the possibility of political violence. Safeguards to ensure that any acting head of state cannot automatically assume the presidency, and collegiate systems of government which avoid vesting too much power in one person, may be important in maintaining a degree of stability.

Power-sharing will be a critical aspect of the resolution of Afghanistan's conflicts and the consolidation of peace. Numerous mechanisms can be put in place to lock potential spoilers into the government. The executive can be made into a 'grand coalition', proportionally allocating cabinet posts and deputy ministerial posts based on election results. A system of 'mutual vetoes' or 'unit vetoes' could permit each significant subgroup a veto over all major policies. Consultation mechanisms between representatives of major ethnic groups can be established (such systems ensure buy-in by all significant groups but run the risk of stalemates).

5.2.1 The executive

The 1964 constitution provided for a constitutional monarchy, whereby the king had ultimate executive authority (the power to declare war, sign treaties and dissolve parliament, for instance); the prime minister administered the executive authority; and the parliament had broad legislative and executive oversight powers for the budget, the ratification of treaties and the approval and dissolution of the executive.

Given that substantial authority was in the hands of the monarch, the election of the executive and the exercise of executive power will be substantially different in the 2003 constitution. The 1964 constitution granted the following powers to the king: command of the armed forces, declaration of war, convening of *loya jirga*, dissolution of parliament, absolute legislative veto, signature of treaties, appointment of the prime minister and cabinet, appointment of one-third of the upper house (the *Meshrano Jirga*) and its president, appointment of the chief justice and justices of the Supreme Court, appointment of judges and high-ranking military officers,

appointment of ambassadors and government representatives abroad, declaration of a state of emergency, and pardons. Some of this impressive catalogue of powers will undoubtedly have to be removed from the person of the chief executive, and altered or redistributed among the branches of government.

Many of the powers articulated in the 1964 constitution will probably be constrained to promote a balance between legislative and executive authority:

• the prime minister, if there is one, is likely to be chosen by the legislature;

• the cabinet of a president may be chosen by the president, possibly with the approval of the legislature (or part thereof), whereas the cabinet of a separate prime minister may be chosen by the prime minister or by the legislature;

• the veto power of the executive may be overridden by a legislative majority;

• the power to dissolve the legislature will be removed or constrained;

• the power to appoint members of any house of the legislature may be removed;

• the appointment of ambassadors and other representatives of the state may require legislative approval;

• the appointment of justices and judges may require legislative approval; and

• the signature of international treaties may require legislative approval.

Executive control over the military and the security forces, combined with the subordination of those forces to civilian rule, will be an essential element of Afghanistan's move towards peace and stability. Constitutional authority over the security forces will not be sufficient. The relationship between the chief executive, the minister of defence and the chief(s) of the military services should be institutionalised within, or concomitantly to, the constitution. Key issues include command and control, powers of appointment, the power to declare martial law or states of emergency and succession. Critical issues to be addressed include mechanisms that can ensure that confrontations within the executive over security issues are resolved peacefully, and the procedures required to authorise the use of military force.

One of the key choices is whether there will be an independently elected head of state, a prime minister (selected by a majority/majority coalition of parliament), or both. Given that there is little patience in Afghanistan for unresponsive authoritarian rule and an inherent mistrust of a strong executive, power-sharing mechanisms will be needed to ensure broad participation, while not leaving the executive bereft of decision-making authority.

There are essentially three options for the executive:

- *A pure presidential system*: the head of state and head of government are one and the same. The president is elected directly by popular vote; the executive is not subject to a no-confidence vote by the legislature (barring impeachment) and is elected for a constitutionally prescribed period. The executive is represented and dominated by the powerful, unitary figure of the president.

- *A pure parliamentary system*: the head of state and head of government are the same. The prime minister can be selected by the majority party or coalition in the legislature, or in some cases can be elected directly. The executive is subject to removal by a no-confidence vote of the parliament. Depending on the structure and make-up of the legislature and the cabinet, this tends to be a consensus executive, and relatively weak or strong depending on the strength of the prime minister's party. This model may also incorporate a largely ceremonial president.

- *A semi-presidential system*: the head of state (the president) is directly elected by popular vote, while the head of government (the prime minister) is selected by the legislature. The head of state controls defence and foreign policy, while the head of government controls administration and most domestic policy issues. The strength of the president and prime minister will depend on the duties assigned to each, the relative strength of their respective parties and the political or party differences between them.

Trust in the electoral process is a fundamental feature underpinning a successful presidential system. The authority of the executive over the government is tempered not so much by immediate obstacles (like the need for legislative approval) but by the prospect of future losses at the polls. Bad policies or bad results elicit no immediate sanction, and so faith in future elections is essential to accountability. Given Afghans' limited experience with electoral politics and the fragility of the current situation, this faith is not likely to exist at the outset. Nor is it easy to see how a direct election for president could be a meaningful exercise of political choice in a country where national politics is as yet little developed and the means of communication is limited. The concentration of power in the hands of one person is also potentially dangerous in an unstable political situation as it increases the rewards of illegitimate capture of the presidency, and thus increases the risk of this happening. A presidential system where the executive and the majority in the legislature are from different parties can also lead to paralysis, a particular problem if the legislature controls the budget. Using legislative control over the budget as a brake on the executive could also make impossible strategic thinking over financial decisions, as the budget would become subject to trade-offs between the various parties.

There may be a perception that a strong executive is needed to bring the military and various armed factions under control. This may be true if a majority of groups participate in a new government and executive independence is necessary to overcome factional pressures. However, because the executive may well be 'another faction' in the eyes of many Afghans, overly concentrated power and the ability to act unilaterally could undermine the entire process, or tilt dangerously towards despotism. Ultimately, government stability in Afghanistan will be the result of compromise, not electoral victory. It is difficult to see a presidential system making the necessary compromises in the short term. A semi-presidential system is similarly problematic, as it creates two power centres with the potential for destabilising conflict between them.

The need to involve an array of groups and factions in the governing process suggests that a consensus-based approach may be necessary. Given the atomised nature of Afghan political organisation, it seems likely that the legislature will be made up of multiple parties, with none gaining a clear majority. Thus, the executive in a parliamentary system is likely to be the result of a potentially fragile coalition, with the danger that this will lead to instability.

In discussions around the country, most people seemed to prefer a strong executive prime minister with a role for a ceremonial president who could serve as mediator, respected elder and − hopefully − a symbol of national unity. However, the presidential ambitions of certain faction leaders may push them to support a presidential system, even though they may be unwilling to deal with a rival victor.

5.2.2 The cabinet

In any executive system, the cabinet may or may not be subject to the approval of the legislature. In a presidential system, the cabinet serves at the president's pleasure as a group of advisors. The appointment of ministers may require the approval of part or all of the legislature, but generally dismissal will not. In a parliamentary system (the 'collegial executive'), the prime minister may or may not have control over his ministers. Indeed, where the executive is a coalition arrangement, the division of ministerial posts will reflect the make-up of the coalition or even the parliament, and changes in the cabinet may endanger the stability of the government as a whole. Thus the prime minister may not have the political or constitutional authority to dismiss cabinet members.

As the most consistently visible manifestation of government, the executive branch will reflect the status of inter-group relations for many observers. An executive branch dominated by a certain group is likely to prompt discontent among many. At the same time, the executive is the focus of accountability. Effective responses and accountability are less likely when ministers and their key

staff are entrenched as a result of political deal-making, and thus not in fear of losing their positions.

As this relationship remains unclear within the ATA, the relative power of its executive offices is a cause of constant speculation and concern. At present, the executive authority remains the sole locus of real power within the government structure. The make-up of that authority must reflect the power relations holding the peace process together. However, one of the key purposes of constitutional design is to institutionalise the mechanisms for resolving conflict. In other words, tools must be created to allow power struggles within a divided executive to be resolved. These might include coordination councils on key issues such as defence or reconstruction; the appointment of mutually agreed mediators; or a fair division of power to ensure balance. There are no such effective institutional tools within the ATA at present. Consequently, in the face of tension or ineffectiveness the executive is unable to act, and thus sacrifices its ability to govern and its credibility.

5.2.3 The legislature

The legislature is crucial in ensuring a balance of power and in protecting the system from tendencies towards despotism or the risk of capture by illegitimate means. The legislature needs to be able to dismiss the executive, but the threshold for this needs to be high or instability will ensue. One way of achieving this is to make it a condition that it then has to be re-elected itself.

The 1964 constitution envisioned a bicameral legislature with a directly elected larger lower house, the *Wolesi Jirga* (House of the People) and a smaller upper house, the *Meshrano Jirga* (House of Elders). Due to the extremely short trial period of the 1964 model, the modalities of power-sharing between these two houses or between the executive and the legislature were never fully explored. Worse, the upheaval which followed the 'New Democracy' period in the 1960s[49] did not inspire confidence in power-sharing arrangements in the mind of many Afghans.

In the 1964 constitution the lower house, whose 214 members were directly elected from single-member electoral districts, held the dominant legislative position. The upper house, with 84 members, was designed to provide representation to particular interests (see below). The upper house was comprised of one-third directly elected one from each province, one-third elected by each provincial assembly (which were to be established in each province) and one-third appointed by the king, thus providing disproportionate representation according to province, and to the king. The upper house participated in the legislative process, but could be overridden by the lower.

The primary reasons for creating two houses within the legislature are:

1) To provide representation to particular interests that may not be represented through elections held according to principles allocating equal representation based on population (for instance, to provide specific geographic or ethnic representation).

2) To check the legislative process through mechanisms for delay, negotiation or balance.

3) To provide a small deliberative body to approve certain executive actions (for example, the appointment of judges and ratification of treaties).

The issue of provincial representation remains live, albeit confusing. Provincial boundaries have been radically redrawn several times in the last century, and current practice has been to create more provinces to accommodate factional and ethnic interests. Three provinces have been created in the last few years, and there are said to be proposals for two more. In some areas, districts have been subject to even more change. There were deep suspicions during the *loya jirga* process that district boundaries and population estimates were being manipulated to over-represent certain groups. Thus, the desire for provincial representation may be a bulwark against perceived manipulation by those who control the 'districting' process, and may speak more to uncertainty about ethnic demographics than the relevance of the provinces themselves.

During and after the ELJ there was an attempt to create a quasi-legislative consultative body, a *Shura-i-Milli*. A vote on the type, powers and membership of this body was stopped by Karzai for fear that it would usurp executive power and sow dissent during the transition. After the ELJ some 45 delegates were selected to stay behind to work on this issue, but it was quickly abandoned and there is little expectation that the group will convene again before the elections.

5.3 The *loya jirga*

The constitutionally-defined *loya jirga* occupies an interesting place in Afghan political culture. Under the 1964 constitution, it was composed of both houses of the legislature, and of the chairman of each provincial assembly. It is something of a 'super-parliament', a manifestation of the will of Afghan society so complete that it is capable of standing in for a dissolved government or choosing a monarch when there is no clear successor.

The notion of one *ad hoc* institution that can trump the entire political process is interesting if it could be designed so as to avoid abuse. Unfortunately, the ELJ demonstrated that the institution is highly susceptible to capture by

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[49] See Dupree, *Afghanistan*.

undemocratic and unrepresentative forces. If the *loya jirga* is not included in the constitution, there is a risk that this institution, so familiar to many Afghans, could arise as an extra–constitutional threat to the political order. If included in the constitution, however, it could remain a formidable hurdle to government stability if used to trump governmental authority.

Recommendations

There is a need to aim for government structures and systems that maximise representation and stability and reduce the tendency towards conflict. This should include:

- creating power-sharing mechanisms between Afghanistan's various groups, taking into account both the short-term needs of the transition and the long-term needs of Afghanistan's people;

- balancing governmental authority to ensure stability and burden-sharing, and ensuring that the necessary checks are put in place so that individual branches of government remain within the bounds of their authority;

- paying close attention to the ramifications of the design of the executive on the process of political transition. It is likely that a strong executive branch that incorporates power-sharing mechanisms such as a multi-factional cabinet and a degree of responsibility to the legislature will prove most effective; and

- institutionalising mechanisms to resolve disputes within the executive over such issues as departmental authority and powers of appointment and dismissal.

The ATA should consider establishing a Commission on Local Governance to:

- build on what leadership is intact at the level of province or below;

- address the specific challenges of dividing responsibilities between the centre and the provinces and districts;

- foster local participation in national reconstruction; and

- ensure local participation in national institutions and decision-making.

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6. The judiciary and the justice system

Afghanistan's formal justice system has been influenced, to varying degrees, by Western (mainly French) legal thought, moderate and fundamentalist Islam, and Marxism. These influences largely reflected the values, ideologies and politics of the various Afghan governments. Thus, in the 1950s and 1960s the justice system was modernised and secularised, and state law rather than *Shari'a* became its primary source. After the military coup in 1978, the Marxist government attempted to introduce a Soviet–style judicial system, but these changes were rejected before they took root. The subsequent *mujahideen* regime of 1992–96 reinstated *Shari'a* as the basis of the state, and this was further entrenched by the Taliban's theocratic regime. Nonetheless, while most of these regimes have partly used their systems of justice as tools for achieving their political goals, they have nevertheless contributed to the richness of Afghan legal culture, and there is much within these different doctrines and approaches that can be fruitfully used in a new justice system.

Under the 1964 constitution, the judiciary was to be a fully independent and co-equal branch of government, and the Supreme Court was to be the highest judicial authority in the country. The judiciary was charged with applying the laws and constitution of Afghanistan, and its writ of jurisdiction was broadly worded – explicitly including litigation brought against the state. The state was required to enforce all judgements. The constitution also included safeguards against judicial overreaching, such as public trial provisions and a requirement for the legal rationale for a verdict to be disclosed. The supremacy of the constitution and the laws of Afghanistan was made clear in Article 102; all justices were appointed by the king on the recommendation of the chief justice. These appointments could be reviewed every ten years by the king, otherwise the only possibility of removal was via impeachment.

In reality, Afghanistan's judiciary, in the short time it had, achieved neither independence nor coherence. The judiciary faced three primary obstacles in its development. First, there were far too few qualified judges and lawyers to ensure the fair and even application of the law. Second, local traditional practices for resolving disputes were entrenched, and undermined formal judicial power. In many cases, this meant that judges either supported the local practices, even when at odds with the law, or they became irrelevant. The third obstacle to independence was the pre-eminence of the king and the prime minister.

The years of conflict have almost destroyed the formal justice system. There has been extensive damage to buildings, office furniture, official records, stationery and other essential equipment. The country's intellectual infrastructure has been devastated; many qualified lawyers and judges have left the country, seeking refuge in neighbouring states and in the West, and the number of

Box 4: *Shari'a* and the Afghan justice system

Shari'a has played an important role in the development of the Afghan justice system since the emergence of Afghanistan as a politically organised society. The purest, divine sources of *Shari'a* are the *Quran* and the *Sunnah*. The first refers to the holy book of Islam, and the second to the statements and deeds of the Prophet Mohammad. Taken together, these seemingly do not make up a comprehensive legal code. However, they do lay down general principles as well as specific rules that are subject to interpretation and analysis. Through this interpretation, *Qiyas* and *Ijma* were added as secondary sources of *Shari'a*. In the context of Islamic jurisprudence, *Qiyas* means analogical reasoning; in other words, cases and questions not apparently answered by the primary sources were deduced from similar original cases in the *Quran* or, in the *Sunnah*, through reasoning by analogy. The fourth source of *Shari'a*, *Ijma*, means the consensus of Islamic jurists on a ruling. When qualified Islamic jurists reached a unanimous agreement, their opinion became binding with absolute authority. In this way the outcomes of both *Qiyas* and *Ijma* were transformed into statements of divine law. This has, in turn, resulted in the documentation and compilation of hundreds of cases and books used today as references in Islamic jurisprudence.[50]

In the process of the consolidation of Afghan state institutions, particularly in the early twentieth century, the *Hanafi* School, alongside traditional customary laws, provided the basis of the Afghan justice system. This version of *Shari'a* existed in symbiotic relationships with Afghan customary laws and with 'folk Islam', which generally reflected the cultural, social and economic realities of the everyday life of the people of Afghanistan. *Ulama* (Islamic scholars) interpreted this version of Islam and the *Shari'a*, and also worked as *Qadi* (judges) in state courts.[51] However, in order to have control over the *Ulama* and over their interpretation of Islam and the *Shari'a*, the government established the official institution of *Jami'at-al-Ulama* (a society of Islamic scholars/jurists) and the state-funded Islamic *madrassa* of *Darol Olum–e-Arabi* and *Abu Hanifa* in Kabul.[52] While *Jami'at–al-Ulama* members who were paid very handsome salaries or privileges endorsed the government's policies, the two official *madrassa* trained students of Islamic theology and jurisprudence as *Qadi*.

In the 1950s and 1960s, Afghanistan's rulers started to modernise the justice system in line with those of the Western world. The model that was chosen closely resembled Egypt's, which was strongly influenced by the French and Ottoman legal systems.[53] Judicial personnel studied at the faculties of Islamic Law (or Law and Political Science) at Kabul University. Thus, the graduates of *Darol Olum–e-Arabi* and *Abu Hanifa* were eligible to work as judges and prosecutors only after they had studied modern law as well as Islamic jurisprudence at the Faculty of Islamic Law. Similarly, students at the *Qazayee* and *Saranwali* (judiciary and prosecution) branch of the Faculty of Law and Political Science were trained to work as judges mainly in the commercial and administrative sections of the judiciary. In addition, from the early 1960s all these graduates had to take a nine-month legal training course (including three months' on-the-job training), called *Kadre Qazayee*. Some working legal professionals/judges and lecturers at the faculties of Islamic Law and Law were also sent to the US and Egypt for further training. This modernisation process accompanied the codification of many of Afghanistan's laws in the 1960s and 1970s.

This process gradually resulted in the secularisation of the Afghan justice system, especially in the areas of criminal law, commercial law and general civil law. Thus, state law rather than the *Shari'a* became the primary source of the justice system. The 1964 constitution confirmed this hierarchy by making the constitution and the laws of the state supreme. Nevertheless, *Shari'a* remained the secondary source, as Article 69 of the 1964 constitution states: 'In area[s] where no law [passed according to the constitutionally prescribed method] exists, the provisions of the *Hanafi* jurisprudence of the *Shariaat* of Islam shall be considered as law.' While this justice system reflected a balance between *Shari'a* and modern legal norms, its administration involved long delays, bribery and corruption. Many Afghans, particularly in rural areas, avoided contact with the state's judicial institutions.[54] After the 1978 military coup, the Marxist government attempted to introduce a Soviet-style judicial system. However, since the Marxist regime was at odds with both Islam and Afghan traditions, the whole system of governance and its judicial reforms (decrees) were rejected en masse before they took root. After the collapse of Najibullah's regime, the *mujahideen* government of 1992–1996 declared *Shari'a* to be the basis of the Islamic State of Afghanistan. Although the various *mujahideen* groups interpreted Islam in conflicting ways, most attempted to impose a totalitarian theocracy, of which *Shari'a* laws were part and parcel. The Taliban's theocratic regime of 1996–2001 imposed a still-more regressive version of *Shari'a*.

[50] Ali Wardak, 'Crime and Social Control in Saudi Arabia', in J. Sheptycki and A. Wardak (eds), *Transnational and Comparative Criminology* (London: Cavendish, forthcoming 2003).

[51] Asta Olesen, *Islam and Politics in Afghanistan* (Surrey: Curzon, 1995).

[52] *Ibid*.

[53] Mohammad Hashim Kamali, *Law in Afghanistan: A Study of Constitutions, Matrimonial Law and the Judiciary* (Leiden: E. J. Brill, 1985).

[54] Ali Wardak, *Structures of Authority and Establishing the Rule of Law in Post War Afghanistan*, paper presented at the conference 'Establishing the Rule of Law and Governance in Post-Conflict Societies', Istanbul, 11–14 July 2002.

law students has declined significantly. Judges were often appointed after consultation with regional commanders and, while all judges have allegedly been replaced this year, no strong standards are applied to these appointments. There have also been a number of changes to Afghan law in the past three decades, resulting in confusion about which laws have precedence.

At present, the judiciary is fragmented. Local and regional judges are largely a product of the power dynamics at play where they serve. With the enforcement of judicial decisions remaining largely unrealised, judges are severely limited in their ability to deliver justice. However, there is a notable drive by judges in certain regions to push the boundaries of their authority, and judges in district and provincial courts are beginning to complain about executive abrogation of their decisions. The desire for authority may ultimately have a moderating influence on the courts as a whole if it brings about adherence to a civil code (that is deemed in accord with *Shari'a*), rather than if justice is left to the broader vicissitudes of *Shari'a* interpretation.

The courts are also struggling to uphold basic rights. The court in Herat, for instance, outlined as priorities preventing arbitrary prosecution and banning confessions outside of court, as this tends to lead to torture and false confessions. Most Afghans do not have access to lawyers and are reliant on the state or the court to protect their interests. Several judges have responded positively to the idea of providing professional advice and representation to claimants and defendants before the court.

The present Supreme Court, which is headed by a senior Islamic theologian, has officially activated the existing three-layer court system throughout Afghanistan. This consists of:

- *Mahkama-i-Ibtedaia:* this is a primary court that deals with both civil and criminal cases (with the exception of commercial, public security and public law cases). Each of the 216 districts (the number has increased recently) has a *Mahkama-i-Ibtedaia.*

- *Mahkama-i-Morafa'a:* this provincial appeal court has separate branches for civil and criminal cases. Each of Afghanistan's 32 provinces has a *Mahkama-i-Morafa'a.* This court also deals at a primary level with commercial, public security and public law cases. The latter category is normally heard at a higher level at *Mahkama-i-Ista'naf.* There is only one central *Mahkama-i-Ista'naf,* situated in Kabul.

- *Mahkama-i-Tameez:* this court, which is staffed by the most senior judges at the Supreme Court, deals with all kinds of judicial cases at the highest level of the judicial system.

Senior authorities in the Supreme Court state that all the different courts throughout Afghanistan are fully functional, and staffed by an estimated 2,000 judges (others say over 3,000). However, the authorities were unable to substantiate

any of these figures. Very few of the judges are female and there are no women among the 100-plus senior judges of the Supreme Court. Most of the female judges at the Supreme Court work in administrative sections.

Despite the formal appointment of judges at different levels of the judicial organisation, the administration of justice (especially at primary level in rural areas) faces serious difficulties. First, most primary courts have not been refurbished and lack even basic materials. Primary court judges have insufficient administrative support, and as many appointments to judicial positions appear to have been political, a significant number are Islamic theologians without legal training. More importantly, there is little or no interaction among the judiciary, the police, the prosecution and the prison/correction service.

The prison service in the main urban centres is basic, and non-existent in many districts and some provincial centres. The prison service in Kabul is small, and closely controlled by the Ministry of Interior. Currently, there are an estimated 600 prisoners in Kabul prison. Conditions are bad, particularly in provincial gaols, such as those in Sheberghan and Herat. At the time of writing there were still about 3,000 political prisoners (mainly former Taliban soldiers) in Sheberghan. These prisoners are treated in inhumane ways, and many of them suffer from illnesses related to malnutrition and overcrowding. Dozens have died since their surrender to Northern Alliance forces in November 2001. Meaningful corrective regimes or rehabilitative programmes do not exist. Although a juvenile court and correctional institution are formally functioning in Kabul, they have neither the facilities nor the professional personnel to deal with the problems they encounter.

6.1 Substantive law

The 1964 constitution and the 'existing law' currently provide an interim legal framework for Afghanistan. As far as substantive law is concerned, an overwhelming majority of legal professionals, Ministry of Interior personnel and academics interviewed agreed that the 1975 Afghan Civil Code and the 1976 Criminal Codes provided some of the most comprehensive and 'balanced' legal documents. They added that these codes, alongside the amended 1973 Law of Criminal Procedure, the 1973 Law of Police and Gendarmes and the 1966 Laws of Saranwali (Prosecution), are as applicable today as they were when they were introduced. They also agreed that, as stipulated in the 1964 constitution, in areas where no law existed the *Hanafi* School of *Shari'a* should be considered as applicable. However, the existing legal codes and laws of procedure need some rethinking and reform. For example, the Afghan *Shi'ite* (who form around a fifth to a sixth of the population) are mostly followers of the *Ja'afari* School. The inclusion of this alongside the *Hanafi* School as a secondary source of law needs serious consideration. Despite the fact that judges at the High Court, as well as Islamic theologians,

insisted that the *Hanafi* School must remain as the secondary source of law, senior academics at the Faculty of *Shariat* (Islamic Law) at Kabul University argued that *Sunni* and *Shi'ite* jurists need to 'sit together' and find some common ground between the *Ja'afari* and the *Hanafi* schools. They suggested that jurisprudential issues on which the two agreed, as well as those on which they differed, must be reflected in future law. In addition, certain aspects of existing laws need to be modernised. For example, some of the provisions regarding divorce, inheritance and witnesses reflect the patriarchal structure of Afghan society and appear to be influenced by a less liberal version of *Shari'a*. A modern legal system must provide a broad multi-dimensional framework that reflects the social, cultural and religious values of Afghan society, and has the capacity to address fundamental human rights issues.

6.2 The Afghan Judicial Commission

As stipulated in the Bonn Agreement, a 16-member independent Judicial Commission was formally established in May 2002. It was, however, dissolved four months later. Political tension among members, the lack of a clear agenda and the impression of undue conservatism among some in the ATA seem to be the main reasons for the dissolution of this body. There was reportedly strong competition and recrimination between the Ministry of Justice and the Supreme Court, as both wanted to control the appointment of judges, and the Ministry of Justice wanted to control the Attorney-General's Office. As a result of the heavy involvement of these two entities, the Commission was reportedly not sufficiently independent of the government to be effective.

The Judicial Commission was reconvened in Kabul in November 2002, comprising nine members and a chair. Most of the commissioners appear to be reform-minded, and some have legal qualifications from universities in the West. However, the Commission is not politically balanced, does not represent the various ethnic interests in the country well and has only one female member. If it is to achieve its goals, it is likely to need significant assistance from the UN and other international organisations, such as the Rome-based International Development Law Organisation (IDLO), which is closely involved in the development of the Afghan judiciary and justice system.

6.3 Traditional mechanisms of dispute settlement

The role of the central government and its formal agencies in maintaining social order in Afghanistan has always been limited, particularly in rural areas. Despite this, there existed a reasonable degree of social order in these areas, mainly due to the operation of traditional systems of dispute settlement in villages and tribes: the aforementioned *jirga* among the Pashtuns, and its equivalent among non-

Pashtuns, the *shura*.[55] These institutions incorporate the prevalent local customary 'laws', institutionalised rituals and a body of village elders whose collective decisions about the resolution of disputes are binding on the parties involved.

The authority of these institutions varies from region to region. They are at their strongest and most institutionalised in the Pashtun tribal areas, where they often have virtually total jurisdiction, resolving even the most serious crimes. In other areas they solve only minor disputes, referring more serious or more complex issues to the courts, or in their absence to the local commander. Elsewhere the two systems work in tandem, with the majority of disputes resolved by *jirga/shura*; at times a judge will refer cases lodged with the court to the *jirga/shura*. At present, the main functions of the court often involve only the certification of legal documents, the issuing of certificates and other similar activities.

In traditional justice, the process of mediation and reconciliation between disputants commonly involves seeking forgiveness or pardon, and the obligatory acceptance of a truce offer. It is against the tribal code of behaviour to reject such an offer. A victim's relatives thus pardon the offender and the two parties are reconciled. People often prefer *jirga/shura* to formal justice institutions because they are conducted by respected elders with established social status and a reputation for piety and fairness. In many cases, disputants personally know and trust local elders. In addition, elders reach decisions in accordance with accepted local traditions and values that are deeply present in the collective conscience of the village or tribe. Also unlike state courts, *jirga/shura* settle disputes without long delays and without financial costs. Illiteracy also discourages people from using courts – the overwhelming majority of Afghans are unable to make applications, read or understand the laws or do the paperwork. Furthermore, while the state justice system criminalises and excludes offenders, the traditional system largely aims at the reconciliation of disputants and the reintegration of offenders into the village or tribe. However, in Pashtun areas the *jirga* may recommend, in some cases of murder, direct vengeance or the marriage of a woman from the offender's tribe to one of the victim's close relatives. While the first punishment is in direct conflict with state law, the second is a clear violation of human rights. A further problem with the traditional system is that these institutions are generally men-only.

Senior judges at the Supreme Court, prominent lawyers and ordinary people all felt that *jirga/shura* must become an integral part of any future justice system. Supreme Court judges said that this would significantly reduce the workload

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[55] For a more detailed description of these mechanisms, see Ali Wardak, '*Jirga* and Traditional Conflict Resolution in Afghanistan', in John Strawson (ed.), *Law after Ground Zero* (London: Cavendish, 2002).

of the courts. Academic lawyers agreed with the idea in principle, but cautioned that this may reduce the authority of the judge. Key officials at the Ministry of Interior, on the other hand, rejected the idea of incorporating *jirga/shura* into a future justice system as trivialising justice and the legal order. They stressed that the formal justice system alone should deal with disputes, and were unaware that most are currently resolved outside the courtroom.

The incorporation of *jirga/shura* is unlikely to result in the trivialisation of the formal justice system; on the contrary, it is likely to strengthen it by making it more widely accessible, cost-effective and quick. Moreover, the state simply does not have the resources to establish an adequate formal justice system in all parts of the country.

Recommendations

A joint Afghan and international team of legal experts should examine the existing national justice system, including the judicial structure and its capacity to deliver justice in a fair way. The examination should focus on the relationships between the Afghan Supreme Court, the Ministry of Justice, the prosecution service, the police and the prison/correction service.

The Judicial Commission should focus its initial efforts on clarifying and reforming legal codes. Additional Afghan and international legal expertise should be provided to the Judicial Commission as necessary. Key issues are:

- existing laws should be clarified, their relationship to Afghanistan's international treaty obligations determined and their relevance to the present day assessed. Where necessary, reform should be considered;

- Afghan *Sunni* and *Shi'ite* jurists should establish some common ground between the *Ja'afari* and *Hanafi* schools. Jurisprudential issues on which the two differ must be reflected in future laws; and

- whatever legal system is put in place must be clearly codified to ensure that the application of the law is fair, balanced and consistent.

The operation of the formal legal system should be strengthened. There needs to be:

- an assessment of the number of qualified and independent judges, independent prosecutors and court staff, and their professional training needs;

- a setting of standards for judicial appointments, along with training and refresher courses;

- a staged rehabilitation programme for the judicial system. In the first stage, basic facilities and training should be provided to each provincial court;

- piloted support programmes to help district courts to function; and

- pilot *jirga* and human rights units alongside the court of justice in a few districts to formalise the link between the formal and traditional justice systems and to make justice more accessible, cost-effective and efficient.

Legal assistance centres should also be considered. The public could appeal to these for help in using the court system, and this may ultimately lead to a more effective judiciary and a powerful means for the institutionalised resolution of disputes. Urgent attention must be paid to conditions in Afghan prisons. The most important areas are:

- that the minimal nutrition and health needs of prisoners are met;

- the physical and hygienic conditions in which prisoners live;

- the possibility of developing new rehabilitative programmes within and outside prisons; and

- the problem of illegal detainees. Consideration could be given to creating a team of independent prison inspectors to ensure that no one is illegally detained or imprisoned.

Attention should also be given to the special needs of juveniles.[56] As a priority, training should be provided to upgrade the knowledge of justice professionals on existing legislation pertaining to children and juveniles, and on Afghanistan's obligations under international treaties to which it is a signatory.

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[56] Detailed work on this has been done by Afghan and international staff at UNICEF.

7. Human rights

Given the serious rights abuses by most if not all parties to the conflict, the increasing ethnic polarisation in recent years and the legal and cultural position of Afghan women, attention to individual and group rights will be crucial to the future of Afghanistan. These rights need to be embodied in substance *and* procedure, thus making sure that the law is both clear and applied.

Including guarantees of human and civil rights in the constitutional framework is a key aspect of ensuring these rights, but this will amount to little without concomitant guarantees that these rights will be respected and violations stopped and, where appropriate, punished. The mechanisms that will enforce rights must also be part and parcel of the effort to define Afghanistan's approach to securing rights for its citizens.

Article 25 of the 1964 constitution reads: 'The people of Afghanistan, without any discrimination or preference, have equal rights and obligations before the law'. The constitution provides for a catalogue of rights for citizens, including equality, liberty, dignity, freedom from unauthorised search and arrest, public trial, freedom from torture, humane punishment, right to counsel, right to travel internally and externally, secrecy of communication, freedom of thought and expression, freedom of assembly and association and the right to public education and work. All of these rights are, of course, subject to specific limits as determined by law. These rights, while far-reaching, do not specifically address two issues that are likely to be significant: women and minorities.

While the blanket application of rights can be effective if done in an all-inclusive manner, another approach is to specifically identify groups in need of protection. For instance, the new constitution or accompanying legislation may include a prohibition on discrimination with regard to some combination of gender, ethnicity, race, religion, national origin, disability and age.

Whether the guarantee of rights is accomplished by constitutional text or by legislation, enforcement is likely to be a process of gradual acclimatisation as these rights are introduced and tested through administrative, legislative or judicial action. Under Afghanistan's civil law system, the value of judicial action in the positive interpretation of rights will be limited, as judicial decisions do not have the law-making weight that they carry in a common-law system. Evolution will have to come primarily through legislative action and a strong focus on equitable treatment and enforcement of the laws by the executive.

7.1 Women's rights

Neither Afghan law nor society has traditionally guaranteed equal legal rights for women. While this inequality was extreme under the Taliban, tradition and the conservative interpretation of Islam have long prevented women from enjoying legal and actual equality in the areas of marriage, divorce and inheritance, and the right to travel, to education and to work. Gains made in earlier years largely affected only the urban elite, and even they were swept away by the years of conflict.

These disparities are unlikely to change dramatically in the short term, and whether greater legal equality for women will be guaranteed in the new constitution and accompanying laws remains to be seen. Whatever legal guarantees are created, a gap is likely to remain in implementation. In order to encourage the acceptance and implementation of rights for women, these rights should be realistically crafted. On the one hand, failing to advance equal rights for women in the constitution may retard their progress. On the other, legal assertions that are unlikely to be implemented, or worse that are likely to be rejected, can be counter-productive.

Afghanistan has international legal obligations as a ratifier of numerous treaties guaranteeing equal rights for women, including the International Covenant on Civil and Political Rights (1976), the Convention on the Political Rights for Women (1953), the Convention Concerning the Equal Remuneration for Men and Women Workers for Work of Equal Value (1951), and the Convention Concerning Discrimination in Respect of Employment and Occupation (1958). Enforcement of these treaties, however, is dependent on internal enforcement of the law. If the legislature or the courts refuse to adhere to these principles despite treaty obligations, there is little that can be done. Therefore, it would be best to ensure that all of Afghanistan's international legal obligations are incorporated into the constitution or the laws of the state.

A recent UN paper[57] lists the main issues affecting women as: exclusion from education; lack of access to health services; exclusion from employment and income possibilities; exclusion from public spaces; gender discrimination and gender-based violence; and little opportunity to participate in politics or governance. The report also notes the failure of international organisations to distinguish between Islamic principles and erroneous interpretations of such principles, leading to confusion about what can and cannot be done, and to what is described as 'hesitant' programmes. Women themselves talk of how they still do not have their rights, and claim that they do not yet feel safe.

The treatment and status of women are by no means uniform across Afghanistan. Cultural differences and the rural–urban divide mean that there is significant regional variation. Women in Hazarajat, for example, are freer than

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[57] *Issues Affecting Women in Afghanistan*, Office of the Special Adviser on Gender Issues in consultation with the UNDG Task Force on Gender in Afghanistan, 2002.

in many other areas. Prior to the Taliban takeover of the area, it was not unusual for villages in some districts to have women's *shura*, or even sometimes for women to participate in a mixed *shura*. Even after the Taliban took over, many girls' schools continued to run because the local community fought for them, and female health workers continued to travel as part of their work.

It is also a mistake to think that all Pashtuns are conservative towards women, or that non-Pashtuns are less so. In some rural areas of Badakhshan, women found it impossible to work outside their village, even as health workers accompanied by a male family escort. In the provincial capital, Faizabad, women have felt forced to wear the *burqa* and many women who worked with assistance agencies were unable to go to their offices on a regular basis, but felt forced to work from home.[58] Indeed, many women even in Kabul still feel the need to wear the *burqa*, in part due to conservatism in the new government. In Herat, many Taliban-era restrictions remain in place, or have been reintroduced.[59] Throughout the last two decades, many of Afghanistan's factions became more conservative on women's issues as the conflict progressed. For example, in Mazar-i Sharif in 1997, before the Taliban takeover, a decree was issued banning Afghan women from working with international agencies unless the agency concerned had a female head of mission. Indeed, the first rules against women working in Kabul were not issued by the Taliban but by the Rabbani government that preceded it.

It should not be assumed that Islam is necessarily a negative force with regard to women's rights. Speaking of how conflicts were traditionally resolved, elders in Zabul explained how, whereas the settlement of disputes had once often involved an exchange of girls, they no longer allowed this practice as they had heard that it was against *Shari'a*. Several women spoke of Islam as giving them freedoms, and argued that they should not be deprived of their rights in its name.

7.2 Minority rights

The position of ethnic, linguistic and religious minorities in Afghanistan is a critical element in rebuilding a stable nation. The country is made up of many different groups of people, each with their own rich history and culture. As discussed above, the numbers belonging to each of these groups is a matter of much dispute, but while Pashtuns are almost certainly the single largest group, it is likely that no one ethnic group has an overall majority. Political organisation runs somewhat along ethnic lines, with each significant group asserting political and military control over its own region. However, few parties are completely

mono-ethnic, although the tendency towards this has increased over the years of the war. Many cities and some rural areas are very mixed, and even in areas dominated by one group there are often pockets of others. Many Afghans assert that the conflict is not ethnic. This, coupled with the fact that in many areas people live together peacefully, suggests that existing tensions can be overcome if active steps are taken to reduce hostilities. It is also notable that, although all the main groups have strong ties to neighbouring states, at no time in the conflict has any group suggested breaking up the country.

The willingness of groups to subordinate themselves to a government controlled in part by others will depend on their sense of security. One of the ways to build confidence among these groups will be through guarantees of protection, rights and representation – a point made repeatedly by those consulted for this study. This can be achieved through language, education and employment policies that ensure cultural traditions and equal opportunities.

Many of these issues can be technically protected through individual rights guarantees in the constitution. However, there is also an argument for the protection of groups – designated as such for their shared characteristics. The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992 outlines many of the issues crucial to the 'group rights' concept of minority protection.

7.3 Transitional justice and the Human Rights Commission

Years of atrocities, compounded by new abuses and growing evidence of earlier acts, ensure that Afghanistan's political transition will entail a reckoning of some sort. Dealing with past human rights abuses during a peace process is always a thorny issue, and Afghans themselves rarely agree on this matter. Virtually every faction leader has been accused of abuses (some worse than others), while every ethnicity has been subject to abuse. Some argue that true peace and reconciliation cannot occur without some degree of justice for past abuses, others that peace will be undermined by digging up the past and engaging in recrimination. A discussion with ELJ delegates in Mazar is typical. Some argued that 'God will punish them'; another that 'God is too patient, there must be trials, must be justice. They have committed very heinous crimes. When a mother has brought up a child and they kill him how can she forgive these people? They must be indicted. But it must not be a personal vendetta, it must be justice and a fair trial'.

The Bonn Agreement does not mention transitional justice, nor impunity or accountability for past crimes. It does say that the UN will investigate human rights abuse, but does not specify which part of the UN should

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[58] Badakhshan Area Report, Strategic Monitoring Unit, 2001.

[59] Human Rights Watch, October 2002.

be responsible, nor whether the mandate includes past as well as present crimes. The Secretary-General's report to the Security Council in December 2001 states that 'the Afghan people and their international partners must commit themselves to addressing the problems of the past by ending impunity and ensuring accountability for past abuses, including gross and systematic violations of human rights' (C/2002/1157, para 83). Quite how this is to be implemented, and what the role of these 'international partners' should be, is far from clear. Recent examples of 'transitional justice' in other countries range from criminal tribunals in Rwanda and the former Yugoslavia to truth and reconciliation commissions in South Africa and El Salvador and amnesties or minor steps in Guatemala and Angola. The problem for Afghanistan, of course, is that many of those implicated are senior figures in the ATA and military power-holders in various regions of the country, and they will not easily be brought to justice. UNAMA has so far taken the approach that at present it is impossible to have both justice and peace, and that human rights has to be seen within the overriding objective of securing a peaceful transition. Others have argued that without justice peace is impossible.

The Bonn Agreement called for the creation of an independent Human Rights Commission (HRC) to consider these issues. The HRC is mandated to conduct human rights monitoring; investigate violations; develop and implement human rights education programmes and domestic human rights institutions; and propose a national strategy for transitional justice to address past abuses.[60] In pursuing these objectives, the Commission is empowered to 'receive, hear and consider complaints and petitions concerning both individual cases and general situations'[61] and issue decisions or refer cases to the courts. It also has the power to summon anyone resident in Afghanistan to deliver evidence, provide testimony or produce documents or other material evidence.

This mandate is far-reaching, and perhaps extends much farther than reality will allow at present. The HRC's members are themselves split over which aspects of their mandate to pursue. Currently four issues are being focused on: transitional justice, building the institution of the commission, public education and gender. The first is the most controversial and difficult in the present environment. HRC members assert that they are receiving very little political or institutional support. Some believe that this is due to concerns that the HRC will criticise the government, while others suggest that the commission is having trouble getting on its feet for

the same reasons that most government bodies are inactive, namely slow funding and a lack of experienced staff. The security situation also prevents the HRC from going into the field to investigate, or even hold consultations. Negotiations over how to protect commissioners and their staff – especially when those they may be investigating are part of the government – have not yet led to a solution.

Recommendations

Women's rights should be supported by:

- establishing a committee of the Constitutional Commission, comprising a spectrum of views, to examine possibilities for incorporating equal rights for women. This committee should also consider means for the implementation of these rights, and make recommendations to that end;

- compiling and translating the laws and treaty obligations of Afghanistan which pertain to women, along with traditional practices, *Shari'a* interpretations and practices from other Muslim nations; and

- addressing women's rights in practical terms. A focus on education and employment opportunities is more likely to benefit women than polarising debates about 'rights'.

The Constitutional Commission should establish a committee of representatives of key ethnic groups to examine possibilities for establishing minority group protection in Afghan law.

The UN and ATA should find ways to publicly evoke support for the efforts of the HRC, including:

- ensuring political, financial and administrative support to the HRC;

- assuring protection for HRC members;

- ensuring that there is space for independent human rights monitoring groups to function; and

- consideration should be given to establishing an international Human Rights Task Force to focus international support for, and attention to, the human rights situation in Afghanistan.

The UN needs to strengthen its role in the monitoring and investigation of human rights abuses, and ensure that it has adequate staff capacity to fulfil these responsibilities.

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[60] Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission, Annex One: Terms of Reference of the Afghan Independent Human Rights Commission.

[61] Terms of Reference, Article 10.

8. Elections

The Bonn Agreement provided that the ATA should 'lead Afghanistan until such time as a fully representative government can be elected through free and fair elections to be held no later than two years from the date of the convening of the Emergency *Loya Jirga*'. However, in order for elections to take place, a substantial number of logistical, legal, financial and political hurdles need to be overcome. It is not clear whether these challenges can be met according to the established timeline. There are enormous procedural difficulties, such as a population count, establishing electoral districts for whatever electoral system is chosen, passing the constitution and an electoral law, voter registration, public education, political party development and extensive staff training. There needs to be a broad consensus among political actors about the electoral rules, so that people accept the outcome. There must be an adequate budget. Finally, and most importantly, there is the question of whether adequate security can be established in time. The lack of centralised governmental control, tensions between armed factions, lingering or resurgent terrorist threats, lack of ability to enforce electoral and other laws and a potential reluctance to accept unfavourable results are all critical issues.

Serious consideration therefore must be given to the desirability and practicability of adhering to the current schedule. Most important is to assess whether elections held in 2004 will push Afghanistan's peace process forward by reinforcing participation and the legitimacy of the central government, or back by upsetting the fragile equilibrium that currently exists between the factions. This first election also needs to be seen in the light of the country's long-term political development; it should not be viewed as a one-time deal, after which the international community leaves the country and withdraws financial and political support, as has been the case in many other situations of post-conflict transition.

8.1 The nature of elections

A free and fair election entails the right and the opportunity to choose one thing over another. This implies the absence of coercion. Key freedoms (for both voters and candidates) include freedom of movement, assembly, association and speech, as well as freedom from intimidation and universal adult franchise. 'Fairness' means impartiality, and 'involves both *regularity* (the unbiased application of rules) and *reasonableness* (the not-too-unequal distribution of relevant resources among competitors)'. Criteria for fairness include independent electoral authorities, impartial voter education, fair media access, secure polling stations and ballot boxes and appropriate, transparent and reviewable scrutiny procedures.[62]

Freedom and fairness are at the heart of the democratic claims of electoral processes. A critique of the 1998 Cambodian election noted that 'Formulations such as "broadly representative" or "broadly reflecting the will of the people", when used to describe elections which are not genuinely free and fair, are simply devoid of content'.[63] There is a practical trade-off between time and 'freedom and fairness': in general, the less time one has to prepare, the less confident one can be of ensuring a free and fair outcome.

Afghanistan therefore confronts a serious dilemma. On the one hand, there is a danger that any move to prolong the life of the ATA by postponing elections could lead some disgruntled actors to denounce the process and embark on a campaign of spoiling. On the other, an election held without adequate preparation is likely both to fall short of meeting the criteria for freedom and fairness, and risk triggering a campaign of spoiling by the losers. While democratic mechanisms can be an effective means of processing conflict, and a well-constructed democratic transition in Afghanistan may actually help to institutionalise mechanisms for conflict resolution, holding elections too early could undermine the entire peace process. Election campaigns typically produce intense political contention, and in fragile polities can increase distrust between parties, tempting them to step outside the framework of constitutional politics if they emerge from the voting as losers. Successful electoral processes build on a culture in which elections are seen as a legitimate means of constituting a leadership, and outcomes are therefore accepted even by those who find them disappointing.[64] Such cultures cannot be conjured up overnight. Most of those who currently hold power in Afghanistan came to it by the gun, and persuading them to give it up to the ballot box will not be easy.

There are, however, a series of pressures that may exert themselves to keep the elections on track. First, elections may be seen not only as an important milestone in Afghanistan's transition process, but also as an indicator that the international community can scale back its attention and resources. Second, the already-established timetable will carry some institutional momentum. To fall behind may be seen as a failure. Third, internal political competition among Afghans may put pressure on the electoral timetable, as those groups who believe that they will do well in the electoral process will push for the timetable to be kept. Given the lack of a spectrum of organised parties, this tight timeline may serve the few powerful groups that exist. Finally, there may be a desire to

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[62] Jørgen Elklit and Palle Svensson, 'What Makes Elections Free and Fair?', *Journal of Democracy*, vol. 8, no. 3, 1997, p. 35.

[63] John M. Sanderson and Michael Maley, 'Elections and Liberal Democracy in Cambodia', *Australian Journal of International Affairs*, vol. 52, no. 3, 1998, p. 245.

[64] Krishna Kumar and Marina Ottaway, 'General Conclusions and Priorities for Policy Research', in Krishna Kumar (ed.), *Postconflict Elections, Democratization and International Assistance* (Boulder, CO: Lynne Rienner, 1998), pp. 229–237.

see elections as *the* mechanism to achieve a more representative government. One cannot, however, place the entire burden of change on to an election. Experience from recent post-conflict elections shows that massive shifts in power can easily result in a return to war. The move towards a more broad-based government needs to have started *before* the election, and politically there are strong arguments for moving into an electoral phase only after other key tasks of state-building have been successfully accomplished.[65]

8.2 Preparing for elections

8.2.1 Population count

In order for elections to be carried out, it is necessary to have a relatively accurate count of the population, or at least the voting population. This is needed for logistical reasons and if there are to be electoral districts (as opposed to treating the entire country as a single electoral district).

Afghanistan's first population count in over 20 years is now getting under way in the form of a pre-census household survey. However, only very basic information will be available prior to the election: number of households, number of residents in each household, gender breakdown and broad age breakdown (such as number over/under 18 years). This, it is estimated, will be complete by the end of 2003. The full census enumeration is not likely to begin until 2005. It will return to every household and use a lengthy questionnaire covering such things as ethnicity, occupation, household income, education, gender and age, but collecting and compiling this data is likely to take years.

8.2.2 Voter registration

Registration of voters is a complex task requiring substantial time, planning and resources; perhaps in recognition of this, the Bonn Agreement specifically requests the UN to conduct a voter registration exercise. Given Afghanistan's political fragility and difficult terrain, this is unlikely to be done quickly or smoothly.

There are essentially two options: voters can be registered in advance, or on election day. Ideally, pre-election registration would be done after the adoption of a new constitution (scheduled for December 2003) because, although the eligibility to vote is currently established by

law, it is not clear that the criteria will remain the same. However, given that much of Afghanistan is snowbound in January and February, it is highly unlikely that a credible register could be constructed for a June 2004 election if eligibility is not agreed until late 2003. Providing agreement could be reached between the major players, an alternative would be for registration to start earlier and to be in accordance with existing law, with amendment if necessary by the ATA. Subsequent elections would be in accordance with the new constitution.

Advance registration has several advantages. First, it reduces fraud. Issuing voter cards or creating voter lists creates a check against multiple voting and identification difficulties on election day (especially given the widespread duplication of names in Afghanistan). Prior to the election, a challenge period can be instituted to allow objections to improper registrations, and on election day voting lists can be compared with votes cast to prevent ballot stuffing. A voter card with protection against fraud worked well in Cambodia, reducing confrontations over identity at the polls. However, it has become common practice to stain the voter's finger with indelible ink to prevent multiple voting, and modern ballot papers can be stolen but not usually forged. Perhaps most importantly, the prior registration of voters may lessen the chance of non-Afghans from bordering countries voting. This is most particularly an issue in the parts of the country adjoining the tribal areas of Pakistan, where people on both sides of the highly porous border are from the same tribes, national identity means less than tribal identity, and the population already feels disenfranchised. The fact that many people in these areas are armed also raises the possibility of intimidation.

The second advantage of advance registration is that it provides an approximate count of how many people are eligible to vote where. This makes election logistics far easier, enabling the proper printing and distribution of ballots to avoid shortages or gluts in polling places. The population data and age breakdown provided by the pre-census household listing may partly address planning needs, though it would not give any indication of the number of people actually likely to vote. In some countries, seats in the legislature are apportioned based on the number of registered voters. Advance registration would be necessary for this.

There is also an argument for registering voters on election day. Pre-registration means that those not registered will not be able to vote. If individuals or groups have not been registered, this can cause alienation and disruption. Particularly vulnerable would be *kuchi* (nomads) and returnees who arrived after the registration cut-off date. In transitional elections in South Africa and Sierra Leone, no voter roll was established prior to the election due to fears of disenfranchising poor, remote and marginalised populations (South Africa did have the advantage of a comprehensive identity card system, although Sierra Leone, like Afghanistan, did not).

[65] Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflict* (New York: W. W. Norton, 2000); Marina Ottaway and Anatol Lieven, *Rebuilding Afghanistan: Fantasy Versus Reality* (Washington DC: Carnegie Endowment for International Peace, 2002); Andreas Wimmer and Conrad Schetter, *State Building First: Recommendations for Reconstruction and Peace-Making in Afghanistan* (Bonn: Center for Development Research, University of Bonn, 2002).

Whether registration is done beforehand or not, a number of problems need to be solved. Given the collapse of central population registers, mechanisms will have to be devised and ratified to establish that people are adult Afghan citizens. One issue is age, as many rural Afghans born in the last two decades may not have any form of birth certificate or identity card. Another is citizenship, especially in the border areas. Afghan voters outside the country will have to be registered beforehand, but this will be considerably easier. Most of those outside the country have documents attesting to their age and nationality. Such registration could be carried out by a combination of post and registration centres established in areas of significant Afghan expatriate population.

Due to the substantial number of Afghans living outside the country, a decision will have to be made as to whether Afghans who are resident abroad will be eligible to vote. Essentially there are three categories: registered refugees, non-registered refugees and those who are permanently resident abroad. Some would argue that the latter category should not be included in a register as it is inappropriate that people play a role in choosing the government of a country in which they no longer live and to which they do not plan to return except for visits, while others argue that the strength of their identification with Afghanistan justifies such inclusion. In Cambodia in 1993, expatriates were permitted to vote in their country of residence but only if they had returned to Cambodia to register. Practically, however, it could be very difficult to distinguish between non-registered refugees and those permanently living abroad, especially in neighbouring countries. Alternatively, it can be decided that any Afghan who has citizenship should be able to vote. In terms of *how* people vote, it would be possible to treat registered refugees differently under a legal framework; officially registered refugees could, for example, be allowed to vote outside the country, but others could be permitted to do so only if they return. In some situations, for example in Bosnia, refugees had to physically return to vote, even if only for the day.

Finally, the registration of women voters will require separate female staff (as will an election itself). This greatly adds to the training problems confronting the electoral authorities.

8.2.3 Public education

There will undoubtedly be a need for voter education around the new constitution and, perhaps more importantly, around the new electoral system. If a proportional-representation system is used and single-member districts are eliminated, there needs to be education on how votes are pooled and seats apportioned after the count. These new systems need not be difficult, but some degree of information on the consequences of a vote needs to be widely disseminated. This has been successfully done in many parts of the world – for example, Cambodia, South Africa and East Timor – and good models exist.

8.2.4 Logistics

Logistically, holding an election in Afghanistan involves challenges of terrain, history and a collapsed infrastructure that cannot be underestimated. Election machinery must be chosen and acquired, tens of thousands of polling workers need to be trained and measures put in place to ensure the security and anonymity of the vote. Lost ballot papers, inoperable polling places, untrained poll workers and flawed counts can all lead to disputes over the validity of an election. Mechanisms to resolve disputes must also be designed and put in place. Given the importance of making this first election a capacity-building exercise, sufficient time must be allowed to properly train senior Afghan staff.

8.2.5 Security

As a prerequisite to any elections, security is important at three levels. First, cooperation from key political players to make a complex transition work is very difficult to maintain without an adequate neutral security force in place. Even carefully crafted settlements (such as the 1994 Arusha Accords for Rwanda) have unravelled because inadequate security guarantees prompted parties to renege on their commitments.[66] The deployment of ISAF in Kabul is a step in the right direction, but it will be necessary to go further. Second, voters need to be confident that they will be relatively safe if they go to the polls. Inevitably, a large number of voters will be exposed to the risk of attack by spoilers, and a robust security presence can help to deter this. Third, the electoral process itself must be marked by a high degree of security. Blank ballot papers must be protected, and are especially vulnerable when being moved from central storage points to the actual localities where polling will take place. An equally high level of security is required when marked, spoiled and unused ballot papers are being returned to central counting points. Any lapse in security can prompt charges of irregularity in the conduct of the election.

Neutral security forces can also supply essential logistical capabilities. In Cambodia, even with a much smaller population and less savage terrain than Afghanistan, the UNTAC Military Component's contribution to a successful outcome was vital. It is difficult to imagine how a free and fair election could be conducted without the skills and assets of a comparable force.

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[66] Barbara F. Walter, *Committing to Peace: The Successful Settlement of Civil Wars* (Princeton, NJ: Princeton University Press, 2002).

Security will also be crucial in the preparation for elections. Much of the intimidation, corruption and violence that accompany elections occur before polling day. Creating a safe environment for legitimate political parties must be a key consideration in determining the viability of free and fair elections.

8.2.6 Independent electoral commission

While many 'electoral' decisions must await the deliberations of the CLJ, there is no reason why one important step cannot be taken immediately: the establishment of an independent electoral commission. Such commissions are found in a number of states, including those where electoral processes have formed part of a complex political transition, such as South Africa, Sierra Leone, Sri Lanka, Mozambique and India. In some cases, these commissions comprise experts who provide a conclusive final assessment of the electoral process. In East Timor, for example, at the 1999 'popular consultation' at which a majority of voters opted for independence, a commission of three distinguished international specialists was constituted to oversee the process. At the 2001 constituent assembly elections, a commission consisting of three international experts and two very able East Timorese appointees oversaw the process. The term 'independent electoral commission' can also be attached to the formal bureaucratic agency, typically headed by a chief electoral officer, which is responsible for the organisation and conduct of voting. There is a strong case for establishing both kinds of commission in Afghanistan. They contribute to the neutrality and transparency that are vital if an electoral process is to succeed.

The electoral commission should be responsible for:

- registering parties;

- investigating and resolving pre-election and election disputes;

- overseeing balloting and the vote count;

- overseeing, training and coordinating election workers and observers;

- regulating and policing the election campaign; and

- the public information and education campaign.

8.3 Political parties

Creating and regulating political parties is likely to be one of the most important and controversial issues Afghanistan will face. The country has had an unhappy history with political parties, which are associated with both the rise of communism in Kabul in the 1970s, which resulted in the 1978 coup and subsequent Soviet invasion, and with the *mujahideen*. While 'parties' (*tanzeemat*) were prominent within the Afghan resistance during the 1980s, they were

for the most part based on networks of ethnic affinity or patronage. Moreover, their responsibility for the brutal civil war in the early 1990s that destroyed the capital and paved the way for the Taliban means that they are hated by many Afghans. *Mujahideen* parties have also tended to have a strong ethnic character – a fact that contributed greatly to the ethnicisation of the civil war.

Afghanistan has no law legalising or regulating political parties. Article 32 of the 1964 constitution gives Afghan citizens the right to form parties, but the Political Parties Law was never signed by the king and political parties were never legal under the constitutional regime. This lack of a law, according to ATA sources, means that political parties are still not legal in Afghanistan, and thus all party activities are currently proscribed. Some in the government want to use this state of affairs to control unwanted political activity, while others say that a political party law has been drafted and will be put to President Karzai soon.

This raises two concerns. First, with less than two years remaining until the date for the first election, there will be insufficient time for new parties to form and participate in the political process. While numerous proto-parties are already registered with the Ministry of Justice using euphemistic names like *sazman* (organisation), *nizat* (movement) and *shura*, these entities cannot yet act as political parties in the fullest sense, and they are very aware of the need to tread carefully at present. Second, there is a risk that the lack of a political party law might be used to suppress political activity by groups without power or an established party structure.

Afghans interviewed for this study felt strongly that a political parties law should endorse certain basic principles: a platform consistent with the constitution; public organisational and financial records; financing guidelines, including rules about funding from foreign sources; non-discrimination; and absence of military power. All of these would be considered standard good practice. Possible clauses could also be added to promote ethnic, gender or geographic diversity within the parties. It seems ill-advised, however, to require specific ethnic quotas for parties, especially in a situation where there is no agreement on numbers. Rules can be established requiring 'national' parties to establish offices in a certain number of provinces; to attain a number of signatures/members in different provinces; and to run candidates in a certain number of provinces. This has been done with some success in Kenya. Such rules may also, however, limit the potential for smaller, independent parties. It is particularly important to develop a rigorous code of conduct for parties contesting an election, with penalties for electoral offences. Such a code might also legitimately commit contesting parties to respect Afghanistan's responsibilities under international law.

Even without a legal structure in place, party development is under way and there is already fierce competition. Many of the various factions controlling the country were formed

as parties (*hezb* or *tanzeemat*) during the war with the Soviets, and have developed party structures. Younus Qanooni, the powerful former interior minister, has announced that he is forming a political party, the Nizat-i-Milli. Joined by Wali Massoud, the brother of assassinated leader Ahmad Shah Massoud (and possibly Minister of Defence Fahim), the party is establishing cultural and educational centres, printing propaganda and recruiting. These leaders have inherited part of the party apparatus of Jamiat-i-Islami, once headed by former President Burhanuddin Rabbani, which had one of the most extensive structures among *mujahideen* groups. Karim Khalili, the Hazara leader who heads the Hezb-i-Wahdat party, is also working aggressively to create a strong party structure. Wahdat has also started schools and cultural centres. Khalili is trying to transform Wahdat into a nationalist movement while moving away from mullahs and Iranian influence in this mostly *Shi'ite* party. As an ethnic and religious minority in Afghanistan, the Hazaras have long argued for increased regional autonomy as a safeguard for their rights. However, Khalili has recently tempered this by promoting a more egalitarian Afghan nationalism.

Although there is no formal party, a religious coalition of conservative *jihadi* leaders such as Burhanuddin Rabbani and Abdul Rasul Sayyaf seems imminent. A group of this kind, especially if successful in reaching out to different ethnic groups, would be a powerful force. Potential leaders have already shown their strength at the ELJ, and the readiness of those like Sayyaf to label political opponents as 'communists' and 'infidels' is likely to allow them to capture deeply conservative supporters. Repression of organised groups is also already present. In Herat, for example, one group has struggled simply to start a Council of Professionals, which they have emphatically stated is not a political party; attempts to start an independent political party in Herat are likely to be challenged even if a law is put in place.

Even without repression, many new parties may have virtually no resources comparable to those which the *tanzeemat* can muster, and there is therefore a case for some 'indirect funding' of campaigns for such parties from the relevant electoral authorities, as was, for example, done in Mozambique. This could include the provision of office space, training, communications facilities and access to radio broadcast services.

International organisations such as the National Democratic Institute (NDI), the Friedrich Nauman Stiftung (FNS) and the Friedrich Ebert Stiftung (FES) are supporting political party development in Kabul. As partners they have proto-parties such as the Council for Defence of Democracy and Freedom, the National Progressive Council of Afghanistan and the National Council of Peace and Democracy of Afghanistan. They are also working with delegates from the first *loya jirga* who may be politically active through the transition phase.

They are training party organisers in the basics of political party activity, including message and platform development, communications, fundraising, supporter and voter mobilisation and candidate development. Political party support can take different forms. Since these organisations are usually tied to political parties in their countries of origin (NDI, for instance, belongs to the US Democratic Party and FES is part of Germany's Social Democratic Party), they often look to support parties that share their political outlook. This can be controversial, as it may appear as though certain parties are backed by certain governments. Another approach is for those international support agencies, perhaps in conjunction with a new electoral authority, to provide these training and organisational resources to any party that qualifies according to certain basic criteria.

Finally, individual eligibility to contest an election may prove contentious. Many Afghans argue that those with a reputation for human rights abuse should not be permitted to stand. Such a ban will in practice be exceedingly difficult to enforce, since there are no formal findings of criminality from a competent tribunal on the basis of which one could give effect to such a prohibition, nor is there likely to be before this first election. Some such individuals may nonetheless continue to possess a spoiling capacity, which they might seek to direct against vulnerable voters in a poll from which they had been excluded. The act of excluding such individuals from politics may have to be left to the voters, or to institutions of justice that may be established as part of the evolving Afghan polity.

8.4 The choice of electoral system

The choice of electoral system is always a complex question. There is 'no perfect election system, and no "right" way to approach the subject of electoral system design'.[67] Different electoral systems give effect to different visions of what electoral participation involves and may be appropriate both for different countries, and for different phases of a country's political life. Discussing the electoral system with Afghan experts and citizens throughout the country, certain basic principles emerged. First, given the factionalised nature of Afghan politics, the primary goal should be to produce proportionality – in that each party gets a proportion of seats in accordance with the proportion of votes received. Second, most Afghans want an opportunity to vote for candidates from their own area. The distrust of political parties also means that voters should be given the chance to vote for individuals, rather than solely parties. Third, the voting procedure must be simple and transparent. Illiteracy and innumeracy limit the complexity of possible voting systems. Inexperience with voting also means that results must be easily explicable.

[67] Ben Reilly and Andrew Reynolds, *Electoral Systems and Conflict in Divided Societies* (Washington DC: National Academy Press, 1999), p. 54; see also Giovanni Sartori, *Parties and Party Systems: A Framework for Analysis* (Cambridge: Cambridge University Press, 1976).

Much of the detail of the electoral system is likely to be in statutes, rather than in the constitution itself, which is more likely to assert a few general principles. However, electoral systems can be manipulated to produce certain results, and the fundamentals of that system should probably be protected against majoritarian change. This can either be done by constitutionalising those safeguards, or requiring a super-majority to change all electoral laws. Due to the absence of a legislature, the first electoral law will be a decree law and it is critical that work begins on this as soon as possible. If there are issues concerning how the first election can or should be held that are irreconcilable with future concerns, then one-off provisions can be made.

8.4.1 Majority systems

Majority systems focus on choosing a particular group to rule for a specified period, and authorise it to prevail over minorities. They do not tend to produce proportional results; and although it is possible that single-member district elections could produce a fairly proportional result in terms of ethnicity, without sufficient data this would be impossible to determine in advance. If it did produce proportionality, geographic divisions could stand as a proxy for ethnicity, thus providing proportionality without quotas or excessive gerrymandering; if it did not, the dangers of majoritarian single-member district elections are considerable. In areas with mixed population districts, smaller groups are likely to be unable to elect a representative, and such a group may feel as though it never has representation. This geography-based approach also assumes that the primary political fault-lines are, and will remain, ethnic. In the long run others, based on economic development and religion for example, will emerge. There may be no effective proxies for these divisions, which could prevent their representation in the national politics of the country. Finally, a prerequisite for a defensible single-member constituency system is electoral districts of relatively equal population. The stable population distribution data required do not exist in Afghanistan, and will not be available until refugee returns are substantially completed and a census is performed.

8.4.2 Proportional systems

PR systems focus 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.[68] The challenge in Afghanistan is likely to be to devise a system that combines macro-level proportionality with micro-level representation. Broad ethic proportionality on a national level will be key to the

legitimacy of the government. Regional or geographic proportionality will also be important, however. People feel the need to have a local connection with government, and a representative, rather than only a party structure.

A majoritarian system may be best for a stable, consolidated democracy in which losers are prepared to accept their defeat and do not fear that the winners will attempt to liquidate them. It is less well suited to countries that are ethnically plural, have limited sense of nationhood, or are emerging from conflict. The St Lucian Nobel Prize winner W. Arthur Lewis argued as long ago as the 1960s that 'the surest way to kill the idea of democracy in a plural society is to adopt the Anglo-American system of first past the post'.[69] However, numerous post-colonial societies carried over a unitary system which contained no recognition of geographically concentrated minorities. The price for this is still being paid in today's conflicts. A PR system which allows a range of different parties to feel that they have to some degree been 'winners' may have more to commend it in transitional phases,[70] and most of the countries whose situation most closely compares to that of Afghanistan have used simple PR systems. These include Sierra Leone, South Africa, Namibia, Cambodia, Mozambique and Liberia.

One approach that may satisfy the main criteria is multi-member districts based on provincial boundaries with a 'free list' system. Seats could be apportioned between provinces in accordance with actual turnout, voter registration or population. In this approach, candidates can either be part of a party list, or they can be independent. The ballot would contain a list of all candidates (with symbols and photos) and their party affiliations. Voters would simply cast one vote for their favoured candidate. Seats would be awarded to parties (and independents treated for the purpose of seat allocation as a party), but the candidates filling those party seats would be the highest-polling candidates from that party on the ballot. This system is used in Finland and, with adaptations, in other European states. Voters would choose which candidates would win outright, and parties could choose which of their candidates would benefit from a strong party vote. Independent candidates could also be elected in this fashion, but their excess votes would not accrue to anyone. This 'excess vote penalty' would encourage independent candidates to join together into lists as well. A possible variation of this method would be to split the ballot, with half as described and the other half a party-only section, thus allowing voters to simply cast a ballot for a party, which would then select from its list of ranked candidates. The system allows for parties to compete, while creating room for independent candidates; allows voters to choose candidates rather than just parties; and is highly proportional.

[68] G. Bingham Powell, Jr., *Elections as Instruments of Democracy: Majoritarian and Proportional Visions* (New Haven, CT: Yale University Press, 2000), pp. 4–7.

[69] W. Arthur Lewis, *Politics in West Africa* (London: George Allen & Unwin, 1965), p. 71.

[70] Reilly and Reynolds, *Electoral Systems and Conflict in Divided Societies*, p. 55.

Another model is to have a mixed system of multi-member districts and national party lists. This could require two votes to be cast, one for a local candidate and one for a national party, or it could be based on a single vote. District seats would be apportioned as described above, whereas national seats would be apportioned according to a national party list. Such a system would create incentives for national party-building, an important facet of democratic consolidation. Incentives could also be created through legislation. For instance, in order to be on the national ballot parties may be required to have candidates in a specified number of provinces.

The substantial Afghan expatriate population will also have to be considered. If these voters are allowed to participate without residency, there are a variety of ways to include their voices. A '33rd province' could be created for seats for expatriate Afghans. Expatriates could also be asked to choose a province to vote in.

Some have suggested that national elections should be preceded by local elections, perhaps for mayors, provincial councils and possibly governors. This was done in Rwanda. The advantages of this approach could be to build democracy from the ground up, and to avoid hasty national elections. Election flaws can be worked out without the potentially catastrophic costs of a failed national election. However, democratic elections at the local-provincial level are only valuable if one is electing bodies with some power and role. Therefore, a necessary first step would be to decentralise institutional power down to regional authorities. If it is considered that the time is not right for serious federal institutions or a decentralisation of power, it would seem to be a mistake to start the whole democratisation process by electing governors, mayors or provincial councils, as their lack of power would make elections seem an irrelevance to most people. Holding free and fair local elections also requires all the elements of infrastructure, security and education that a central election would need.

8.5 Women and the vote

Ensuring that women are able to vote will be a significant challenge. Separate facilities for registration and voting will be necessary, and these will need to be staffed by females. Even then, it may be difficult for women in rural areas to vote, although some interviewees suggested that the problem was less ensuring that women cast a vote, and more that they do so freely.[71] Some suggested that the female voter turnout could be bolstered by informing men that failure to allow women to vote would weaken the representation of their group, but many believed that, ultimately, many women would be prevented from voting.

Getting Afghan women into the legislature in any significant number will require special rules to ensure their representation. These could either be placed on the legislature – i.e., women's seats may be established which will guarantee a certain minimum percentage – or there could be rules requiring women's representation on party lists. Reserved seats tend to carry a stigma, and may separate women from the party system. This could harm women's representation in the long term. However, it may be impossible in the short term to require parties to list female candidates. Some electoral systems require that one in every three candidates on a party list is a woman, thereby guaranteeing that at least one-third of the seats for each party will be held by women. Such a system is unduly restrictive of freedoms generally accorded political parties in selecting candidates, and some parties in Afghanistan may reject representation by women altogether. It needs to be remembered that forced change has never worked in Afghanistan.

The options could be:

- reserved seats appointed nationally (on whatever basis is deemed fit);

- separately-elected MPs from women-only lists (perhaps based on the national vote);

- a provision that candidate lists must to some extent be diverse; and

- incentives, but no mandates, for parties to place women on their lists.

Such suggestions may seem unlikely to be adopted in the climate created by years of Taliban rule, but it is worth noting that, in pre-conflict Afghanistan, women were in parliament, and at one time both the minister for education and the minister for labour and social affairs were women; and despite all the difficulties, some women were elected to the ELJ.

8.6 International assistance to electoral processes

International assistance in the electoral process can take a number of forms.[72] The least intrusive is observation, whereby interested individuals and groups may receive special accreditation to scrutinise polling in order to report on the level of compliance with prescribed procedures. Monitoring is more intrusive. Some systems of monitoring may require an international agency to certify the adequacy of different stages of an electoral process. The UN was involved in 1989 in monitoring the conduct by South

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[71] One Afghan woman who had lived in the tribal areas of Pakistan cited examples of illiterate women being 'herded' to polling stations to cast their vote.

[72] Robert A. Pastor, 'The Third Dimension of Accountability: The International Community in National Elections', in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder, CO: Lynne Rienner, 1999), pp. 123–42; William Maley, 'Exporting Expertise in Electoral Administration', in Marian Sawer (ed.) *Elections: Full, Free and Fair* (Sydney: The Federation Press, 2001), pp. 175–88.

Africa of the election which led to Namibia's independence. Most intrusive of all is the actual conduct of an election, for which the UN was responsible in Cambodia during the UNTAC deployment in 1992–93.

While Afghanistan had lower-house legislative elections in 1965 and 1969, nothing is left of the administrative machinery that was responsible for their conduct. Thus, a high level of international involvement will be required to conduct an election in Afghanistan. The first such poll should be treated as a capacity-building exercise, with the objective of building up Afghan staff to whom the responsibilities of electoral administration can be handed in the future. The most effective way of transferring the necessary skills is likely to be through hands-on experience of running an election alongside experienced international staff, and specific study. Given the sensitivities surrounding gender, women will need to play a prominent role in the planning and execution of most electoral activities. There are a number of bodies in a position to provide assistance. These include the Electoral Assistance Division of the Department of Political Affairs at the UN Secretariat; the Washington-based International Foundation for Election Systems, established in 1987; the Stockholm-based International Institute for Democracy and Electoral Assistance (International IDEA), founded as a freestanding international organisation in 1995; and the independent electoral commissions of various UN member states.

Perhaps most important of all is financial support. Free and fair elections are not cheap, and very substantial resources – measured in many millions of dollars – will need to be found in order to fund the process.

Recommendations

Major improvements need to be made in security if elections are to be held according to the timetable agree at Bonn. Substantial and credible human, material and financial resources also need to be committed soon to support an electoral process. If free and fair elections cannot be assured, the election timetable should be renegotiated.

An independent electoral commission of Afghan and international specialists should be appointed as soon as possible to address:

• the elections timetable and necessary procedural steps;

• the formation, development and regulation of political parties; and

• the design of the electoral system so that it has the confidence of the population and produces a fair and representative government.

If voters are to be registered before the election, the process must be started at least a year in advance, and therefore perhaps ahead of the new constitution. In this case, a one-off voter-eligibility law should be passed by the ATA.

The responsible Afghan authorities should give strong consideration to creating an electoral system which will ensure the proportional representation of the voting population in the government. International expertise should be provided to create models of the likely outcomes of different electoral systems, to ensure outcomes match intentions.

Efforts should be made to broaden the base of government prior to polling, in order to reduce the risk of post-election violence.

The international community should ensure that the necessary political, financial and security support is in place for the elections.

Immediate action should be taken to regulate political parties so that legitimate parties can begin their work. Consideration should be given to providing basic equal-access support to nascent parties competing in the general election, including communications and training facilities.

Specific attention must be paid to ensuring representation of women in Afghanistan's elected bodies to overcome hurdles to women's candidacy and voting.

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9. The role of the international community

Prior to 11 September, it had been hard to sustain donor concern about Afghanistan. However, with the fall of the Taliban came a surge of interest, with expressions of support for rebuilding the country and accompanying pledges of financial assistance. The signing of the Bonn Agreement was followed by a major donor conference in Tokyo in January 2002, which brought forth substantial pledges of aid.

There was early agreement in the Security Council that the UN should lead the political and assistance effort in Afghanistan. In order to do this, it set up an integrated mission, UNAMA.[73] However, the mission was not officially established until the end of March 2002, and since then it has struggled to integrate its political and assistance pillars, as well as coordinating the main UN agencies and their programmes. In addition, ambiguities in the Bonn Agreement have led to a number of areas of contention. Fundamentally, these revolve around the question of UNAMA's independence, or otherwise, from the AIA/

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[73] This report will not attempt to evaluate that mission as this is the subject of another DFID-funded study, *Beyond Brahimi: Learning Lessons from Peace Operations.*

ATA. Given that there is as yet no institutionalised opposition in Afghanistan and the country has failed to move beyond factional power, the claim of many Afghans that the UN needs to take responsibility for the full implementation of the Bonn Agreement, including addressing human rights issues, would seem valid if there is to be progress towards a more legitimate government. Unlike in East Timor or Kosovo, however, UNAMA is not administering a territory, though it does have a mandated responsibility to promote good governance. This duty needs to be balanced with its support for the Afghan administration. Finding this balance requires a recognition that the administration is not a monolithic bloc which international players must either wholly support or else bypass. Rather, a choice can be made as to *how* to support it. It is possible to work to strengthen those structures and processes that will bring the state under the greater control of a legitimate authority – such as ensuring that presidential authority is not bypassed and routing all financial support through the Ministry of Finance – and to guard against actions that support factional interests.

Despite the pledges of substantial assistance made at Tokyo, few tangible benefits for ordinary Afghans have as yet emerged. The government tends to blame donors for this, and donors the government. A confusion of categories and the absence of centralised, up-to-date figures makes it difficult to track what is actually happening to funding, and accounts for often contradictory accounts. What is clear, from interviews for this study and from expressions of frustration made at numerous meetings, is that the gap between expectation and reality on the ground is proving problematic. While the signs of international spending are all around in the white cars and foreign faces, ordinary Afghans have yet to see much in the way of benefit. Moreover, there is a real fear that, as the military focus shifts to Iraq, Afghanistan will once again be abandoned.

The role of aid in Afghanistan is both to meet ongoing humanitarian need and to support the reconstruction effort. The line between these two is, however, by no means clear. Afghanistan has some of the world's worst figures for the commonly accepted indices of human wellbeing (such as infant and maternal mortality, life expectancy and access to safe water), and the current situation could well be seen as a humanitarian crisis. The underlying causes are, however, long-term and require long-term solutions. There is, therefore, a need both to address the longer-term issues of economic recovery and service delivery and to continue to meet the ongoing humanitarian crisis, without the latter undermining the former.

Finding a path through these competing pressures is made more complicated by the fact that the agencies are themselves subject to often contradictory pressures – the need to be visible, to maintain profile, to attract funding and achieve headquarters priorities are often at odds with the need to build local capacity and to support an emerging government. Finding the right balance would always be difficult, but at present there seems to be insufficient clarity as to what using

aid to support a political process might mean. Does it mean that the assistance community simply does what the government requests? Or that it has a set of principles from which it negotiates? The years of Afghanistan being seen as a 'failed state' encouraged the international community to believe that it could do what it wished, but this is no longer the case. The ATA is increasingly asserting its right to control what happens in Afghanistan, and to impose some planning framework on the various agencies. This is legitimate, but it does not obviate the need for assistance agencies to maintain some basic principles.

It is clear that there are tensions at a number of levels between the authorities and assistance agencies. There has been a substantial increase in the activities of agencies already on the ground in Afghanistan, matched by the arrival of additional organisations since late 2001. While some have cooperated well with the new authorities, others do not pay them the courtesy of a visit, let alone discuss plans. This problem is aggravated by the fact that both NGOs and the UN have resources of which ATA departments can only dream. The international agencies perhaps need to ask much tougher questions of themselves about which skills are needed and for what purpose. Particularly – though not only – within the UN, it was noted how foreigners have been brought in to do jobs previously carried out by Afghans, and how many Afghans have effectively been demoted.

Recommendations

The international community needs to sustain its engagement in Afghanistan over the coming years, specifically:

- maintaining a long-term political engagement with the country;

- committing to long-term funding at an adequate level for reconstruction, and ensuring that this funding is provided in a principled, accountable and transparent fashion and supports the process of peace-building and of pro-poor development;

- committing to a long-term presence for international peacekeeping forces, with the consent of the Afghan authorities;

- making adequate funds available, at the appropriate time, for the elections and giving other support as necessary to ensure that they are free and fair;

- supporting the full implementation of the agreements made at Bonn, including human rights responsibilities; and

- fully supporting President Karzai as the legitimate leader of the ATA and strengthening his position against factional interests.

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Annex 1
Methodology

This report is based on desk research and a field study. The desk research included published material and unpublished reports, minutes of meetings, newspapers and the extensive material provided through various list-serves. The field research was undertaken between the beginning of August and mid-September 2002 by a team of three, two expatriates (one male, one female) and one Afghan. A substantial part of the writing was done in Kabul, and the analysis was informed throughout by ongoing developments in the country. Both expatriates knew the country well, having between them worked in Afghanistan for more than a decade. This gave them access to an excellent network of Afghan colleagues whose insights and wisdom were drawn on extensively for this study. These individuals were far more than just interviewees, being rather people with whom we shared our analysis as it began to emerge and against whom we tested ideas and understandings. Three of these colleagues accompanied the team leader on different visits to the provinces, one to Khost and Gardez, one to Zabul and Qandahar, and one to Farah and Nimroz. In addition, Dr Ali Wardak went back to his home area and explored in detail how the justice system worked there, following up complainants as well as asking questions of those in charge.

Travel outside Kabul was split between members, but the team met in Kabul both before, during and after travelling. In all, 11 provinces were visited: Paktia, Khost, Zabul, Wardak, Qandahar, Farah, Nimroz, Herat, Faryab, Balkh and Nangarhar, in addition to Kabul. Evidence was taken from Afghan and international agency staff working in a further three (Bamiyan, Baghlan and Badakhshan). Efforts were made to talk to Afghans, male and female, from many different walks of life, and over 250 Afghans took part in individual interviews or group discussions. A further 31 expatriates were interviewed. Interviews included high-level government officials, senior judges at the Afghan Supreme Court, professors of the Faculties of Law and Islamic Law at Kabul University, former judges and legal experts, UN officials, NGO staff, diplomats, members of the ELJ, elders and members of village *shura/jirga*, Kabul University students, teachers, commanders, members of both the US and Afghan military, members of civil society institutions and organisations, and ordinary people in Kabul and the various provinces visited. The oldest interviewee was 109, the youngest were in their late teens and early twenties. Semi-structured interviews were used, and most interviews lasted at least an hour, but often two or more.

In addition to their own work, the team benefited from the insights of another DFID-funded study, under the auspices of King's College London, which looked at the operation of the UNAMA mission. Further insights were provided by the later participation of one of the team members in the World Bank study on provincial-level service delivery.

In the report, the analysis of the field data is placed in the context of the historical development of Afghanistan and the current political situation. The historical section of the report was written largely by Dr William Maley, an academic who has followed the situation in Afghanistan for more than two decades and who has published widely. Dr Maley also made a substantial input to the elections section, as well as offering his insights to the overall study. Comparative material was provided by Dr Andy Reynolds. Drafts of all sections were shared and commented upon by the whole team. The study went through ODI's normal process of peer review.

Annex 2
Government ministers (as at September 2002)

President	Karzai, Hamid
Vice-President	Khan, Mohammad Fahim
Vice-President	Khalili, Abdul Karim
Vice-President	Arsala, Hedayat Amin
Vice-President	Shahrani, Niamatullah
Minister of Agriculture and Livestock	Anwari, Sayed Hussain
Minister of Border and Tribal Affairs	Noorzai, Mohammad Aref
Minister of Civil Aviation and Tourism	Sadeq, Mohammad Mirwais
Minister of Commerce	Kazemi, Sayed Mustafa
Minister of Communications	Stanakzai, Mohammad Masoom
Minister of Defence	Khan, Mohammad Fahim
Minister of Education	Qanuni, Yunis
Minister of Finance	Ghani, Ashraf
Minister of Foreign Affairs	Dr. Abdullah
Minister of Hajj and Mosques	Naseryar, Mohammad Amin
Minister of Higher Education	Faez, Mohammad Sharif
Minister of Information and Culture	Raheen, Sayed Makhdoom
Minister of Interior	Wardak, Taj Mohammad
Minister of Irrigation and Environment	Nuristani, Ahmad Yusuf
Minister of Justice	Karimi, Abdul Rahim
Minister of Labour and Social Affairs	Qarqin, Noor Mohammad
Minister of Light Industry and Foodstuffs	Razam, Mohammad Alam
Minister of Martyrs & Disabled	Wardak, Abdullah
Minister of Mines and Industries	Mohammadi, Juma Mohammad
Minister of Planning	Mohaqqeq, Ustad Haji Mohammad
Minister of Public Health	Sediq, Sohaila

Minister of Public Works	Ali, Abdul
Minister of Reconstruction	Farhang, Mohammad Amin
Minister of Refugee Affairs	Nazeri, Enayatullah
Minister of Rural Development	Atmar, Mohammad Hanif
Minister of Transportation	Jawed, Sayed Mohammad Ali
Minister of Urban Development	Pashtun, Mohammad Yusuf
Minister of Water and Power	Kargar, Mohammad Shaker
Minister of Women's Affairs	Sorabi, Habiba
Chair of the Human Rights Commission	Samar, Sima
Chief Justice of the Supreme Court	Shinwari, Faisal Ahmad
Presidential Adviser on National Security	Qanuni, Yunis
Ambassador to the US	Shahryar, Ishaq