

# Post-War Afghanistan: Reconstructing a Failed State

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## Abstract

*Afghanistan once represented a fragmented and failed socio-economic and political entity. Operation Enduring Freedom, while targeting the Taliban and Al Qaida as part of the global war on terrorism helped create the structure of a new Afghan State. This article analyses the challenges faced by Afghanistan and how the new Afghan elite and its foreign supporters seek to address them through constitutional means. The New Constitution provides the framework of how Afghanistan wishes to reconstruct the new State. While it does concede the right of popular participation, its highly centralised form of government and unitary system that sidelines the political ramifications of ethnic nationalism are likely to pose serious challenges to nation-building. It might even push the central government to rely more upon foreign forces, mostly from the NATO countries. The situation is volatile and is likely to lead to conflict escalation unless the central government as also its foreign supporters are prepared to make major compromise with local ethnic leaders/warlords, and thus bypass provisions of the Constitution. However, that will in turn set a wrong precedent for a new State.*



## A War-Devastated State

Two decades of war left a telling effect on Afghanistan. A decade-long struggle against the Soviet occupation that drew inspiration more from tribal and ethnic loyalty as also the concept of religious war (jihad) seriously undermined the nascent movement towards Afghan nationalism. The intra-tribal/ethnic conflict that followed the Soviet withdrawal and the further fillip to Islamic radicalism superimposed upon outdated tribal value-systems added fuel to fire. Afghanistan turned into a failed State. The Taliban regime completed the process of national disintegration. Operation Enduring Freedom brought in a new regime, with those who had contributed towards the outster of the Taliban regime faced with the dunting challenge of reconstructing a failed nation-State.

What is helping Afghanistan in its recovery is the role, however limited it might appear, of the United Nations as an institution that has retained its credibility and legitimacy in the post-Cold War period despite the actions of some great powers. The UN had given its blessings to a group of 21 states that had held six meetings on Afghanistan between November 1996 and November 2001. The sixth meeting was held on November 16, 2001, after Operation Enduring Freedom had been launched. Also, eight states: China, Iran, Pakistan, Russia, Tajikistan, Turkey, the US and Uzbekistan, held periodic meetings under the UN auspices. The group adopted a declaration on November 12, 2001, following which the Security Council unanimously passed Resolution 1378 on November 14, 2001. It not only welcomed the declaration of November 12 but also expressed its support for the efforts of the Afghan people to establish a new transitional government leading to the formation of a broad-based multi-ethnic and a fully representative government based on respect for human rights. It also expressed support for action in combating international terrorism and illicit drug trafficking, return of refugees and for rendering of urgent humanitarian assistance. The resolution also asserted that the UN would continue to play a crucial role in the restructuring of post-war Afghanistan. Lakhdar Brahimi, Special Representative of the UN Secretary-General, took initiatives in that direction, providing legitimacy to the Bonn Conference. Political steps advocated by the Bonn Conference were strongly influenced by the fast changing military situation in Afghanistan. The rapid collapse of the Taliban at the hands of the forces of the Northern Alliance – especially the occupation of Kabul – backed by US air power gave the non-Pashtun groups, constituting the Northern Alliance, a potentially dominant role in reshaping the post-war destiny of Afghanistan. This was unacceptable not only to the Pashtun groups but also to Pakistan and even to the US. Thus, the Bonn agreement, in a way, not only put the brakes on the political ambitions of the non-Pashtun groups but also allowed pro-US Pashtun groups, led by Hamid Karzai, to play an important role in shaping the policies of post-war Afghanistan. Yet, according to Ali A Jalali, the Northern Alliance took the lion's share in the power-sharing arrangements stipulated under the Bonn agreement.<sup>1</sup>

Lakhdar Brahimi interacted in Bonn with about 23 members representing various pro-coalition Afghan groups as well as others and persuaded them to accept an agreement on the provisional arrangements in Afghanistan pending the reestablishment of permanent government institutions. The agreement was signed on December 5, 2001, with Lakhdar Brahimi as witness.<sup>2</sup> The Security Council endorsed the Bonn Agreement in its Resolution 1383 on December 8, 2001, and called upon all Afghan groups to implement the agreement in full and to cooperate with the Interim Authority due to take office on December 22, 2001. The Bonn Agreement gave the Afghan Interim Authority a six-month period to govern the country beginning December 22. Thus, the UN was actively involved in the task of post-war Reconstruction of Afghanistan while military action to subdue the Taliban and Al Qaida was still on.

Meanwhile, an emergency Loya Jirga (Grand Council) was called to select a

broad-based Transitional Authority to lead Afghanistan pending the election of a fully representative government in 2004. The process of representation in the Loya Jirga was rather elaborate and based upon a two-tier method. In the first step, about 40-60 representatives were selected at the district level. In the second, representatives from several districts in a given region met to select the delegate who would represent them in the Loya Jirga. Of the 1,500-odd delegates in the Loya Jirga, two-thirds were chosen by the Afghan people and the remaining by various groups. There were complaints that the selections were rigged.<sup>3</sup> The Loya Jirga was attended by Lakhdar Brahimi as UN representative and by Zalmay Khalilzad as the Special Envoy of the US.

The Loya Jirga was convened in June 2002. It was mandated to select the Head of State as well as to approve the structure of the Transitional Authority and appoint key officials. The Loya Jirga represented the diverse and often antagonistic interests of various Afghan groups that had helped to oust the Taliban regime. The assembly was not, and could not have been expected to be 'democratic' in the Western sense, but it did symbolise the Afghan method of reaching a consensus that was as binding upon the participants as that arrived at by any democratically elected institution. The influence of the politics of intimidation as also of bribery was not to be ruled out. But, the Loya Jirga did succeed in electing, through a secret ballot, Hamid Karzai as the President. Karzai won by obtaining 1,295 votes out of a total of 1,575 votes that were cast. There vice-presidents and a cabinet were also elected.

It seems that almost all the factions were interested in thwarting the return of the ex-King Zahir Shah to mainstream politics though he was accorded all the respect. "Although the former monarch publicly declined his candidacy for any official position, it was widely believed that his ouster was engineered by a heavy-handed American and United Nations manoeuvring."<sup>4</sup> Hamid Karzai, who had a weak political base of his own even among the Pashtuns, was expected to be more accommodative than the ex-king. Also, the secular image of King Zahir Shah had little attraction for the Islamists in all the camps.

After the Loya Jirga had agreed on the new government, the Interim Authority established under the Bonn Agreement gave way to the Transitional Authority and eventually to the Transitional Islamic State of Afghanistan. Apart from running the State, the major task of the new authority was the drafting of a Constitution and presenting it for approval before a 'constitutional' Loya Jirga and subsequently to organise an election by July 2004. The roadmap of transfer of power from the Taliban-led regime to a more representative regime was thus clearly laid down by the Afghan themselves.

### **Experiment in State Formation**

The long period of anti-Soviet insurgency followed by the inter-ethnic civil war and the Taliban rule had collectively contributed to turning Afghanistan into a failed State. It was logical that the defeat of the Taliban would be followed by an effort

to recreate Afghanistan as a new, viable, stable and modern State. Not only the Afghan people but also their Western supporters were keen to give new Afghanistan the shape of a modern, democratic, albeit an Islamic State. That effort was reflected in the type of Constitution that was framed for the new Afghan State under Western patronage.

As part of the timetable laid down under the Bonn Agreement, Afghanistan had to have a Constitution so that a newly-elected government could take over from the provisional government. Accordingly, a draft Constitution<sup>5</sup> was tabled on November 3, 2003, to be discussed by the Loya Jirga and, if possible, approve the final draft of Afghanistan's new Constitution.

The process of the drafting of the Constitution was set in motion with the election on December 14, 2003, of Sibghatullah Mujaddedi as the president of the 'constitutional' Loya Jirga. He had fought against the Soviets as the leader of a moderate party called Afghan National Liberation Front and was for a brief period President of Afghanistan in 1992. The Loya Jirga was convened in Kabul to discuss and approve the new Constitution that was formally inaugurated by ex-King Zahir Shah on the same day.

The Constitution-making process was not smooth, to say the least. The Loya Jirga convened debated the draft Constitution for almost three weeks. Issues such as the highly centralised presidential form as opposed to a parliamentary form of government as also the unitary form of government versus the federal form were vociferously debated. Those who wanted to rush through the process of legitimising the draft Constitution were impatient with the numerous amendments being proposed. Farooq Wardak, the Director of the Constitutional Commission, is reported to have stalled further debate by saying: "No one is allowed to speak ... We have no more time for talking." Microphones were reportedly cut off to halt the interventions of several delegates.<sup>6</sup>

Though the draft was amended to somewhat water down presidential absolutism, yet consensus eluded the Loya Jirga. While Karzai and his group believed that a simple majority was sufficient to ratify the new Constitution, others cautioned against it and worked towards reaching at least a semblance of consensus so as to avoid an open ethnic split. Almost one-third of the 502 delegates had threatened to boycott the voting. Lakhdar Brahimi, among others, mediated to avoid an open split. Finally, Sibghatullah Mujaddedi asked all delegates to approve their endorsement of the final version of the Constitution. Reportedly, an overwhelming majority did so. Those who objected obviously went unnoticed. He was also quoted as saying that the final draft of the Constitution would be distributed to the delegates<sup>7</sup>, implying thereby that the delegates probably agreed to the final Constitution even before its text was formally circulated. The new Constitution came into force, as per Article 162, after it was approved by a consensus on January 3, 2004 (14 Jaddi 1382 Hijri). UN Secretary General Kofi Annan welcomed the step. This document became a decree after President Hamid Karzai signed it in a formal ceremony on January 26, 2004.<sup>8</sup>

The draft Constitution was amended in its final form on crucial issues like the powers of the elected Assembly and the recognition of the ethnic diversity of Afghanistan. It had provided for what can be termed as presidential absolutism. Not only had the president been given over-riding powers as the Head of State, but under Article 159 of the draft Constitution, elections for the National Assembly could only be held a year after his election giving him enough time to manage affairs to his satisfaction. Article 160 of the final Constitution, however, recommended that elections for the post of president as also for the National Assembly be held simultaneously. The final Constitution also provided, under Article 156, for the formation of an independent electoral commission, a point that was missing in the draft. The final version of the Constitution also gave the Lower House (Wolesi Jirga) greater powers to act as a check on presidential absolutism.

### **The New Constitution**

#### *Place of Islam*

Keeping in mind the deep-rooted Islamic tradition in Afghanistan that had been radicalised over the past two decades due to the indoctrination of Islamic theology, the new Constitution formally legitimised the prominent place of Islam in the country's socio-economic and political ethos. The Preamble speaks of firm faith in God Almighty and belief in the sacred religion of Islam. Article 1 defines Afghanistan as an Islamic Republic. The flag of Afghanistan has as the insignia a *mehrab* and pulpit in white as also the phrases: "There is no God but Allah and Mohammad is his Prophet" and "Allah is Great". This phrase was not in the national anthem of the draft Constitution but was added in the final text (Article 20). As per Article 149, provisions dealing with Islam in the Constitution cannot be amended. All oaths of office are to be taken in the name of God.

The Constitution also directs the State to promote religion. Under Article 17, the State shall adopt all necessary measures for promotion of education at all levels, development of religious education, organising and improving the conditions of mosques, madrassas and religious centres. Under Article 45, the State shall devise and implement a unified educational curriculum based on Islam and the national culture as also the curriculum of religious subjects on the basis of the Islamic sects (*mazhab*). While this might be seen as State interference in religious affairs, it may also be used as a means to 'manage' these institutions vis-a-vis the radical Islamic groups. Article 54, while empowering the State to ensure the physical and psychological well-being of the family, which is considered as a fundamental unit of society, also says that it should work for the elimination of traditions contrary to the principles of Islam. While Article 35 grants freedom to form social organisations as also political parties, it also points out that their programme and charter should not be contrary to the principles of Islam.

The Constitution also officially recognises the Hanafi School of Jurisprudence as the main school (*mazhab*). As per Article 130, when there is no provision in the

Constitution or its laws regarding ruling on an issue, the court's decision shall be in accordance with the Hanafi system. The Constitution also provides for the country's Shia populace. Under Article 131, the court shall apply the principles of the Shia school of law in deciding cases dealing with personal matters involving the followers of Shia sect. It adds: "In other cases, if no clarification in this Constitution and other laws exists and both sides of the case are followers of the Shia sect, courts will resolve the matter according to the laws of this sect". The Constitution is silent in the case of only one party being a Shia.

This formal constitutional concession to Islam was essential to establish the credentials of the new regime as representative of Afghan identity and to prove that it was not a hostage to secular values that might be imposed by the Western supporters of the new regime. Though Afghanistan has been 'liberated' from the stranglehold of the Taliban, yet one wonders how modern moderate Afghans will fare under the new system. The tussle that the 'moderate' elements in Afghanistan face was evident from the controversy over the question of whether women could be shown to be singing on Afghan TV. Sayed Makdoom Raheen, Minister for Information and Cultural Affairs, had permitted that footage on January 13, 2004, thereby breaking a 12-year ban. Kazi Ahmad Manawi, Deputy Chief Justice of the Afghan Supreme Court, voiced his protest the next day and complained to Sayed Makdoom Raheen. He said: "We are opposed to women singing and dancing as a whole. This is totally against the decisions of the Supreme Court", and said that it had to be stopped.<sup>9</sup>

### **Place for Human Rights**

Western influence in the Constitution is evident in the elaborate provisions made for fundamental rights and duties of citizens. Chapter II comprising 37 Articles is devoted to that topic. Article 22 says that the citizens of Afghanistan – whether men or women – have equal rights and duties before law. The provision of equality among men and women was included in the final version of the Constitution and was not there in the draft. Liberty is the natural rights of human beings and liberty and dignity of human beings are inviolable (Article 24). Article 29 prohibits torture of human beings. It also gives freedom of expression (Article 34), to form social organisations and political parties (Article 35), to conduct peaceful demonstrations (Article 36), etc. Under Article 43, education is the right of all citizens and the State promises free education up to the level of B.A. (*lisans*). The draft Constitution was more modest and had offered free education only up to the secondary level. The Constitution also says that work is the right of every citizen (Article 48). It provides for the establishment of an Independent Human Rights Commission for Afghanistan for monitoring human rights observance as also for the advancement of human rights (Article 58).

At least on paper, the West has laid down the norms of freedom and democracy in a failed State like Afghanistan. Time alone will tell how these values take root in what essentially was, and still remains, a medieval society. It will not be easy,

given the prevailing deeply entrenched feudal warlordism and the tribal ethos of the Afghan society as also its poor economic base.

### **Presidential Form of Government**

The framers of the draft Constitution had proposed a strong and unitary presidential form of government, probably because it suited their supporters in the West, particularly US. The monarchy as an institution was given a symbolic send-off in the Constitution, relegated as it was to Chapter XII dealing with the transitional provisions. Article 156 of the draft Constitution (and Article 158 of the final text) says that the title of the Father of the Nation and privileges granted by the emergency Loya Jirga of 2002 to His Majesty Mohammad Zahir Shah, former king of Afghanistan, are to be preserved for him during his lifetime. He has no role under the Constitution. The president has taken over all the powers and functions of the Head of State.

Article 1 of the Constitution makes Afghanistan a unitary state. Thus, as the Head of State, the president enjoys wide-ranging powers. These powers were almost absolute under the draft Constitution but the final version, which emerged after a long debate in the constitutional Loya Jirga, provides for a system of checks and balances, primarily by the Wolesi Jirga (the House of the People). Chapter III of the Constitution deals with the presidential system of government.

The president will be elected for a five-year term by direct voting by all eligible voters. He must get at least 50 per cent of the votes. If none of the candidates succeed in obtaining 50 per cent of the votes, then the top two candidates have to contest again, so that one of them can be declared the winner (Article 61). The president will be supported by two vice-presidents (only one as per the draft Constitution). These three posts have to be contested together as a team. Article 62 lays down qualifications for those who wish to contest. They have to be Muslims and born of Afghan parents and should not have citizenship of another country. The age limit for contesting the elections is 40 years. The candidates should not have criminal records. Article 64 defines the powers and functions of the president. Apart from the usual powers as Head of State, he is also tasked with the obligation of supervising the implementation of the Constitution. Article 157 provides for the establishment of a Commission for Supervision of the Implementation of the Constitution. Its members are to be appointed by the president. Under Article 65, the president can call for a national referendum on important national, political, social and economic issues.

Article 69 of the Constitution deals with proceedings for his impeachment for crimes against humanity, treason, etc. The charge has to be levelled by one-third of the members of the Wolesi Jirga. If two-thirds of its members uphold the charge, the Wolesi Jirga can convene the Loya Jirga within a month. If the Loya Jirga too approves the charge by a two-thirds majority, the president stands dismissed. He can be referred for trial before a special court that comprises three members of the

Wolesi Jirga, three members of the Supreme Court appointed by the Loya Jirga, and the Chairman of the Meshrano Jirga (House of Elders). A person appointed by the Loya Jirga conducts the lawsuit.

Chapter IV deals with the details of the presidential form of government. Ministers work under the chairmanship of the president. They are appointed by him and have to be 'introduced' for approval to the National Assembly (Article 71). Article 72 lays down their qualifications. While the draft Constitution categorically said that the person has to be a citizen of Afghanistan, the final version modified it as follows: "Must have only the citizenship of Afghanistan. Should a nominee for a ministerial post also hold the citizenship of another country, the Wolesi Jirga shall have the right to confirm or reject his or her nomination". Thus, the Constitution has a provision for Afghans with dual citizenship to join the government as ministers. Probably, the aim is to enable those in exile to return to the country and serve it effectively. Article 75 gives details of the usual work entrusted to the government like executing the provisions of law, maintaining public order, preparing the budget, devising and implementing programmes of social, cultural, economic and technological progress, etc. The government also has to report to the National Assembly at the end of the fiscal year regarding its performance and has to submit plans for the next fiscal year.

Since the Afghan Constitution provides for a unitary form of government, there is no provincial autonomy. The administration is based on central units, each headed by a minister, and local administration units like in the provinces. Their numbers, areas, etc., have yet to be regulated. As per Article 136, they are to be defined on the basis of population, social and economic conditions and geographical locations. Article 137 further underlines the centralised nature of the administration. It says that government, while preserving the principle of centralism, shall delegate certain type of authority to local administrative units for expediting and promoting economic, social and cultural affairs, and to increase the participation of the people in the development of the region. Thus, the Constitution introduces a new concept of popular participation – not in decision-making but in implementation.

The provincial councils will comprise representatives who are elected for a four-year term through direct and secret ballot (Article 183). The body has only an advisory role and works for 'securing development targets'. The Constitution also provides for elected district councils (three-year term) and elected municipalities.

### **Popular Participation and Decision-Making**

The Constitution also has provisions for popular participation in decision-making. According to Article 4, national sovereignty belongs to the nation that exercises it directly or through its representatives. As per the Article, the nation of Afghanistan consists of all individuals who are citizens of Afghanistan.

Chapter V deals with the National Assembly. It is the highest legislative organ



and is the manifestation of the will of the people. It represents the whole nation (Article 81). It comprises of two houses: the Wolesi Jirga (House of People) and Meshrano Jirga (House of Elders). Members of the Wolesi Jirga are elected by direct, secret ballot for a period of five years. Their total number should not exceed 250 (Article 83). The Meshrano Jirga comprises elected as well as nominated members. Each provincial council elects one person for a four-year term. Each district council elects one person for a three-year term. The president appoints the remaining one-third members for a five-year term. These members are experts and experienced persons. They must include two representatives each from the disabled and impaired sections and from the Kochis. The same Article says that half of these members appointed by the president should be women.

The Constitution lays down qualifications for these members. They have to be citizens of Afghanistan or should have obtained the citizenship at least 10 years before formally announcing their candidature. A candidate should have attained the age of 25 years for contesting a seat in the Wolesi Jirga, and the age of 35 years for contesting a seat in the Meshrano Jirga. The credentials of the candidates are to be reviewed by the Electoral Commission (Article 687). The National Assembly has the power to ratify, modify and/or abrogate law or legislative decrees, approve plans for economic, social, cultural and technological development, as also state budgets, create/modify administrative units (provinces and districts), ratify international treaties, etc. (Article 99). Any commission of either house can question a minister. A law has to be approved by both the Houses and endorsed by the president. In case the president does not agree, the document will be sent back for reconsideration to the Wolesi Jirga within 15 days. If it is voted upon by a two-thirds majority, it is considered approved (Article 94). Thus, the Lower House has been given, under the final Constitution, the power to overrule the president.

The Constitution also provides for a mechanism for resolution of conflicts between the two Houses. In case the decision of one House is rejected by the other, a combined committee composed of equal number of members from each house will be constituted to resolve the issue. The decision of the committee will be enforced after its approval by the president. In case the committee is unable to resolve the issue, the defeated resolution is considered void. However, in case the Wolesi Jirga has approved the resolution earlier, it can be approved in the next session of the Wolesi Jirga if voted upon by a majority of its members (Article 101). Thus, the directly elected body has been accorded greater powers under the Constitution.

As noted earlier, the revised and final Constitution has given more powers to the National Assembly, particularly to the Lower House (Wolesi Jirga) so as to check presidential absolutism as was suggested in the draft Constitution. Some of the Articles deserve special mention in this context since they offer an improvement over the draft. Under Article 50, the State is obliged to adopt necessary measures of a strong and sound administration “after authorisation by the National Assembly”. The president has to determine the fundamental policies of the State “with the

approval of the National Assembly” (Article 50). The president appoints important officials like ministers, members of the Supreme Court, the Attorney General, the Director of Central Bank, etc., “with the approval of the Wolesi Jirga” (Article 64). In the original draft, the president was responsible only to the Nation. In the final version, he is also responsible to the Wolesi Jirga. The ministers need to be approved by the National Assembly. The ministers are responsible to the president as well as to the Wolesi Jirga for their duties (Article 77). In case the Wolesi Jirga is in recess, and in case of an Emergency, the government can adopt legislation other than those relating to the Budget and financial affairs. These decrees have to be submitted to the National Assembly within three days of the start of the session. In case the National Assembly rejects them, the decrees become void (Article 79). The Wolesi Jirga can pass a vote of no confidence against a minister (Article 92). The president has the power to declare Emergency, but he has to seek the approval of the National Assembly if it has to be extended beyond two months (Article 143). These Articles, introduced in the final draft, do restrain the absolute powers of the president.

### **Loya Jirga**

The Loya Jirga, an informal, though important body in earlier days, has been given constitutional legitimacy as well as a fixed membership. It is accepted as the highest manifestation of the people’s participation. It comprises all the members of the National Assembly as also the chairpersons of all provincial and district councils. Ministers and members of the Supreme Court can attend it but without the right to vote (Article 110). The president, under Article 64, can convene the Loya Jirga, to take decisions on issues related to independence, national sovereignty, territorial integrity, and supreme interests of the country. It can also be convened by the Wolesi Jirga under Article 69, dealing with the impeachment of the president and to amend the Constitution (Article 150). The majority of members constitute the quorum, and the decisions are taken by a majority of the members present and voting (Article 113) except when amending the Constitution, which requires a two-thirds majority (Article 150).

### **Other Institutions**

Chapter VII of the Constitution deals with the judicial system that comprises the Supreme Court (Stera Mahkama), the High Court, the Appeals Court, etc. The Supreme Court will have nine members who will be appointed for 10 years with the approval of the Wolesi Jirga (Article 117), and there will be no reappointment. Members so appointed have to be at least 40 –years old and citizens of Afghanistan. They need higher education in law or in Islamic jurisprudence. No degrees are specified. Besides their legal role, under Article 121, the courts can “review compliance with the Constitution” of laws, legislative decrees, international treaties and conventions and “interpret them in accordance with the law”.

The Constitution provides for a state of Emergency under Chapter IX. Under

Article 143, the president “in confirmation of National Assembly” shall declare a state of Emergency in some part or whole of the State. If Emergency continues for more than two months, the approval of the National Assembly is required. During the period of Emergency, the president has powers to issue decrees (Article 144) but these measures, unless approved by the National Assembly soon after the end of the Emergency, become invalid with the end of the Emergency (Article 148). If the Emergency extends beyond four months, the president needs to convene the Loya Jirga (Article 147). During Emergency, the Constitution cannot be amended (Article 146).

Chapter X deals with the procedure for amending the Constitution. Under Article 149, provisions dealing with Islam in the Constitution cannot be amended. According to Article 67, the vice-president, while acting as president, cannot ask for an amendment to the Constitution. Also, as noted before, under Article 146, the Constitution cannot be amended during an Emergency. Article 150 gives the procedure to be adopted for amending the Constitution. A commission, composed of members of the government, of the National Assembly and the Supreme Court, will be established by a presidential decree to prepare a draft of the amendment. The Loya Jirga, convened by the president, has to give its approval by a two-thirds majority for amending the Constitution.

The Constitution has certain provisions that provide some guidelines for the State’s economy. It specifically encourages a free market economy. Under Article 10, the State encourages and protects private capital investments and enterprise based on the market economy. The Constitution, however, does not give foreigners the right to own immovable property in Afghanistan (Article 41). One wonders how that will encourage foreign investments that are badly needed for the economic and infrastructural growth of the country. The Constitution also promises to prevent smuggling of narcotics. As per Article 7, the State will prevent all types of terrorist activities, production and consumption of intoxicants (*muskirat*), as also production and smuggling of narcotics.

While the desire to root out the base of narco-terrorism in Afghanistan is laudable, at least on paper, one wonders how the regime in Kabul can impose its will upon the various warlords who not only control production and trade of narcotics in their respective areas but also have strong militias of their own, capable of defying the central authority. It will be almost impossible to eradicate narco-terrorism in Afghanistan without providing for viable and acceptable alternate inputs for socio-economic and political growth of Afghanistan. There are no such signs as yet.

Chapter XII deals with the period of transition between the adoption of the Constitution and its implementation as well as elections of the president as also of other representatives of the people. As noted earlier, the final version of the Constitution, under Article 160, lays down that every effort shall be made to hold the first presidential election as also the parliamentary elections at the same time. Under Article 159, these elections were to be held within six months after the

approval of the Constitution. One wonders how the present government of President Karzai could have attained that objective when the country still remains unpacified. Also, there are no acceptable electoral details like census or voters list, constituencies, etc. Any attempt to push through an early election will put a serious question mark on the legitimacy of the new government that is likely to further complicate the already serious situation.

### **Recognising Ethnic Diversity**

The Constitution recognises the ethnic diversity in Afghanistan and yet makes no effort to neutralise the consequences of these centrifugal forces, although Article 4 of the final version lists the various tribal groups of Afghanistan. The list includes Pashtuns, Tajiks, Hazaras, Uzbeks, Turkmans, Baluchis, Pashais, Nuristanis, Aymaqs, Qirghiz, Qizilbash, Gujurs, Brahwais and even Arabs. In the draft Constitution, only Pashto and Dari were recognised as official languages of the State. However, the final version made concessions to other languages as well by adding: “The Turkic languages (Uzbeki and Turkmen), Baluchi, Pashai, Nuristani and Pamiri (*alsana*) are official language in areas where the majority speaks them. The practical modalities for implementation of this provision shall be specified by law.” Thus, Article 16 provides for a three-language formula wherever necessary. In the draft Constitution, the national anthem was to be in Pashto. That is retained but in the final version, names of all ethnic groups have also been added to the national anthem besides ‘Allahu Akbar’ (Article 20).

### **Pitfalls**

The most serious lacuna in the new Constitution is an attempt to force a unitary form of government upon the people of a State who are divided by geographic, ethnic and tribal loyalties, and where ethnic and tribal groups tend to spill over into the neighbouring States. The impact of this diversity would have been minimised if the Constitution had provided for a structure to share power under a federal formula. But the Constitution does not provide for a meaningful form of provincial autonomy. Though the members of the provincial councils are directly elected for a four-year term, the council can only advise the central administration on issues lying within its domain (Article 139). The Constitution has reduced these bodies to the level of administrative units only, with all powers concentrated in Kabul. “One doubts if the centralised model will work in Afghanistan, with every major ethnic group occupying geographically distinct regions and a history of warlordism supported by regional armies, with a ‘national’ army yet to take shape.”<sup>10</sup>

The attempt by the government in Kabul under President Hamid Karzai to dominate traditional warlords in their areas of influence is facing stiff resistance. They had fought the Soviet forces for years. Many of them had resisted military attempts by the Taliban-Al Qaida fighters to subdue them, and finally had helped the coalition forces in defeating them in 2001. They are not likely to disband their

followers and handover power to President Hamid Karzai and his small US/NATO-supported 'national' army, especially when Karzai does not possess a strong base even among the Pashtuns.

President Karzai had dispatched a small contingent – almost a token presence of a few hundred fighters – of the national army in March 2004 to Herat. In the clash between this group and the fighters of Ismail Khan, troops sent by President Karzai were driven out. A similar detachment was sent in the first week of April 2004 to the northern province of Fayab, which falls under the territory dominated by General Rashid Dostum. In a clash near Malmana, the forces of Karzai were defeated and they are also said to be under pressure in the entire frontier along the border with Pakistan.<sup>11</sup>

### **Security, Reconstruction and Presidential Absolutism**

At least two decades of continuous war and civil strife had seriously damaged the socio-economic base of Afghan society. Efforts are being made to help reconstruct it. But it needs not only sufficient financial inputs but also an environment of security so that foreigners and non-governmental organisations (NGOs) can contribute. Both are in short supply. Foreign donors had promised an aid of \$4 billion earlier. They promised an additional \$4.5 billion during the Berlin Conference in April 2004. Of that, nearly half the amount was promised by the US. Afghan officials had gone to Berlin with a seven-year development plan and a bill of \$27.6 billion. Obviously, they were disappointed. They also complained that the promised aid did not reach them. According to *The Economist*, for many Afghans, planting poppy is still the only way to survive since it provides an income of \$2.3 billion per year.<sup>12</sup>

More than 10,000 American troops are engaged in fighting Al Qaida and the Taliban along the Afghan-Pakistan border and about 6,000-strong NATO-led ISAF are stationed in and around Kabul to offer security to the new Afghan government. NATO members have not responded to the appeal to increase the number of troops so as to offer security to aid workers in the interior. This challenge is being met through the creation of civil-military provisional reconstruction teams (PRTs) that are interlinked with NGOs. It is an attempt to support NGOs without an overt show of force. Already, six such teams are operating in Afghanistan. Of them, three were provided by the US while one each was provided by Germany, the UK and New Zealand. The US has promised to raise five more such units. Other NATO members have been requested to contribute five more units to raise the total to 16 by mid-year.<sup>13</sup> That will also coincide with the preparation for holding elections in Afghanistan.

There is every possibility that the unrestrained support offered by NATO and even the UN to the Karzai regime in Kabul would alienate them vis-à-vis the ethnic groups in the north. Thus, the primary supporters of the Karzai regime in Kabul are caught between the forces of Al Qaida and the Taliban on the one side and the mounting discontent of their erstwhile alliance partners in the north. Though a linkup between the forces of radical Islam and the erstwhile Northern Alliance does

not seem possible, yet the alliance against the radical Islamists that had underlined the cooperation during Operation Enduring Freedom has suffered a setback. This will have a major impact upon the stability of Afghanistan.

### **The Presidential Election**

The case of Afghanistan, as also of Iraq, is unique in the sense that under the pretext of war on terrorism, military intervention, led by the US, not only overthrew the then existing regime, but also installed a new puppet regime that had to be legitimised through follow-up action under the formula of democracy and the related constitutionally legitimised procedures. Hence, a new Constitution was crafted that would give Hamid Karzai legitimacy through a nationwide election.

A Joint Electoral Management Body (JEMB) was constituted under the chairmanship of Zakim Shah to conduct the election. The UN too joined in, especially in the process of registering votes. As a special case, Afghans, mostly Pashtuns, who had been residing in Pakistan for decades, were also registered as voters and arrangements made so that they could cast their votes. About 6.5 million Afghans, out of an estimated 9.8 million were registered as voters. The victory of the coalition-supported faction led by Hamid Karzai was also facilitated by JEMB. Contrary to the explicit recommendation under Article 160 of the Afghan Constitution that stipulated simultaneous elections for the post of the President and the National Assembly, the JEMB recommended that the Presidential election be held in October 2004. The UN Secretary General too lent his seal of approval to this violation of the Afghan Constitution. The election for the National Assembly has been postponed till mid-2005. It is feared that such an arrangement would enable the newly elected presidential team to influence these elections to its own advantage.

Elections for the post of President were held on October 9, 2004. The team led by Hamid Karzai managed to acquire more than 50 per cent of the votes. Some candidates did raise the issue of electoral malpractices, but even Yunus Kanooni, Karzai's main rival, accepted the results. Hamid Karzai's victory was the result of two main factors. First, the opposition had remained divided on sectarian and ethnic lines, and hence was in a state of perpetual minority. If they had formed a coalition, they might have offered a close fight. Second, Karzai's team had eroded the opposition's sectarian and ethnic loyalty by including Ahmad Khalili, a Hazara, and Ahmad Zia Masood, brother of late Ahmad Shah Masood, the Tajik leader, as vice-presidents in his team. This move not only divided the opposition but also gave the new team a pan-Afghan identity.

Undoubtedly, President Karzai and his team have now acquired constitutional legitimacy. But the big question still remains unanswered. Constitutional legitimacy, even if sanctioned by the UN and the great powers, will prove to be inadequate if not simultaneously accompanied by credibility and acceptance among the vast majority of the Afghan people. This is true not only of Afghanistan but also of other States, including Iraq. It has been Afghanistan's misfortune that various regimes that ruled

over Kabul after the ouster of King Zahir Shah in 1974 were unable to acquire legitimacy as well as credibility, despite the fact that most of them did succeed in acquiring some international recognition. In the light of this, the forthcoming election of the National Assembly especially that of the Wolesi Jirga assumes great importance. Hopefully, the election to the Lower House will throw up a new Afghan elite that will eventually help establish the credibility of the regime in Kabul. Only a regime that is both legitimate and credible can confront on a national level, the forces of violence that have poisoned the atmosphere in Afghanistan for almost three decades.

Kabul will not be able to impose its effective authority on the whole of Afghanistan for at least some years to come. Will the NATO in general and the US in particular, who have gradually increased their military presence in Afghanistan since Operation Enduring Freedom, continue to support the regime of President Hamid Karzai in exercising centralised authority over the whole of Afghanistan? And for how long? Indirectly, it will mean that these foreign forces are preparing to hold on to Afghanistan for some years to come. What long-term impact will that have upon the region, given the added complications arising from their occupation of Iraq since March 2003, remains to be seen. Will the policy win friends, or will it add fuel to the so-called war on terrorism that is now taking the shape of a clash of civilisations?

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