

## Summary of Briefing Paper on States of Emergency

The 1964 constitution gave the executive, the king, power to declare a “state of emergency” in times of “war, danger of war, serious disturbances, or similar conditions which endanger the country” (article 113; see also articles 8.16, 113-19). During this “state of emergency,” the executive had extraordinary powers to suspend six constitutional rights (involving warrantless searches, property use, privacy, the freedom to assemble, and compensation); to postpone elections; and to pass any legislation. But a state of emergency had to be approved by the Loya Jirga within three months.

The requirement that the Loya Jirga approve declaration of a state of emergency is one example of rules that limit the executive’s power. Such rules aim to prevent the executive from exploiting states of emergency to threaten human rights or harm the basic institutions of government. Such rules should deal with the following aspects of a state of emergency:

- *Starting a state of emergency:* In general, a state of emergency should be triggered only by a major event like an attack on the nation, not by a mere risk. Afghanistan, however, is subject to frequent border incursions and other types of violent incidents. The executive may thus be able to impose a state of emergency at any time. Therefore, to constrain the executive’s ability to impose a state of emergency, a heightened threshold may be necessary. Since it may be difficult to define in advance what such a threshold should be, other rules, such as those requiring approval of a representative body, are particularly important.
- *Ongoing legislative approval:* Because of the grave danger that the executive may abuse rights or become a dictatorship, a state of emergency should be limited in time. Thus, a state of emergency can last only until the legislature has time to meet and approve by majority vote the state of emergency, as Article 113 of the 1964 Constitution required. If representatives need to travel from the provinces, there may be an unavoidable delay of several weeks before legislative approval. In most countries, the “legislature” means the parliament, or one house of a bicameral parliament. In Afghanistan, it in this context it has generally meant the Loya Jirga.

It is not enough that the Legislature or Loya Jirga give approval only once. When an emergency begins, there may be pressure on the legislature to approve the state of emergency. As the emergency continues, the executive may be tempted to use the emergency for political gain, for example, by calling opponents “traitors,” or using its emergency powers to consolidate power. Therefore, fresh legislative approval of the state of emergency could be

required every two to three months. In order to assure against trivial continuation of the emergency, one might require that every time the legislature votes, a larger majority will be needed to continue the state of emergency. In the first vote, a simple, fifty (50) percent plus one majority would be enough; the next time, a sixty (60) percent majority would be needed to continue the state of emergency; a seventy (70) percent majority would be required the third time; an eighty (80) percent majority the fourth time and thereafter. This means that the state of emergency is unlikely to continue too long, and that significant minorities in parliament can veto the state of emergency if they feel it is no longer justified. The executive is also less likely to abuse rights during the state of emergency if it knows it must win these bigger majorities to continue the emergency

Since convening a Loya Jirga is an extraordinary event, even if the initial approval is vested in the Loya Jirga, the constitution may wish to invest these continuing approvals in the standing legislature. The legislature has an important role in limiting executive power, especially in times of emergency. Hence, the legislature and Loya Jirga must not be dissolved at such times.

- *Legislative committee oversight:* To examine the information on which the government bases the claim that a state of emergency is necessary, the legislature should have some independent body that can examine the information. One alternative is to establish a committee, led by a member of the opposition, which has the right to examine all secret information possessed by the executive. This committee decides what information to share and issues reports to its colleagues in the legislature. This gives the legislature enough information to make meaningful choices about whether to continue the state of emergency. When the state of emergency ends, this committee may be required to make a public report within one year.

An Afghan legislative body that does not have permanent committees (such as the Loya Jirga) could still have a standing body led by a respected politician who is recognized as being independent of the governing party to play the same role. That way, even if there are not clear majority and minority parties, a person from outside the ruling group will head the committee. The membership of the committee could also be chosen by the government from lists of legislators compiled by parties out of power.