

Presentation to Constitutional Commission of Afghanistan

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Mr. Chairman of the Commission, His Excellency Vice President Shahrani,  
Ambassador Brahimi, members of the commission, esteemed colleagues and guests:

I thank all of you for the honor of appearing before this esteemed group and for giving me this opportunity to discuss a few ideas about the future constitution of Afghanistan with you. I know you will do your utmost to draft a constitution that will help build an Afghanistan worthy of the sacrifices the people have made and that will be a precious gift to their descendants.

In the modern world, humanity is divided into sovereign states, each of which governs itself according to a distinct set of laws. A constitution expresses the highest and most binding agreement among the people of the state, the nation, about how they wish to govern themselves. A constitution expresses the will of the members of the nation to live together according to common rules. It also recognizes that the members of the nation are divided in many ways and wish to agree on means to settle those differences through law and rules, rather than through force and violence.

A constitution expresses a common commitment of the nation, but when people agree to abide by a national constitution, they do not, and should not, abandon all other loyalties. They remain loyal to some things larger than the nation, such as a universal religion or common principles of humanity. Some extremists may misuse such values to subvert the nation, but a nation that abandons such principles falls victim to oppression

and war. That is why I am sure that the constitution of Afghanistan will affirm commitment to the basic principles of Islam and the universal principles of human rights.

When people agree to abide by a national constitution, they also remain attached to things smaller than the nation: family, region, ethnic group or tribe, profession, party, and much more. When these loyalties take precedence unjustly over the nation or universal values, the result can be chaos, fitna. But when a state tries to destroy these loyalties in the name of national unity, the people lose their voice. They become powerless individuals, and the result, again, is oppression, zulm.

The people of Afghanistan have experienced more than enough zulm, but that does not mean they want a weak government, for they have also experienced more than enough fitna. They do not expect miracles, but they want a government that is strong enough to provide basic security and services and accountable enough to them not to abuse them.

We know how far the reality is from this even today. One can be tempted, in such a situation, to write an ideal constitution and try to impose it on an unacceptable reality. But a constitution is not a model for a new society. It is an agreement among the people of the existing society about how to live together in a better way. It has to embody people's hopes for a better life, but if it cannot be implemented, it does not matter how good it sounds on paper.

The research we have conducted suggests, a few characteristics of today's Afghan society that might affect how you draft the constitution. First, Afghanistan is a country emerging from decades of violent conflict. Therefore it needs a government that can lead the effort at reconstruction and development. It has to be able to enact and implement

laws and regulations that the people need without undue delays, without too many complicated disputes among different parts of the government. We know how the Afghan people are suffering today because of the delays in providing reconstruction assistance. Many of these delays are due to international rather than Afghan problems, but the constitution should decrease rather than increase these delays.

Second, the relations among the different parts of the Afghan nation have become a very sensitive and difficult subject. The delegates to the Emergency Loya Jirga showed that the people of Afghanistan consider themselves a nation, and today there is not a single separatist movement in this country. Nonetheless, decades of violence and of the destruction of national institutions have left tremendous mistrust. Every group feels they have been victims of injustice, and the sad fact is that they all are right. Every leader proclaims his loyalty to the Afghan nation, but nearly all of them have followers only from their own group or region. The constitution must provide mechanisms to create broad consensus, to prevent the domination of any group, and to assure that minorities do not suffer from injustice.

Perhaps the most difficult task you have is to design a constitution that can reconcile these two needs. One way to prevent the government from being dominated by any faction is to create checks and balances among the different parts of government in the process of making and implementing laws, and this is absolutely necessary to prevent emergence of a lawless dictatorship. But a society with many factions faces the danger that a process that is too complicated will result in a government that cannot act because of internal conflicts. To some extent, this is what occurred during the decade of

democracy, which led, as we know, to experiments in dictatorship that destroyed the country.

These are real problems that cannot be resolved by a constitution alone, no matter how good it is, but I might suggest one way to approach it. Whenever possible, it is better to make the government inclusive and broad-based through the mechanisms by which leaders are chosen, such as systems of election, rather than through complicated rules for governing. Especially when virtually all leaders are faction leaders rather than national leaders it is difficult to do so. But this is a principle, which may affect how you design certain key elements of government, in particular the chief executive of the state, the relations between the central government on the one hand and provinces, districts, localities, or regions on the other, and the constitutional court (high office of the constitution). The Center on International Cooperation, where I work, has commissioned papers from international experts on all of these issues and some others. These papers are available to you in English, Pashto, and Dari. If you would like further consultations or papers we are ready to assist. Let me share with you some of the ideas that these experts suggested.

On the form of the chief executive, His Majesty Muhammad Zahir, the former king of Afghanistan and the father of the nation, has stated that he does not wish to see the monarchy restored, and the commission therefore need consider only republican forms of government. Among republican forms of government, we can distinguish those with an executive president who heads the government, parliamentary systems where a prime minister heads the government, and systems that include power sharing between a president and a prime minister. One should not limit one's analysis to these three types,

because each type can be structured very differently, and I refer you to some of the papers on this point.

Some of the international supporters of democracy in Afghanistan have argued strongly for a parliamentary system as the best way to insure that an Afghan government will be inclusive as well as effective, and these arguments have some merit. But I have observed that, both for historical reasons and because of the desire for a strong symbol of national unity, Afghans have reached a consensus that they wish to have a president elected by the whole nation. Given this consensus, the key questions are: Should Afghanistan also have a prime minister? How should the people elect the president? What powers should the president exercise?

A presidential form of government is attractive because it seems that a single national leader might unite people and be able to take action when needed. On the other hand, in a society that is divided among many groups that do not trust each other, it can be dangerous to create one such powerful office. Under some systems, a president can exercise an enormous amount of power, even if he receives only a minority of the vote. A presidential system can lead to the situation that Afghanistan must avoid, in which the president represents only part of the nation, but rules all of it. In a fragile situation after decades of conflict, some people might then reject the new system altogether.

But as drafters of the constitution you can design a presidential system that will reduce these risks. Among the methods for doing so are inclusion of a prime minister, the design of the system for electing the president, and the drafting of the powers of the president, especially in relation to the prime minister, legislature, courts, and provincial or local government.

Creation of the office of prime minister as well as of president might seem an attractive option. It resembles the system that existed under the 1964 constitution, with a president rather than king. It also allows for two prominent positions that can be occupied by people coming from different parts of the nation, and thus creates a mechanism for power sharing.

If you choose such a system, however, you should be aware of certain difficulties it may create. In some such systems, either the president or the prime minister may become powerless. In other cases, they struggle against each other continuously and paralyze the government. You can try to prevent such conflicts by drafting the powers of the two offices very carefully. But I suggest that you consider the current conditions of Afghanistan. All politics consists of factional struggle, sometimes even with guns, and where the power of factional loyalty is still much stronger than the power of laws, however carefully they are drafted. Even in developed countries like France, this system can destabilize the government. During the decade of New Democracy in Afghanistan, this country experienced some such problems which is why it had four prime ministers in only ten years and could not take vital decisions for the nation.

Some of the experts, therefore, suggest another approach to assure that the executive power is inclusive. They suggest that the system of election for the president must be designed so that no one representing only a section of the nation can be elected. In developing countries such as Nigeria, Kenya, and Indonesia, for example, a successful presidential candidate must not only win the national popular vote but also win a certain portion of votes in different provinces of the country. Hence no one appealing to only one geographical or ethnic region can become president. In another system, voters rank

the candidates as their first and second choice and so on. In counting the votes, the candidates with the least votes are eliminated. This favors moderate and inclusive candidates who win many second-choice votes from groups other than their own. It can be implemented among illiterate voters using colored ballot papers. There are other methods as well.

In such a system the president can play the role of a legitimate and effective leader, but it becomes even more important for other parts of the government to be fully representative. Therefore rules for electing the parliament must assure full representation of minorities. In addition, the devolution of powers to provincial and local government can enable people to participate without having every small group or faction represented in the central government. Those who are in the opposition in Kabul may nonetheless exercise some power in their own areas.

This question of the relation of the central government to the rest of the country is in many ways the most difficult issue for Afghanistan. As we see from recent dramatic events, it is not an issue that will be resolved only by drafting a constitution. Just after Nawruz, I spoke with Chairman Shahrani about this subject. I believe he expressed a common view of the drafting commission. If I remember correctly, and I am sure he will correct me if I do not, he said that, on the one hand, in the past the government of Afghanistan was too centralized. When everything must be decided in Kabul, too often nothing gets decided. On the other hand, this is not the time to establish federalism, because the government is too weak. The government needs to be stronger, but less centralized.

Let me illustrate the problem with a story I heard earlier this week. The people of one village needed a small amount of money to clean an irrigation canal, but they needed it quickly, to clean the canal in two weeks for the spring planting. They went to the Ministry of Rural Development, which told them that it had the money, but first it had to decide on the allocation to the province. Then the province would decide on the allocation to the district. Then the district would decide on the allocation to the village. But by then not just two weeks but maybe two months or two years would have passed. Instead, they approached a man from the village who is a powerful government official. He gave the money from his own pocket, and they cleaned the canal. So now the people of this village are loyal not to the government, but to this man. Now this man supports the government, but if he decides to fight it, the villagers may support him, not the government. This shows that when the government is too centralized, it harms national unity, because it cannot help the people.

The situation would be different if the province or district had its own funds that did not belong to any particular ministry, but that it allocated with the help of a provincial or district council elected by the people. The national parliament can decide what powers to grant to such local councils, and these powers may change over time. We know that in many parts of the country the people have already organized themselves into such shuras. These should be viewed as very valuable contributions to national government and reconstruction, not as threats to the power of Kabul. To help consider how to allocate funds and powers to these councils, the constitutional commission might consider establishing a special commission on devolution to advise the parliament. I believe that

the draft will also require the election of such councils, and provide for the members to be paid salaries, instead of merely recommending them, as did the 1964 constitution.

Finally, I understand that the commission is considering establishment of a constitutional court to review legislation and acts of the government for conformity to the constitution. Afghanistan never had such judicial review in the past. Instead, it was the responsibility of the king to assure that the government acted in accord with the constitution and the fundamental principles (asasat) of Islam. Many new democracies have established such courts to safeguard the rights of the people.

Unfortunately, if judicial review is established in too broad a manner, it can have negative effects on the functioning of government. If a court reviews legislation before it is enacted, such review can delay necessary government decision-making. If a court has the power to decide if the government's decisions conform to a general idea like the principles of Islam, it has a tremendous amount of discretion, it can misuse for political purposes. In Pakistan, for instance, a court overturned arbitrarily the commercial code and the banking laws; on the grounds that they contradicted Sharia with disastrous economic effects. We have seen such dangerous results in Pakistan. In the past the responsibility for conformity to the principles of Islam remained with riyasat-i taqin and the executive, acting on the advice of experts. The commission might consider if this system might be sufficient for the country today as well. A number of the experts whom we consulted suggested that the jurisdiction of the constitutional court should be limited to disputes involving fundamental rights and relations among different parts of the government, as is done in Malaysia, where the laws also conform to Islamic principles.

These are only a few of the many complex issues that you will have to consider. I am grateful for the opportunity to provide you with a few analyses that might be of some benefit. Now you are starting the most important part of the process, consulting with the people of Afghanistan themselves, to see what they want from their future government. The analyses of experts will be useful only insofar as they help the people understand how they might best achieve the goals they set for themselves. The opportunity for such service is a great honor. Thank you.