

The Loya Jirga in the Afghan institutional and political context¹

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1. Premise. 2. The double failure of the institutional framework. 3. Composition and functions of the Loya Jirga. 4. President Karzai's call for a convention aimed at reconciliation. 5. Possible scenarios.

1. The current difficulties with State building in Afghanistan depend only partially on the crisis of legitimacy affecting the new democratic institutions. For example, the vicious circle of poverty, integration into global organized crime, and violence, denounced in 2005 from the World Bank², is still there, and appears a key factor both of the influence of the Taliban on the population, and of the lack of security. Corruption should also be enumerated among those difficulties. The crisis of legitimacy of the State, however, is even more worrying. The institutions established from the 2004 Constitution are affected by endless conflicts and, first and foremost, are perceived from the people as imposed from the outside. The more time passes in these conditions, the more such perception is likely to increase, creating further hostility towards ISAF/*Enduring Freedom*, and thus impeding a 'decent' military disengagement from the country.

According to many recent studies, the only way for countering that perception is to nationalise as far as possible the decision-making process in Afghanistan. Also my paper is focused on the topic, driving attention to the potential role of the Loya Jirga, namely the sole institution expressing the tradition of the country under the 2004 Constitution.

2. Historically, the state of Afghanistan descends from a Pashtun tribal empire. Pashtun kings conquered areas inhabited by other groups and taxed them more heavily than Pashtuns. Moreover, each ethnic group has a distinct political perspective. While Pashtuns want a strong centralized state controlled by them, Tajiks focus on power sharing, and Uzbeks and Hazaras focus on recognition of their identities and mechanism of local self-government. This legacy explains why for Pashtuns the state appears as an instrument through which a mainly Pashtun elite rules, rather than a mechanism through which all citizens govern themselves on a non-ethnic basis³.

¹ Paper to the Seminar: Afghanistan & State Building, Panel 7: Constitutions, Multicultural Democracies and Citizenship, University of La Verne, April 15-17, 2010.

² World Bank, *Afghanistan – State building, sustaining growth, and reducing poverty: a country economic report*, 2005, XI.

³ See B. R. Rubin, *The Constitutional Process in Afghanistan. A Challenge for Governance*, LUISS Guido Carli, Rome, March 15, 2004.

But this is not to say that, in the Afghan history, a decision-making process didn't exist. Selected bodies both at the local and at the national level such as *jirgas*, *shuras* and *loya jirgas* ensured a certain institutionalisation of political decisions, functioning as institutions of "assembly democracy" as distinguished from those of "modern" representative democracy. During the XX century, various attempts were made to modernize Afghan politics, including the establishment of elections, but they were thwarted by political uprisings, rebellions, and undemocratic competition for leadership⁴.

The transition to constitutional democracy following the Taliban' defeat needed therefore to be conducted gradually, and to be carefully combined with assessment of traditions and customs of the country. The 2001 Bonn's agreement, on the contrary, was driven by the candid presumption that the mere approval of a democratic Constitution, as intended in Western countries, would per se reach the desired outputs.

I am not raising objections to the fact that the Afghanistan Constitution was imposed from the outside. Particularly in the last two decades, the international community played a leading role in constitution-making process in a number of countries, and the legitimacy of these interventions, usually as part of a wider State-building, is now almost uncontroversial. What is not beyond controversy is their capacity in tailoring the constitutional draft to the diverse issues at stake.

Such capacity has proved to be particularly low in our case. Political failure in Afghanistan, it has recently been held, "was baked in the cake in the 2001 Bonn Process"⁵. This is demonstrated inter alia by the fact that the Afghan monarchy was eliminated from a ceremonial role in the new Constitution, in spite of the petition, signed by nearly two thirds of the delegates to the Emergency Loya Jirga in 2002, to make the aging King Zaher Shah the interim head of the state. It is worth noticing that the 1947 Constitution of Japan, although resulting from the U.S. government's draft, left the Emperor in charge.

The failure of the institutional framework of the 2004 Constitution is two-fold, concerning both the functioning of the decision-making process and the popular legitimacy of the new democratic institutions.

The Constitution has engendered a number of controversies between the different powers of the state without providing corresponding remedies. The huge exertion of the presidential veto power over the laws, and the frequent refusal of the Wolesi Jirga to confirm the nominees appointed by the President, raise controversies on the interpretation of the Constitution. But their solutions, in turn, are impeded by the deep divisions of views on whether the Constitution gives the power of constitutional interpretation to the Supreme Court (Article 121), or to the Independent Commission for the supervision of the implementation of the Constitution (Article

⁴ A. Larson, *Toward an Afghan Democracy? Exploring Perceptions of Democratization in Afghanistan*, AREU, September 2009, 5-6.

⁵ T. H. Johnson, M. C. Mason, *Democracy in Afghanistan is wishful thinking*, *The Christian Science Monitor*, August 20, 2009.

157)⁶. The Constitution has thus put the premises for an institutional stalemate, involving as well the power to legislate on crucial issues such as the electoral system, political parties, and the media. Since the functioning of central institutions is seriously compromised, constitutional amendments are urgently needed in order to find remedies for the most worrying flaws. The Constitution gives the power of constitutional amendment to a grand assembly called Loya Jirga, on which I will return later.

On the other hand, the new democratic institutions have gained scarce consensus among the people. According to a recent survey of popular perceptions of democracy in Afghanistan, the low legitimacy of the current system of governance depends to a significant extent on the widely held suspicion that democracy is an imported, and thus expendable, political system, rather than founded on the Islamic and national tradition of the country. Democracy, it has been inferred, should be discussed and defined on Afghan terms, even if the outcomes might not sit comfortably with liberal/Western democratic principles⁷. As it is further argued, if we demand too great a change from Afghan culture it is likely to be rejected and provide ideological ground for the Taliban's advance. It is only by broadening our focus beyond democratic outcomes – beyond elections – to include democratic process that we have any chance at democratizing Afghanistan⁸. Greater weight should thus be given to democracy at the local levels, where the participation of the people to governance is ensured through jirgas or shuras, the traditional councils of respected elders who solve problems, including criminal matters, and make decisions⁹.

This line of thought tends to include the people within the democratic process according to Afghan standards, and match the fact that, unlike the Kabul's 'mess', democracy is making strides in the quiet corners of the country¹⁰. Unfortunately, these suggestions amount to long-term solutions. Only a rapid 'afghanization' of the decision-making process would reverse the current perception of the formal institutions (the central rather than the local) as grounded on Western values, and shed light on, and possibly increase, the division among Taliban following the global project of the Jihad, and those seeking to be openly legitimised among the political actors of the country. A nationalization of that process would consist in adapting the institutional framework to national traditions and customs through appropriate constitutional amendments. Convening the Loya Jirga appears once again necessary, being the sole institution established for that end, and, at the same time, symbolizing the national tradition.

⁶ On this see A. Dempsey-J. A. Thier, *Resolving the Crisis over Constitutional Interpretation in Afghanistan*, Usipeace Briefing, March 2009.

⁷ A. Larson, *Toward an Afghan Democracy?*, at 13.

⁸ N. Adiparvar, *Democracy for Afghanistan?*, *Arab News*, November 13, 2009.

⁹ N. Adiparvar, *Democracy for Afghanistan?*

¹⁰ *Wise council. Village-development councils are taking on more serious roles*, *The Economist*, March 25, 2010.

3. *Loya Jirga's composition* - Article 110 states that “Loya Jirga is the highest manifestation of the people of Afghanistan”. It consists of members of the National Assembly and of Presidents of the provincial as well as district assemblies. Ministers, members of the Supreme Court and the Attorney General shall participate in its sessions without right to vote.

By connecting together national and local institutions, the composition of Loya Jirga reflects a cooperative attitude which is strongly needed in the country, where deep divisions occur also between Kabul and rural areas. It could be objected that such composition doubles that of the National Assembly, consisting of the Wolesi Jirga (the House of People) and Meshrano Jirga (House of Elders) (Article 82). Two thirds of members of the Meshrano Jirga are in fact elected and appointed among members of local councils (1/3 provincial and 1/3 district council of each province), the remaining members being appointed by the President “among experts and experienced personalities” (Article 84). But the prevalence of members representing rural areas within the Loya Jirga mirrors the fact that 75%-80% of the population lives in these areas. Furthermore, since members of the cabinet and of the Supreme Court participate to the workings of Loya Jirga without voting, convenient confrontations among the highest authorities of the three branches of power are likely to be taken.

Loya Jirga's functions – Article 111 of the Constitution entrusts Loya Jirga with the following tasks:

- “1. To decide on issues related to independence, national sovereignty, territorial integrity as well as supreme national interests;
2. Amend provisions of this Constitution;
3. Impeach the President in accordance with the provisions of Article Sixty Nine of the Constitution”.

The President of the Republic is the only authority empowered to convene the Loya Jirga (Article 64, n. 7), except than in case of impeachment (Article 69).

Historically, the loya jirga has been called in times of national crisis in Afghanistan for centuries, and has approved many Afghan Constitutions. In 1747 such an assembly in Kandahar selected Ahmad Shah Durrani as the first king of Afghanistan, uniting a patchwork of contentious tribal entities into the modern Afghan state. It is worth adding that an “Emergency Loya Jirga” elected Hamid Karzai as head of state with 1555 votes cast in 2002, and the Constitutional Loya Jirga ratified the Constitution in 2004.

The loya jirga is only the biggest among the jirgas (or shuras). And, unlike presidential elections, which strike most Afghans as an alien and fundamentally suspect practice, jirgas of all sizes are trusted and utterly familiar institutions¹¹. According to some analyst, a better solution for the contested election of President Karzai was to convene an emergency loya jirga, thus relying on the historical processes that Afghans relied on in the past¹².

¹¹ A. Rahel and G. Krakauer, *To Save Afghanistan, Look to Its Past*, *The New York Times*, September 10, 2009.

¹² Council on Foreign Relation, T. H. Johnson, *Interview*, October 23, 2009.

4. During his 19 November 2009 inauguration speech after he was re-elected by default in August, President Karzai called for a Loya Jirga to discuss the idea of making peace with the different insurgent groups, including the Taliban. But since the London Conference in January, the Afghan Government's announcement has changed. Rather than to a "Loya Jirga" as composed and functioning within the meaning of Articles 110 and 111 of the Constitution, it refers to a "National Council for Peace, Reconciliation and Reintegration", gathering together tribal leaders and political figures with the end of encouraging the reconciliation with the Taliban, except for those who have links with Al-Qaeda, under the guide of the Saudi King Abdullah. Observers believe this shifting is due to the fear that a formally constituted Loya Jirga might adopt decisions or resolutions on key issues, such as requiring foreign troops to leave Afghanistan immediately, annulling Presidents Karzai's re-election or even impeaching him, that would be difficult for the government and international community to accept or implement¹³.

Through this initiative, the President seeks to reinforce his low popular legitimacy. Even in case of a Taliban refusal to participate to the convention, he would appear as leader of the country's reconciliation. And this image, as demonstrates the invitation to the Saudi King to chair the meeting, would be tailored in Islamic vests, rather than Western. What is unclear is rather the political and institutional scenario that the convention might disclose.

5. Although deriving its legitimacy both from the tradition of the country and from the aim of reconciling all the Afghans, the convention planned by the President is not composed in conformity with Article 110 of the Constitution, and therefore should not be empowered to amend the Constitution according to Article 111. If this is so, the convention called by President Karzai should end without touching the text. And this might also be the intention of the President. On the other hand, there is a feeling that convening a formal Loya Jirga would open a Pandora's Box of suggested revisions that would involve a lengthy debate.

Nevertheless, without convening a formal Loya Jirga, the institutional stalemate created by constitutional provisions would not be overcome, nor would the popular dissatisfaction with national institutions be reduced. A further inconvenient might be even more important. Also the chances of reconciling with Taliban are likely to be reduced, to the extent that the constitutional provisions in force are preserved.

It is worth noticing that Chapter Eight of the Constitution, devoted to the administration, draws the picture of a highly centralized State. The Administration, states Article 136, "shall be based on central and local administrative units in accordance with the law". And Article 137 specifies that "The government, while preserving the principle of centralism, shall – in accordance with the law – delegate

¹³ J. Mosazai, *A Loya Jirga or not a Loya Jirga: The Significance of a Name, Dispatches from the field: Perspectives on the Afghanistan Conflict*, March 30, 2010.

certain authorities to local administration units for the purpose of expediting and promoting economic, social, and cultural affairs, and increasing the participation of the people in the development of the nation”.

A decentralized form of government giving political weight to regional governing councils might be envisaged as a way to concede autonomy to Taliban-led local administration. Such option could appear as a concrete step towards reconciliation. It is worth noticing in this respect the recent initiative of the provincial governors of Nangarhar, Laghman, Kunar and Nuristan to convene a “regional peace jirga” aimed at promoting peace and development within the region, and that would be composed by 300 members, including the rebels.

At the same time, the establishment of a decentralized form of government would need appropriate amendments of Chapter Eight of the Constitution, and therefore the opening of a formal Loya Jirga. Once convened, that assembly is likely to discuss further constitutional amendments, and possibly to reform the institutional framework according to the already mentioned necessities.

As the Pakistani journalist Ahmed Rashid has put it, despite the rhetoric of “Afghan ownership” of the peace and development process, nine years after the end of the Taliban regime “there is still no semblance of a working Afghan State with basic governance institutions such as functioning bureaucracy, judiciary and police”¹⁴. Since the 2004 Constitution has decisively contributed to that situation, approval of appropriate constitutional amendments is one of the most urgent objectives to be pursued in Afghanistan.

¹⁴ BBC, February 2, 2010.