

THE EFFECTIVENESS OF “LOYA JIRGA” IN MAKING THE CONSTITUTION OF AFGHANISTAN

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ABSTRACT

Replacing the old constitution in Afghanistan was generally an essential step forward in the nation building process. The Effectiveness of loya Jirga or Grand Council was important to adopt the constitution and to confer legitimacy to it. Consequently, the constitution of Afghanistan which was made by a special Loya Jirga (Grand Council) (13 December 2004- January 2004), was ratified by President Karzai on 24 January 2004. Therefore, this paper will provide a basic historical background of Constitutional Loya Jirga. Moreover, the author will highlight the legal framework for the Constitutional Loya Jirga and will focus on the role and Effectiveness of Constitutional Loya Jirga in constitution-making in Afghanistan.

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INTRODUCTION

Constitution-making and constitutional choice are vital aspects of a democratic government. New nations and new governments that seek democratic credentials make writing of a constitution a primary priority. However, the Constitution is usually changed through a systematic act and processes called constitutional reform. The Constitutional reform seeks to achieve certainty and predictability in the law among other things. It involves concepts and processes.¹ In fact, in Afghanistan, the constitutional Loya Jirga (Grand Council) is the most representative body assembled in Afghanistan for the purpose of agreeing on the constitution. In addition, Loya Jirga has the role to review and adopt the constitution.²

In this article, the author begins by examining the historical experience of Constitutional Loya Jirga as the basis for the today's constitution in Afghanistan. Furthermore, the paper will describe the constitution-making process from 2002- 2004. In the third part of his paper, the author highlights the role and Effectiveness of Constitutional Loya Jirga in making the constitution in Afghanistan. Finally, the researcher is going to summarize this article with few thoughts on the ramifications of finding.

THE CONCEPT AND BRIEF HISTORY OF CONSTITUTIONAL LOYA JIRGA

To understand the role of “Constitutional Loya Jirga” in constitution-making in Afghanistan, it is necessary to know the historical background of creation of the constitutions in Afghanistan.

Basically, the concept of loyal Jirga is very important to Afghanistan; it is based on the Islamic principle of “Shūra”- the practice of resolving disputes through mutual consultation. Traditionally, the Loya Jirga, is a tribunal gathering of elders to make discussions by consensus. Its roots are deeply embedded in Afghanistan's history. For example, it is mentioned that the Jirga legacy stretches back to the times of ancient Aryans and the Kushan Dynasty where “ council of elders and influential people” came together to settle issues and make important decisions.³

Noticeably, the most important convocation took place in 1747 where Pashton tribal chiefs gathered and elected Ahmad Shah Abdali (Ahmad Shah Duranni), as the king of Afghanistan. Since then, Loya Jirga was widely practiced and used to decide on issues related to independence, national sovereignty, territorial integrity, approval of new constitution as

¹ Hart, V. (2003). Democratic Constitution Making. Retrieved from United States Institute of Peace website: <http://www.usip.org/sites/default/files/resources/sr107.pdf>

²The Constitution-making process in Afghanistan. (2003). Retrieved from <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN016658.pdf>.

³ Melissa Jangl, (2014), Detained by U.S. [Online] Available: <http://www.detainedbyus.org/afghanistans-consultative-loya-jirga/> (May 2, 2015).

well as supreme national interest.⁴ Therefore, the Constitutional Loya is the most representative body assembled in Afghanistan for the purpose of agreeing on the constitution. Its role is to review and adopt the constitution..⁵

Meanwhile, replacing the Constitution is not a new phenomena in Afghanistan. Since 1923 Afghanistan has been governed by eight different constitutions which are;

- (a) Constitution of (1923, During King Amanullah)
- (b) Constitution of (1931, King Nadir Shah)
- (c) Constitution of (1963, King Zahir)
- (d) Constitution of (1973, Sardar Daoud)
- (e) Constitution of (1980, Babrak Karmal)
- (f) Constitution of P(1987, Dr. Najibullah)
- (g) The 1990 Constitution (the proposed new constitution by government of Mujahidin and;
- (h) Afghanistan Constitution of 2004 (the present Constitution).⁶

It is very important to remember that, from all these constitutions, it is only the constitution of 1963 and the constitution of 2004 which introduced a great degree of democratic participation. Most of them were approved without a great deal of public participation and they kept almost all of the state power in the hands of the monarchy with little room for public participation.⁷

In brief, the loya jirga is a general concept which has been used to approve new constitution, declare war, choose a new king or to make social and political reforms. However, Constitutional Loya Jirga is specifically a national gathering that brings representatives from the various ethnic groups and tribal communities to make a constitution for Afghanistan.⁸

THE LEGAL FRAMEWORK FOR THE CONSTITUTIONAL LOYA JIRGA

After the fall of the Taliban in the year 2001, Afghanistan's political leaders agreed on a new constitution for the aim of establishing the framework for the institutions of a new government.⁹ Consequently, the Bonn conference of late 2001 agreed that a constitutional Loya Jirga should write a new constitution. In other words, the constitution- making

⁴ Ibid.

⁵ Ibid.

⁶ Thier, J. A. (2006). Making of a Constitution in Afghanistan, *The. NYL Sch. L. Rev.*, 51, 557.at p,559-560.

⁷ Ibid, at p, 560.

⁸ FrudBezhan, "Loya Jirga -- An Afghan Tradition Explained," Radio Liberty. [Online] Available: <http://www.rferl.org/content/afghanistan-loya-jirga-explainer/25174483.html> (May 15, 2015).

⁹ Thier, J. A., no.6 at 578.

process in Afghanistan was one of the three fundamental aspects of the Bonn agreement. These four distinct aspects are:

1. Establishment of an interim government;
2. Holding of an emergency Loya Jirga to establish a transitional Government;
3. Drafting of a new constitution for Afghanistan, in the light of which elections will be held and an elected government will be established.¹⁰

Furthermore, the Bonn Agreement specifies that a new constitution shall be adopted by a Constitutional Loya Jirga (CLJ) which must be arranged within eighteen months of the establishment of the transitional government. Further, this agreement stipulates that a constitutional commission shall be established by transitional government with the assistance of the international bodies. Thus, one of the aims of Bonn conference was a timetable for creating a new Afghan Constitution.¹¹

After the Bonn agreement, the mechanism for establishment and convening of Loya Jirga was laid out by the president of the Transitional Islamic State of Afghanistan through a decree enacted on July 15, 2003. As provided in the presidential decree 500 delegates would serve in the Constitutional Loya Jirga. Moreover, the decree stipulated the following breakdown for the allocation of seats:

- (a) Three hundred and forty four delegates would be elected by the district representatives who had participated in the first phase of the emergency Loya Jirga elections.
- (b) Forty- two seats were allocated for the refugees in Pakistan and Iran.
- (c) Sixty- four seats were reserved for women to be elected by women. Two women to be members of the Constitutinal Loya Jirga will be elected per province.
- (d) Nine seats were allocated for the Kuchis (nomads).
- (e) Six seats were allocated to the IDPs in Herat and Kandahar provinces
- (f) Three seats were allocated to the Hindu and Sikh minorities.¹²

The Loya Jirga has played a vital role in the constitution of Afghanistan as it is clear from article 111 of Afghanistan constitution which provides that the Loya Jirga can be convened for three reasons:

“ To decide on issues related to independence, national sovereignty, territorial integrity as well as supreme national interest,” in order to alter or amend the constitution, or to impeach the president.”¹³

¹⁰ The Management of the Constitution-Making Process in Afghanistan. (n.d.). Retrieved from

<http://www.constitutionnet.org/vl/item/management-constitution-making-process-afghanistan>

¹¹ The Constitution-making process in Afghanistan, no. 2 at p. 2.

¹² Support to the Constitution-Making Process in Afghanistan. (2004) Retrieved from United Nations Development Program website:

http://www.undp.org.af/WhoWeAre/UNDPinAfghanistan/ClosedProjects/Constitution_Final_Report_2004.pdf

Moreover, Article 110 of Afghanistan constitution stipulates that in its constitutional mandate, a loya jirga "... is the highest manifestation of the will of the people of Afghanistan," and is composed of the National Assembly, and presidents of all provincial and district councils. However, Members of the Supreme Court, ministers, and the attorney general may participate without voting right.

In the light of above explanations, it can be concluded that the Bonn agreement, 2001, the decree of president of Transitional Islamic State of Afghanistan July 15, 2003, and the present Constitution of Afghanistan, 2004 are the legal framework for the constitutional loya jirga in Afghanistan.¹⁴

THE CONSTITUTION-MAKING PROCESS IN AFGHANISTAN

The constitution is the highest law of the land which defines and limits the power of government. Both process and substance are critical for the success of constitution making. Furthermore, the design of constitution and its process of development can play a crucial role in peaceful political transitions and post- conflict peace building.¹⁵

The legal framework for the Constitutional Loya Jirga provides that, the constitution- making process will be accomplished through three constitution-making organs as follows:

- (a) The Constitutional Drafting Commission ("CDC");
- (b) The Constitutional Review Commission ("CRC"); and
- (c) The Constitutional Loya Jirga ("CLJ").¹⁶

The three organs which involved in the constitutional-making process are described below:

The Constitutional Drafting Commission

The president Hamid "Karzai" appointed nine members of the drafting commission on October 5, 2002. The main responsibility of the drafting commission was to produce a preliminary draft of the constitution.¹⁷ The Constitutional drafting Commission divided itself into three committees. These committees included the Research Committee, Drafting Committee and Writing Committee.

Members of the CDC thoroughly studied the past Afghan's constitutions, the constitutions of other Islamic countries, the constitutions

¹³ Constitution of Afghanistan. 2004 (No. 818 of 2004). Article 111.

¹⁴ Constitution of Afghanistan. 2004 (No. 818 of 2004). Article 110.

¹⁵ Constitution making. (n.d.). Retrieved from <http://www.unrol.org/article.aspx?n=Constitution-making>

¹⁶ The Constitution-making process in Afghanistan, no. 2 at p. 2.

¹⁷ Ibid.

of other post-conflict countries and the constitutions of developed countries. The CDC also consulted with national and international legal scholars, relevant state organizations, Afghanistan civil society organizations, Afghan women's organizations, Afghan organizations for the disabled and other relevant individuals and institutions. After this period of analysis and dialogue, the CDC completed its preliminary draft of the future Constitution, which was then presented to the president of the Transitional Islamic State of Afghanistan on March 31, 2003.¹⁸

The Constitution Review Commission

The second step was the constitution review commission which consists of approximately 30 commissioners appointed by the president of the Transitional State of Afghanistan on April 24, 2003. The key responsibilities of the commission were to consult widely with the people of Afghanistan and produce a draft by 30 August 2003 and submit to the constitutional Loya Jirga in October.¹⁹

Moreover, the CRC is comprised of Afghan legal professionals, community elders, religious scholars, educated individuals with a wide range of experience and specialization in various fields, including economic, social science and international relations as well as other representatives of the diverse sectors of Afghan society. The primary responsibility of the CRC is to review, analyze and discuss all provisions of the preliminary Constitutional draft, suggest necessary amendments and submit a completed draft by August 30, 2003 for submission to the Constitutional Loya Jirga in October.

The Key Responsibilities of Constitution Review Commission (CRC):

- Performing further research and consultations with experts on various issues.
- Writing questionnaires to be used during the public consultation process.
- Supporting the Secretariat in raising public awareness and education of the constitution.
- Conducting public consultation in all 32 Provinces of Afghanistan and in four refugee camps in Iran and Pakistan.
- Making the final draft after the views of the Afghan people have been taken into account.

Finally, the CRC shall present its completed draft constitution to the president of the Transitional Islamic State of Afghanistan by September

¹⁸ Support to the Constitution-Making Process in Afghanistan), no.12 at pp, 2002-2014.

¹⁹ The Constitution-making process in Afghanistan, no. 2 at p. 2.

30, 2003, who then Submitted it to the Constitutional Loya Jirga on October 01, 2003.²⁰

The Constitutional Loya Ligra - CLJ)

As mentioned earlier the Bonn Agreement envisioned the facilitation of a Constitutional Loya Jirga (CLJ) to be convened for the making of a new constitution. The CLJ convened in October and completed its work within 25 days by October 2003. The constitution then was published and after that disseminated among the people of Afghanistan.²¹ Thus, the final debate and Taswīb (adoption), at a Constitutional Loya Jirga convened in Kabul from 14 December 2003 to 14 January 2004. Finally, the constitution was formally ratified by President Hamid Karzai at a ceremony in Kabul on January 26, 2004. The new constitution consist of which a preamble and 162 articles are divided into 12 chapters. The first point in the Preamble emphasises on the Afghan people's faith in God and their belief in the sacred religion of Islam.²²

THE ROLE AND EFFECTIVENESS OF LOYA JIRGA IN CONSTITUTION- MAKING.

The Bonn agreement intended the facilitation of a Constitutional Loya Jirga (CLJ) to be convened for the adoption of a new constitution. Therefore, the establishment of the Constitutional Loya Jirga was one of the three major things which are mentioned in this agreement. The role of constitutional loya Jirga was to review the draft of constitution, discuss proposed changes, amendments, and finally adopt the new constitution.²³

This Loya Jirga with 502 representatives including women delegate began debating on 23 December 2003 and eventually the constitution of Islamic Republic of Afghanistan, was approved on January 2004 by a 502 members of Loya Jirga in Kabul. It creates nation that pledge to be both Islamic and Democratic. The new Constitution established a presidential system that roughly follows the American style, dividing government power among executive, legislative and judicial branches.²⁴ Furthermore, this national document grants equal right of citizenship to Afghan men and women and commits Afghanistan to

²⁰Id, at pp, 9-16.

²¹Ibid.

²² J. Alexander Their. (30 May- June 1, 2003). The making of a constitution in Afghanistan. State reconstruction and international engagement in Afghanistan, London School of Economics and Political Science and University of Bonn. Retrieved from http://eprints.lse.ac.uk/28380/1/Thier_LSERO_version.pdf

²³The secretariat of the constitutional commission of Afghanistan, no. 2, at p. 2.

²⁴Sharon Otterman. (2004). , Afghanistan: the New Constitution. Retrieved from Council on Foreign Relations website: <http://www.cfr.org/afghanistan/afghanistan-new-constitution/p7710>

uphold its international human rights obligations. It provides that Afghanistan is Republic and that no law can be contrary to Islam.²⁵

Article 110 of the new constitution deals with the importance of the Loya Jirga. According to Article 110:

“The Loya Jirga is the highest manifestation of the will of the people of Afghanistan. The Loya Jirga consists of:

1. Members of the National Assembly;
2. Presidents of the provincial as well as district assemblies.

Ministers, Chief Justice and members of the Supreme Court as well as the attorney general shall participate in the Loya Jirga sessions without voting rights.”

Article 111 also provides about the importance of Loya Jirga. According to Article 111,

“The Loya Jirga shall convene in the following situations:

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.”

CONCLUSION

- ✓ Thus, in the light of above explanations it can be concluded that, the constitution-making exercise in Afghanistan was an important step forward in the nation building process.
- ✓ The constitutional Loya Jirga played an integral role to adopt a new constitution for Afghanistan.
- ✓ The overall legal framework of the Constitutional Loya Jirga recognized by Bonn Agreement and decree of the president of the Transitional Islamic State of Afghanistan.
- ✓ The whole process of adopting the new constitution started from October, 2002, to January 2004, around 14/15 months.
- ✓ The Constitutional Loya Jirga reconsidered the draft constitution in the light of citizen's suggestion. Once the draft of constitution is finalized by Constitutional Loya Jirga, then it is submitted for the

²⁵Ibid.

approval to the President Karzai. Finally, the Constitution was approved by President Karzai on 24 January 2004 .

- ✓ The new Afghan constitution consists of a relatively short preamble and 162 articles divided into 12 chapters.
- ✓ The Preamble of Constitution says the Afghan people's faith in God and their belief in the sacred religion of Islam.
- ✓ For most part of the country's history, it has been rule by power, not by law
- ✓ The Constitutional Loya Jirga did make an effort to improve life of the people of Afghanistan. It aspires to create a modern, democratic, Islamic state with a strong central government, a monopoly of force, that is guided by the rule of law.
- ✓ Another significant points of the new constitution of Afghanistan is that it has done much more to ensure a diverse parliament and new laws have paved the way for political parties to be formed and operate.
- ✓ The present Constitution does much more than previous constitutions for Afghanistan diversity as a whole because it recognizes other languages and minorities' rights.

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