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President of the state in the Afghan Constitutions

Abstract

The institution of the president exists in the majority of the countries of the western world. Depending on the prerogatives granted by the constitution, the president may perform either a representative function or have the real power. No matter what the role of the president is, the position is deeply embedded in the political system, and the constitutional law as well as political practice specify its scope of competencies and capabilities. When we go beyond the Euro-Atlantic area, we can also find the states where an office of president is run. While its formation, Asian, African and South American societies, consciously or not, usually emulated the Euro-Atlantic experiences. In general, historical background of the non-European states, however, makes the history of the presidential office shorter, and the introduction of this position was often a result of violent socio-political changes. What often distinguishes the presidencies of the African and Asian countries from the Euro-Atlantic ones is their instability – in running this office a lot depends on the personality traits of the person holding it as well as on the tradition (or lack thereof) of strong central governance. On that premise, the presidency history of a non-European state, i.e. Afghanistan can be presented. This is an interesting case since the above mentioned factors are clearly visible in here, and the state's internal political situation is unstable. In addition, as the international forces are supposed to be withdrawn from the country until the end of 2014, the president may then become the main body formulating public policy and, thus, shaping the future of Afghanistan.

Keywords: Afghanistan, president, Constitution.

Prezydent państwa w afgańskiej konstytucji

Streszczenie

W większości państw świata zachodniego funkcjonuje instytucja prezydenta. W zależności od prerogatyw przyznanych mu przez konstytucję, jest on albo reprezentantem swojego państwa, albo też dysponuje realną władzą. Niezależnie od tego, jaką funkcję

pełni prezydent, urząd ten jest mocno usadowiony w systemie politycznym, a przepisy konstytucyjne i praktyka polityczna precyzują zakres jego kompetencji i możliwości działania. Poza strefą euroatlantycką także spotykamy się z państwami, w których istnieje urząd prezydenta. Zazwyczaj przy jego kształtowaniu, świadomie lub nie, społeczeństwa Azji, Afryki czy Ameryki Południowej czerpały z euroatlantyckich doświadczeń. Jednak doświadczenia historyczne państw pozaeuropejskich sprawiają, że urząd ten ma tam z reguły znacznie krótszą tradycję, a jego wprowadzenie często było efektem gwałtownych przemian społeczno-politycznych. Tym, co często odróżnia prezydentury państw afrykańskich i azjatyckich od euroatlantyckich jest ich niestabilność – przy sprawowaniu urzędu wiele zależy od osobowości i cech charakteru osoby sprawującej urząd, jak również od tradycji (lub jej braku) silnej władzy centralnej. Posługując się tymi przesłankami można przedstawić tradycje prezydenckie takiego państwa pozaeuropejskiego jak Afganistan. Jest to ciekawy przypadek, gdyż bardzo wyraźnie widać w nim wspomniane uwarunkowania, a sytuacja wewnętrzna państwa jest niestabilna. Dodatkowo, ze względu na plan wycofania sił międzynarodowych z tego kraju do końca 2014 r., prezydent może stać się głównym podmiotem kreującym politykę publiczną, a co za tym idzie, przyszłość Afganistanu.

Słowa kluczowe: Afganistan, prezydent, konstytucja.

In the majority of the western contemporary political systems the president is a head of state. Depending on the character of the particular system, its competences may vary substantially. It may have mostly a representative and ceremonial functions as in the case of the German president, or have real executive and even legislative powers, as in the case of the United States or France. No matter what the function of the president in a particular state is, its position is safeguarded by constitutions and its role is defined both by statute law and practice of a political system of this country¹. When we go beyond the Euro-Atlantic area, we will also see that in many countries presidents act as heads of state. In most such cases, consciously or not, such Asian, African or South American societies emulated the Western experiences and traditions. Still usually, in these cases, this office has a much shorter history and tradition than in the Western political tradition, and it was, in many cases, introduced

¹ The literature concerning the presidency in democratic countries in Europe and Northern America is very rich. It is enough to mention just such works of just Polish specialists, as: *Prezydent w państwach współczesnych*, red. J. Osiński, Oficyna Wydawnicza SGH, Warszawa 2009; Z. Witkowski, *Prezydent republiki w systemie ustrojowym współczesnych Włoch*, Wydawnictwo UMK, Toruń 1991; E. Popławska, *Instytucja prezydenta w systemie politycznym V Republiki Francuskiej*, Wydawnictwo Sejmowe, Warszawa 1995; M. Jagielski, *Prezydent USA jako szef administracji*, Zakamycze, Kraków 2000; K. Wójtowicz, *Uprawnienia nadzwyczajne Prezydenta Stanów Zjednoczonych*, Wydawnictwa Uniwersytetu Wrocławskiego, Wrocław 1995; B. Dziemidok-Olszewska, *Instytucja prezydenta w państwach Europy Środkowo-Wschodniej*, Wydawnictwa Uniwersytetu Marii Curie-Skłodowskiej, Lublin 2003; M. Bożek, *Instytucja Prezydenta Republiki Federalnej Niemiec*, Wydawnictwo Sejmowe, Warszawa 2007.

as a result of violent political changes. Those specific experiences of non-European countries influence the role and position of this office in those countries. Usually, because it has a much shorter tradition, the presidency is much more unstable than in western countries, as it is not deeply rooted in local political traditions. Therefore of much larger importance is the personality of the person holding this office. The personal charisma and authority is sometimes of crucial value, and determines the real scope of power. The last element was tied also to the local traditions of a strong central government, if they were there or not. Therefore analysing the character and role of the president of any given state, not only should the constitution and other laws be taken into account, but also the historical, social, religious and personal factors.

The problem of the place of the president in the Afghan political system and traditions has, as yet, not been researched and was not in detail described as a separate phenomenon. Usually the office of president and the margins of its responsibilities were mentioned and described during the presentation of consecutive Afghan constitutions.² But it seems that the problem of the place and powers of the office of president should be described separately, because it is one of the key factors shaping the possible future of Afghanistan.

Because the problem of the place and character of the presidential office in Afghanistan was undermined, the literature in this respect is very limited. Therefore this text is based mostly on primary sources, the texts of Afghan constitutions, which define the place and role of the president in the political system, in the first place. The secondary sources concern mostly the history of Afghanistan. Starting from its early history, it is possible to sketch the presidential traditions of Afghanistan. It is an interesting case, as it clearly shows the above mentioned conditions and the state's internal situation is volatile. Moreover, as the international forces will be withdrawn, to a great extent, from Afghanistan in the nearest future, the president, whoever it will be, will have a crucial role to play in formulating future Afghan policies.

It should be stressed that the presidential traditions of Afghanistan are very short. Since the inception of Afghanistan, as a unified state, in 1747, it has been a monarchy. The position of the majority of consecutive monarchs was weak and dependent on the support of Pashtun tribes³. The first Afghan ruler, Ahmad Shah (1747–1772) was not able to effectively control his subjects and the territory of the

² On the Afghan constitutions see for example: N.M. Chrishti, *Constitutional Development in Afghanistan*, Royal Book Company, Karachi 1998.

³ Pashtuns are one of the ethnic groups in Afghanistan and North-Western Pakistan. They are the dominant ethnic group in political life of Afghanistan. The consecutive rulers of Afghanistan were of Pashtun origin, and most of the state offices, especially higher, were occupied by them. In contemporary Afghanistan the Pashtuns consist 45%–53% of the whole population. See: R.L. Canfield, *Ethnic, Regional, and Sectarian Alignments in Afghanistan*, in: *The State, Religion, and Ethnic Politics. Afghanistan, Iran,*

state. He directly ruled only non-Pashtun provinces, peopled for example by Tajiks and Hazara people. In the case of the Pashtun settled territories⁴ the direct rule belonged to the tribal leaders (khans) of particular Pashtun clans and tribes who were more like allies than subjects of an Emir. Despite the efforts of Ahmad Shah, he was not able to transform Afghanistan into a more centralised state⁵. A similar scenario we may find in the case of the consecutive rulers. Even when some of them were able, like Sher Ali Khan (1863–1866 and 1868–1879), to strengthen his rule, usually it ended with the deposition or death of such a ruler. The only exception was the reign of Abdur Rahman Khan (1880–1901). This Afghan ruler was able, due to his personal authority and rising external pressures⁶, to create a relatively centralised state. Abdur Rahman used religious legitimisation to strengthen his position. His rule was sanctioned by the will of Allah, therefore all rebellions were presented as a mutiny against the will of Allah, and his actions against rebellious subjects were religiously sanctioned. Using this kind of sacral legitimisation he tried to weaken Pushtun tribes and brake their will to oppose the central government. One of his methods were resettlements of Pushtuns into the northern parts of Afghanistan which until then were mostly settled by Tajik and Uzbek peoples. One of the experts called this process an “internal imperialism”⁷. The third element of building a strong state was the creation of a regular army directly controlled by the emir. As a result of the Abdur Rahman Khan policy, the Afghan state became much more centralised and the centrifugal forces of the Pushtun tribes were weakened. His achievements were permanent enough that even the actions of his successors, who carried somewhat different policy⁸, could not completely undo his achievements.

The beginning of the 20th century and the rise of modern intelligentsia in Afghanistan brought about the agitation for modernisation and the deep reforms of the state, including the demands for a constitution. Those reformist tendencies clashed with

and Pakistan, eds. A. Banuazizi, M. Weiner, Syracuse University Press, Syracuse 1986, p. 78; L. Dupree, *Afghanistan*, Oxford University Press, Karachi 1997, p. 59.

⁴ The Pashtuns settled most the territories from Amu-Daria in the North to a part of Baluchistan in the South, and from Indus in the East to Iran border in the West.

⁵ J. Sierakowska-Dyndo, *Afganistan – narodziny republiki*, Wydawnictwo Akademickie DIALOG, Warszawa 2002, pp. 37–38.

⁶ The expansion of Russia in the Central Asia, and the expansion of the British Empire in this region (the Second Afghan War 1878–1880). See: P.F. Walker, *Afghanistan: A Short Account of Afghanistan, Its History, and Our Dealings with It*, West Corner of St. Paul's Churchyard, London 1881; E. Sergeev, *Russo-British Relations in Central and East Asia. The Great Game, 1856–1907*, Washington, Baltimore 2013, pp.105–210.

⁷ L. Dupree, *Afghanistan ...*, op.cit., p. 417.

⁸ The son and successor of Abdur Rahman, Habibullah (1901–1919), in his political practice departed from the idea of hard line policy of his predecessor, especially in the relation to the tribal and religious leaders who were marginalized during Abdur Rahman rule.

the position of the tribal leaders who opposed any changes that would undermine their position. The Afghan clergy also was against modernisation, because the next Afghan ruler, emir Amanullah (1919–1929) wanted to build a secular state based on the European model of a constitutional state, adapted to Afghan needs⁹.

Despite the opposition from diverse political groups Amanullah was able to introduce in 1923, the first Constitution in the history of Afghanistan¹⁰. Article 4 of this Constitution declared that the state was a monarchy. Similarly, the next Constitution of 1964¹¹, also confirmed that Afghanistan was a monarchy. Still, the introduction of this Constitution was an important element in the legal and political evolution of the state. The period after the introduction of this Constitution was called an era of constitutional and political experimentation¹². The decision makers of that time decided that the Afghan society was not ready for more radical changes. Still, the Constitution of 1964 introduced several changes which influenced the way of perceiving the state and the way in which it should work. For example it had, for the first time, introduced an idea of the separation of powers¹³.

In fact, it may be argued that the resolutions adopted in this Constitution formed the basis of the later changes in the Afghanistan political system. For example, Article 24 forbade the members of the royal family to serve as prime ministers¹⁴, ministers of the government, members of parliament, judges of the Supreme Court, and also forbade them the membership of any political party.¹⁵ Justifying such a bequest Zahir Shah (1933–1973) said: "... the royal family may hand in the burden of previous generations and allow the well-educated Afghans to take the power"¹⁶.

Moreover, the Constitution guaranteed equality before the law, personal freedom, the protection of private ownership, the freedom of speech and worship, the right to education and health care, and the freedom of establishment of political parties¹⁷. The concession of such freedoms as the freedom of establishing political parties and

⁹ More about Amanullah reform see in: L.B. Poullada, *Reform and Rebellion in Afghanistan, 1919–1929. King Amanullah's Failure to Modernize a Tribal Society*, Cornell University Press, London 1973.

¹⁰ The Constitution of Afghanistan, April 9, 1923, <http://www.afghan-web.com/history/const/const1923.html>.

¹¹ The Constitution of Afghanistan, 1964, <http://www.afghan-web.com/history/const/const1964.html>

¹² R. Magnus, *The Constitution of 1964: A Decade of Political Experimentation*, in: *Afghanistan in the 1970s*, eds. L. Dupree, L. Albert, Praeger Publishers, New York, Washington, London 1974.

¹³ A.S. Sirat, *The modern Legal System of Afghanistan*, "The American Journal of Contemporary Law" 1968, vol. 16, no. 4, p. 565.

¹⁴ For example in 1963 Mohammad Yusuf, who had no connection to royal family, became an interim prime minister. In 1965 he was accepted by the king as the regular prime minister of Afghanistan.

¹⁵ Article 24, The Constitution of Afghanistan, 1964 ..., op.cit.

¹⁶ L. Dupree, *An Informal Talk with King Mohammad Zahir of Afghanistan*, "American University Field Staff Report, South Asian Series" 1963, vol. 7, no. 9, p. 3.

¹⁷ Articles 25 to 40, The Constitution of Afghanistan, 1964..., op.cit.

the freedom of speech led to the dynamic rise of activity among the intellectual elites of the Afghan society. There emerged new political parties and a wide range of new press titles. That social and political ferment in connection with the interests of the newly emerged political parties and with the ambitions of some politicians led, on 17th July 1973, to the *coup d'état* which was headed by Mohammed Daud. The coup which led to the fall of Zahir Shah was nearly bloodless (there were only eight soldiers and policemen killed) and was organised during the absence of the king, who was at the time abroad¹⁸. For the benefit of his subjects and in hope of avoiding any possible further bloodshed Zahir Shah decided not to oppose the coup. Together with his family he remained abroad and on 24th August 1973 he officially abdicated¹⁹.

In effect the monarchy in Afghanistan was abolished and a republic established. On 24th July 1976 a new Constitution was introduced, which changed Afghanistan into a one-party presidential republic. It formally introduced and legitimised the office of president into the Afghan political system²⁰. Mohammed Daud, who was a close cousin of the removed king, became the first president of the republic.

The new Constitution awarded the president a wide spectrum of powers, which made this office a central element of the system, with the competences giving it an influence on nearly every aspect of the state. The president²¹ was elected by the members of Loya Jirga²², by a two-thirds majority for six years (Art. 76 and 80). A candidate had to have the Afghan citizenship²³, and be a Muslim, not less than 40 years of age, and have the full civil and political rights (Art. 77). In the case of

¹⁸ Asian Recorder, September 10–16, 1973, vol. 19, no. 37, p. 11587.

¹⁹ Zahir Shah remained on emigration in Italy and refused to return Turing the Soviet intervention and after the withdrawal of the Soviet troops in 1989.

²⁰ The Constitution of Afghanistan, 1976, <http://www.afghan-web.com/history/const/const1976.html>; Z. B. Sherman, *Afghanistan's Constitutions: A Comparative Study and Their Implications for Afghan Democratic Development*, Naval Postgraduate School, Monterey, California, March 2006, p. 6, http://www.nps.edu/programs/ccs/Docs/Pubs/Sherman_thesis.pdf.

²¹ In the text of the Constitution is used the pronoun 'he'. This may be understood as a sign, that only a male could be a president of Afghanistan. It should not be read as sign of discrimination, but it rather meant that in Afghanistan, a Muslim state, the political role of women, at that time, was limited. But it does not mean that they did not play any role in politics. It is enough to mention Anahita Ratebzad a member of lower house of parliament (Walesi Jirga) in 1965. L. W. Adamec, *Historical Dictionary of Afghanistan*, The Scarecrow Press, Inc., Metuchen, London 1991, p. 203; E. Knabe, *Afghan Women: Does Their Role Change?*, in: *Afghanistan in the 1970s*, eds. L. Dupree, L. Albert, Praeger Publishers, New York, Washington, London 1974, p. 157.

²² There was no limit of the number of terms in office. The Loja Jirga was at first a representation of tribal interests, but with time it transformer into a representation of Afghan society. It gathered both in time of danger as well as in times of peace and tranquility. The 1964 Constitution accepted it as the most important institution in the state. For the summoning of Loya Jirga two factors were necessary. It could be summoned only on the Afghan soil, and by the legal government recognised by the free inhabitants of Afghanistan. *The Tradition of Jirgha in Afghanistan*, "Afghan Information Centre. Monthly Bulletin" 1988, no. 86, pp. 2–7.

²³ The parents of president and his wife needed to be Afghans.

illness or travel, according to the Constitution, the responsibilities of the president were taken over by a vice-president (or vice-presidents), who acted in accord with the guidelines prepared and left by the president (Art. 82). In the case of death or resignation of a president²⁴ his functions were taken over not by a vice-president, but by a chairman of the Upper House of Parliament (Meli Jirga) (Art. 86). In the Constitution the question of impeachment of the president was also resolved. The only reason for it was the high treason, and the impeachment needed to be voted through by two thirds of the members of Loya Jirga (Art. 87).

As it was already mentioned, the Constitution gave to a president very wide powers in many fields. In the case of defence, according to Article 78, the president shall have the “Supreme command of the Armed Forces of the country”; he also has the power of “declaring war and armistice with the advice of Loya Jirga”; but in “the case in which an immediate and open danger threatens independence and territorial integrity, or in other urgent circumstances the president of the Republic may adopt exceptional decisions, and convene the Loya Jirga”; he also had the right to declare: “a state of emergency and its termination”²⁵.

With the respect of legislature, the powers of the president were also very significant. According to the 1976 Constitution, the president convened and inaugurated the sessions of Loya Jirga; he was inaugurating the ordinary session of the Meli Jirga (the Upper House) and was also convening and inaugurating its extraordinary sessions; he also had the right of dissolving the Meli Jirga and decreeing new elections²⁶. Moreover, the Constitution stated that the president was guiding and harmonising the country’s domestic and foreign policy in accordance with the provisions of this Constitution; he had the right to commute or pardon the convicts; he awarded medals, appointed and dismissed the vice-president and ministers, he also accepted their resignations; the president appointed the justices of the supreme court and the chief justice; appointed, retired, accepted the resignations and dismissed judges, officers of the armed forces and high ranking officials in accordance with the provisions of the law; he accredited heads of Afghanistan’s diplomatic missions in foreign states, and permanent representatives to international organisations; he also accepted the letters of credence of the foreign diplomatic representatives. Finally, the president signed laws and ordinances and proclaimed their enforcement, he granted also credentials for the conclusion of international treaties and signed them²⁷.

²⁴ Loya Jirga was a body accepting the resignation of the president (Art. 85).

²⁵ Article 78, The Constitution of Afghanistan, 1976..., op.cit.

²⁶ Ibidem.

²⁷ Ibidem.

So as we may see, according to the 1976 Constitution, the presidential prerogatives were very wide and far reaching. Moreover, he could bypass the parliament, because he was a symbol of national unity and he could recourse to a general vote of the people of Afghanistan on important national matters (Art. 79). In many aspects the competences and powers of the Afghan president were comparable to those included in some European constitutions, especially the French Constitution of the 5th Republic. But in reality this Constitution was never fully implemented. The situation in Afghanistan became more and more volatile. There were bitter confrontations between diverse political groups existing within the still very narrow intellectual and political elites of the state, which were exacerbated by the policy of president Daud himself, whose style of governing was more and more authoritarian. He was appointing and dismissing the officials at his will, he tightened his control over every aspect of the government's actions, so even the smallest expenditures needed to be accepted by him. He surrounded himself with "his own" people, the family and the group of closest political allies.

Those actions caused the expansion of opposition toward the Daud rule. The provenience of those forces was very diverse. On one side there were several Muslim organisations, on the other hand there were several leftist parties. Finally, on 28th April 1978 the People's Democratic Party of Afghanistan (PDPA) organised a coup²⁸. The takeover of power was a bloody one. Some 100 men were killed, including President Mohammed Daud and thirty members of his family. After the coup the PDPA proclaimed the Democratic Republic of Afghanistan²⁹.

The coup did not bring about stability in the state. Discontent was rising very quickly. The people were dissatisfied with the new government, and with the growing Russian presence in Afghanistan. The outbreak came very soon. On 15th March 1979 the mob in Herat attacked the Russians – some fifty soldiers and members of their families were killed. In response, the government forces counterattacked and massacred some 5,000 locals³⁰. That action did not either pacify the situation or stop other outbreaks, which led to the growing repressions on the part of the government³¹. The escalation of violence brought with it many more victims, according to different sources there were from 11,000 through to 35,000 and 100,000 up to 250,000 killed in this phase of internal conflict.³² The situation became even more complex when

²⁸ So called Saur Revolution.

²⁹ L. Dupree, *Afghanistan ...*, op.cit., pp. 770–771.

³⁰ H.S. Bradsher, *Afghanistan and the Soviet Union*, Duke University Press, Durham 1985, pp. 101–103.

³¹ H.S. Bradsher, *Afghan Communism and Soviet Intervention*, Oxford University Press, Oxford, New York 1999, p. 51.

³² O. Roy, *Islam and Resistance in Afghanistan*, Cambridge University Press, Cambridge 1986, p. 95; H.S. Bradsher, *Afghan Communism ...*, op.cit., p. 62.

the Soviet Union decided, in December 1979, to intervene, and this led to a ten-year military conflict in Afghanistan³³.

During the later phase of the conflict, the ruling president, Najibullah (1987–1992) tried to undertake a dialogue with the opposition and reach a compromise. One of the elements of this proposed understanding was the passage and introduction of a new Constitution, on 29th September 1987³⁴. This Constitution, which accepted certain traditional resolutions, like the acceptance, that the Loya Jirga dominant function, as a decision-making body, at the same time promoted the creation of the foundations of the modern national state based on the rule of law and the unity of different tribes and ethnic groups. In the opinion of the scholars and experts this Constitution meant a significant step toward a modern state in comparison with earlier constitutions. But the shadow of Najibullah falls on it, and made it unacceptable to many Afghan factions³⁵.

The 1987 Constitution made provisions for the existence of the office of president in the Afghan political system. In many respects, in this particular case, the regulations were similar to those included in the 1976 Constitution. The requirements for the president were the same. Such a person needed to be a Muslim, have an Afghan citizenship (those requirement applied also to the wife of the president and his and her parents), and be at least 40 years old (Art. 73). The electoral procedure was also very similar. The president was to be elected by Loya Jirga, but by a regular majority, not a qualified one (Art. 72). The term of office was defined differently. In this Constitution the term was seven years, but the number of terms was limited to two (Art. 72). Differently was also resolved the question of absence, resignation or a vacation of the office. In the case of temporary absence the presidential duties were entrusted to the first vice-president, but in the case of a permanent vacation of the office the first vice-president was supposed to convene the Loya Jirga session within a month to elect a new president (Art. 76). Article 71 stated that “The president is the head of the state and shall exercise his powers in legislative, executive and judicial spheres in accordance with the provisions of this constitution and the laws of the Republic of Afghanistan”³⁶.

³³ See more in: V.K. Bhasin, *Soviet Intervention in Afghanistan: Its Background and Implications*, S. Chand, New Delhi 1984; A. Alexiev, *Inside the Soviet Army in Afghanistan*, RAND Corporation, Santa Monica 1988; M. Huner, *The Soviet War in Afghanistan: Patterns of Russian Imperialism*, University Press of America, Lanham; Foreign Policy Research Institute, Philadelphia 1991.

³⁴ The Constitution of Afghanistan, 1987, <http://www.afghan-web.com/history/const/const1987.html>.

³⁵ U. Shankar, *Problems and Prospects of Constitutional Government in Afghanistan*, in: *Afghanistan. Challenges and Opportunities*, ed. K. Wariko, Pentagon Press, New Delhi 2007, vol. 2, pp. 60–61.

³⁶ The Constitution of Afghanistan, 1987, <http://www.afghan-web.com/history/const/const1987.html>.

Article 75 of the Constitution specified the powers of the president, and here also we may see quite a few similarities and borrowings from the earlier Constitution. In the field of defence, the president was the highest commander of the armed forces. He had the right to proclaim a state of emergency, general and partial mobilisation; with the consent of Loya Jirga he had the right to declare war or armistice. In the relation to the executive branch of the government, the president had the right to appoint the prime minister designate to form the government; to approve the head and members of the government after they had received a vote of confidence of the National Assembly, and he also accepted their resignations. He also had the right to convene and preside over the council of ministers when necessary³⁷. Moreover, according to this Constitution the president had many responsibilities similar to those of the presidents of the European states. He signed laws and resolutions of the National Assembly, he approved nominations, promotions and salaries of judges, high-ranking officials and officers of the armed forces. He had the right to proclaim a referendum on major political, social and economic issues, he had the right of pardon and the remitting of the sentences, to accredit the heads of diplomatic missions of the Republic of Afghanistan to foreign countries and international organisations, he also accepted the credentials of the heads of diplomatic missions of foreign states to the Republic of Afghanistan. He had the right to authorise the issue of money, to grant citizenship and asylum in accordance with the law. Finally, he had the right to grant honorary orders, medals and titles.³⁸

This Constitution was never introduced. The continuous guerrilla war with the Soviets up to 1989 and later the civil war made it impossible. Therefore all the arrangements concerning the presidency and its powers remained a dead letter.

In 1989 the Soviet troops withdrew from Afghanistan, and finally the intervention ended. But it did not bring about peace. In fact, a new, yet at that time, internal conflict started. At first between the mujahideen and the forces loyal to Najibullah, and later between different groups of the mujahideen. Despite the chaos in the country, in 1990 a new Constitution was introduced.³⁹ In respect of the powers of the office of president, it repeated the arrangements included in the 1987 Constitution. The only new thing was that this act introduced a concept of the presidential administration (Art. 75).

³⁷ Articles 71–76, The Constitution of Afghanistan, 1987..., op.cit.

³⁸ Ibidem.

³⁹ The Constitution of Afghanistan, 1990, <http://www.afghan-web.com/history/const/const1990.html>.

Neither the new Constitution nor the Peshawar Accord of 25th April 1992⁴⁰, signed by some of the fighting mujahideen groups, stabilised the situation in the country. Therefore the state institutions created by this Constitution were unable to take over the government of the country. According to the Peshawar Agreement, the interim government was established (Islamic Council) which numbered 51 persons with Sibghatullah Mojaddedi at its head as an acting president.⁴¹ The interim government was supposed to govern the country for two months, when a new interim government was supposed to be established with Burhanuddin Rabbani at its head⁴². This government was supposed to rule the country for four months. At the end of the Rabbani government, a Council of Accord was to be established, which was supposed to establish the next interim government, this time for eighteen months. After this period the elections were to be held. In such a constructed system of government the acting president was responsible before the council composed of the leaders of the mujahideen organisations. This complicated situation had no backing of any constitutional law, and did function in the political vacuum left after the Soviet intervention, moreover, in the state of civil war. Therefore from the very beginning there were conflicts concerning who should hold the office of the acting president, and what the prerogatives of this office should be. For example, Gulbuddin Hekmatyar, the leader of *Hizb-i Islami-Afghanistan* (Islamic Party of Afghanistan) was unhappy that Mojaddedi was nominated as the acting president, because he wanted this office for himself. Moreover, he blamed the president for criticising him as the Minister of Foreign Affairs, he argued, that the prime minister should not be a subject to the acting president⁴³. On the 28th October 1992 Rabbani asked the Council to prolong his term of office for the next 45 days, because, as he argued, there were no conditions to assemble a shura (council), because of the fighting in the country. Finally, the shura was assembled at the end of December 1992, and on the 28th December it nominated Rabbani for presidency.⁴⁴ His position was unstable as most of the groups of the mujahideen did not take part in the elections, arguing that Rabbani was manipulating the shura.

⁴⁰ The full text of the Peshawar Accord see: The Peshawar Accord, [http://www.afghan-politics.org/Reference/Accords/Pakistan/peshawar accord.htm](http://www.afghan-politics.org/Reference/Accords/Pakistan/peshawar%20accord.htm).

⁴¹ He was the leader of *Milli-i-Afghanistan* (Afghan National Liberation Front).

⁴² Burhanuddin Rabbani was the leader of *Jamiat-i Islami-i Afghanistan* (Islamic Society of Afghanistan), and on 28th June 1992 he became an acting president.

⁴³ W. Malley, F. Haq Saikal, *Political Order in Post-Communist Afghanistan*, International Peace Academy, Occasional Paper Series, Boulder, London 1992, p. 30.

⁴⁴ B.R. Rubin, *The Fragmentation of Afghanistan. State Formation and Collapse in the International System*, Yale University Press, New Haven, London 1995, p. 273.

The Agreement clearly was not working as the different groups of the mujahideen were unable to cooperate. Therefore the new agreement was signed, this time in Islamabad.⁴⁵ According to this understanding Rabbani was nominated an acting president,⁴⁶ and Hekmatyar was selected for the premiership. The responsibilities of both offices had a constitutional character. For example, the prime minister formed a government in consultation with the president, and the president was the commander-in-chief of the armed forces⁴⁷. But again, as in the earlier case, all of those resolutions remained a dead letter, because the leaders of particular groupings were primarily interested in their own goals and in achieving their own aspirations. They did not want to compromise with anybody.

The emergence of a new political force – the Taleban in 1994 meant a decisive swing in the Afghan politics. Pursuing their own aim to transform Afghanistan into an Islamic state, they introduced their own rule and institutions, very different from the earlier Afghan traditions. At the head of the state there was Mullah Mohammad Omar, whose rule was based on his own personal charisma, not on any legal or constitutional mechanisms. The most important decision-making body in the Taleban political structures was the Supreme Shura which resided in Kabul. At first it numbered ten members, mostly the longstanding friends of Mullah Omar. With time military commanders, ulamas and the tribal elders were added, so in some meetings even up to fifty persons took part⁴⁸. Beneath there was the so-called Kabul Shura, which could be compared to a council of ministers in other states. Its main responsibility was dealing with everyday issues, when the Supreme Shura made more important decisions. It also had the right to make null and void the decisions of Kabul Shura⁴⁹. If we may speak in the case of the Taleban state of prime minister and ministers⁵⁰, there was no place for the office of the president. It may be said that there was no place for this office. Mullah Omar, as a charismatic leader took over the functions and responsibilities of the president's office. In this way a specific situation developed in respect of ruling and the functioning of the state.

⁴⁵ The full text of Islamabad Accord see: Afghan Peace Accord or The Islamabad Accord of March 1933, [http://www.afghan-politics.org/Reference/Accords/Pakistan/Islamabad accord.htm](http://www.afghan-politics.org/Reference/Accords/Pakistan/Islamabad%20accord.htm).

⁴⁶ Presidential elections were supposed to take place on 28th June 1994, but Rabbani moved the date up to the end of that year.

⁴⁷ L.W. Adamec, *Dictionary of Afghan Wars, Revolution and Insurgencies*, Lauham, London 1996, p. 316.

⁴⁸ A. Rashid, *Taliban. Islam, Oil and the New Great Game in Central Asia*, I.B. Tauris, London, New York 2000, p. 98.

⁴⁹ *Ibidem*.

⁵⁰ It is good to remember that the Taleban government functioned in unorthodox way. The Taleban ministers combined their government functions with their military roles. It led to such a situation, as the six months leave of Minister of Health Mohammed Abbas Akhund, who left Kabul to take part in military campaign. A. Rashid, *Taliban ...*, op.cit., p. 100.

After the fall of Taliban as a result of the American intervention in October 2001, there started the process of the reconstruction of Afghanistan. In effect, after over two decades of warfare, since the end of the 1970s, many aspects of political, social and economic life have been destroyed. Barnett Rubin in his book published in 1995 wrote that in fact the very state as an institution fell down⁵¹.

One of the elements of the reconstruction of the state was the preparation and introduction of a new Constitution. Its initial text was prepared by a special commission, which was convened in accordance with the Bonn Accord of 2001⁵². The proposed text of the Constitution was afterwards put before the Loya Jirga, which acted in this respect as a constituent assembly. Its session was held from 13th December 2003 to 4th January 2004, and during it, after some minor changes, the Constitution was accepted and voted upon⁵³. It introduced the presidential system of government in Afghanistan.

Despite the changes in the political environment and situation of the state, in the area of the powers of the president, it emulated in many respects the earlier arrangements. But there were also some changes in this respect, due to the changed situation in Afghanistan.

The 2003 Constitution states that the candidate for the president⁵⁴: “Shall be a citizen of Afghanistan, Muslim, born of Afghan parents and shall not be a citizen of another country” (Art. 62/1)⁵⁵. He or she must be at least 40 years of age and should not have been convicted by a court or deprived of his/her civil rights (Art. 62/3). The term of office was five years and there was a limit of two terms of office for one person (Art. 62)⁵⁶. There are also some limitations connected with the office. Such a person cannot engage into a profitable business with the state (Art. 151)⁵⁷. He is

⁵¹ B.R. Rubin, *The Search for Peace In Afghanistan. From Buffer State to Failed State*, Yale University Press, New Haven, London 1995.

⁵² Bonn Accord was an effect of the meeting of several Afghan groups in December 2001 under the auspices of the UN. The goal of this Accord was the start of dialog between different factions and establishing a basis for democratic institutions in Afghanistan. See more in: *General Background, From the Bonn Agreement to the 2005 Wolesi Jirga and Provincial Council Elections*, http://www.unama-afg.org/news/_parelection/_factsheets/_english/JEMBS%20PO%20BG%20General%20BG%20final%202005-4-1%20eng.pdf.

⁵³ The Constitution of Afghanistan, Year 1382(2003), <http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf>.

⁵⁴ The completely new thing, not present in earlier constitutions, was that the woman could be elected for presidency. Article 22 states that the citizens of Afghanistan – both men and women – have the same rights and duties before the law, <http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf>.

⁵⁵ But differently than in older constitutions there were no qualifications in respect to the spouse of the president.

⁵⁶ Similar limitations apply also to two vice-presidents.

⁵⁷ The same applied to vice-presidents, ministers, judges of the Supreme Court, Attorney General, Heads of the Central Bank and National Directorate of Security, Governors and Mayors, <http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf>.

also obliged to publish a declaration of possessions before and after his/her term of office (Art. 154)⁵⁸.

Article 61 of the Constitution states that the president should be elected by the majority of Afghans in general, free, secret and direct elections. He/she needs to receive more than fifty percent of the votes cast. If in the first round of the elections none of the candidates got the required percentage of votes, then there would be held the second round in which just two candidates who have received the highest number of votes in the first round would participate (Art. 61)⁵⁹.

A lot of place in the new Constitution is devoted to the situation when the president is unable to fulfil his/her duties. Article 67 states that in the event of death or incapacitation of the president, the first vice-president should assume the duties and responsibilities of the president. If both the president and the first vice-president are unable to fulfil those duties, then the second vice-president should assume the duties of the president, then “the President of the House of Elders, the President of the House of Representatives and the Foreign Minister shall succeed respectively and, in that order, and, according to Article Sixty-Seven of this Constitution, shall assume the duties of the President”⁶⁰. We may assume of course that such a detailed description of the procedures in the case when the president dies or is incapacitated follows an example of many western constitutions, where this situation is also clearly settled. But it seems that in this situation the crucial cause was instability within the state. Knowing how unstable and dangerous everyday situation in Afghanistan was, the legislator decided to play safe⁶¹.

Article 69 deals with the issue of presidential impeachment. There are stipulated the reasons for such an action, among which are: crimes against humanity and national treason. In a situation when such a case emerges, the constitution describes a procedure of recall of the president. The initiative is with the House of Elders

⁵⁸ The same applies to vice-presidents, ministers, judges of the Supreme Court, Attorney General. Ibidem.

⁵⁹ Some of the specialists wonder if in so ethnically diversified country, as Afghanistan the president should be elected in general elections. Because in such case the elections would mirror rather the strength or weakness of particular ethnic groups. And this in turn may lead to a situation in which the president will be treated as a representative of his own ethnic group and not of the whole Afghan society. R.B. Rais, *Recovering the Frontier State. War, Ethnicity, and State In Afghanistan*, Lexington Books, Lanham, Boulder, New York, Toronto, Plymouth 2008, p. 128.

⁶⁰ See Article 68, <http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf>.

⁶¹ President Hamid Karzai was, at least, six times a target for assassination attempts. Some of them took place before he was elected for presidency. The first had place in September 2002 when he was an acting president. The second in September 2004 during the election campaign. *Day of Afghan Violence*, PBS Newshour, September 5, 2002, http://www.pbs.org/newshour/bb/asia-july-dec02-afghan_9-5/; C. Gall, *Afghan Leader's Helicopter is Attacked, Aborting a Campaign Rally*, “The New York Times”, September 17, 2004, <http://www.nytimes.com/2004/09/17/international/asia/17karzai.html>.

(Wolesi Jirga), and the whole procedure is very similar to the American procedure of impeachment⁶².

Article 66 states that the president, while exercising his constitutional powers in office, should take into consideration the supreme interests of the people of Afghanistan, and should not use his powers to give any advantage to such factors as: language, ethnicity, tribe, religion or political affiliations. One of the tools the president may use is the referendum. Article 65 gives him that power, to be used in important political, social and economic questions.

The 2003 Constitution acceded to the president a wide range of competences in relation to several functions of the state. In the matters of defence and security, the Afghan president is the commander-in-chief of the armed forces. He has the right to declare war and sign a peace treaty with the endorsement of the National Assembly. He makes necessary decisions to defend the territorial integrity of the state and its independence. He can, with the consent of the National Assembly, dispatch the Afghan armed forces abroad. He also has the right to introduce and terminate, with the endorsement of the National Assembly, a state of emergency. Moreover, he appoints, dismisses, retires and accepts the resignation of the officers of the armed forces, police and national security⁶³.

With respect of executive powers, the president accepts the resignation of vice-presidents, appoints the ministers, an Attorney General, the Head of the Central Bank, the National Security Director as well as the Head of the Red Cross with the endorsement of the House of People. He also accepts their dismissal and accepts their resignations. Moreover, the president has the right to appoint, retire, dismiss and accept the resignation of the higher officials of the state⁶⁴.

In the case of legislative powers, the president oversees the implementation of the Constitution, signs acts, bills and decrees. He also inaugurates the session of the National Assembly and the Loya Jirga⁶⁵.

In the case of international relations, the Afghan president is responsible for the determination of the fundamental lines of that policy, with the approbation of the National Assembly. He appoints heads of diplomatic representatives of Afghanistan to foreign states as well as to international organisations, and he also accepts credentials of foreign diplomatic representatives in Afghanistan. Finally, he issues

⁶² The procedure of impeachment, as it is in different countries, was described for example in: *Checking Executive Power. Presidential Impeachment in Comparative Perspective*, eds. J.C. Baumgartner, N. Kada, Praeger Publishers, Westport 2003; A.S. Perez Linan, *Presidential Impeachment and the New Political Instability in Latin America*, Cambridge University Press, Cambridge 2007.

⁶³ Article 64, <http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf>.

⁶⁴ Ibidem.

⁶⁵ Ibidem.

credential letters for the conclusion of the international treaties in accordance with the provisions of the law⁶⁶.

With the respect of the judicial branch of the government, he has the right to nominate the head and the members of the Supreme Court, with the approval of the Lower House of Parliament⁶⁷. He also has the right to appoint, retire, accept resignations and dismiss the judges. He also has the traditional, in most of the political system, right of reducing and pardoning penalties.

But looking at the position of the president in the political system of Afghanistan it should be remembered that in reality none of the up to date presidents has been able to use all the powers of this office. Looking at the history one can see that although the consecutive constitutions granted the president wide powers, they were unable to use them. They were either toppled too fast (Daud) or the conditions, like the foreign intervention, were unfavourable, and made it impossible to use the whole extent of powers. Finally, the relative position of the president and the regional governors and tribal leaders depended, to a great extent, on personal charisma of the person in office.

Taking into account the current situation (since 2001), it should be stated that the president has, as for now, no chance to use the full extent of his powers, as they are defined in the Constitution. First of all, since 2001 the situation has been far from stable. The conflict or rather the conflicts are still simmering throughout the whole country. Moreover, from December 2001 to December 2014 there stationed in Afghanistan the International Security Assistance Force (ISAF) numbering at the peak of deployment in 2012 c. 130,000 soldiers⁶⁸. In effect, the state is not functioning in an ordinary fashion. Whatever the prerogatives written in the Constitution are, the president faces particular problems which substantially limit his margin of action. The state administration is underdeveloped, the margin of safety is very limited, the security forces are not efficient enough to fulfil their obligations, and the state is financially dependent on foreign aid.

In the case of the central state administration, it should be remembered, that the central, hierarchical administrative structure is something new in Afghanistan. Therefore there are no ready standards of conduct. Moreover, the officials are underpaid, therefore, especially those with higher qualifications, tend to move to other institutions, operating in Afghanistan, such as: Non-Governmental Organisations

⁶⁶ Ibidem.

⁶⁷ L. Armytage, *Justice in Afghanistan. Rebuilding Judicial Competence after the Generation of War*, "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht. Heidelberg Journal of International Law" 2007, vol. 67, p. 186.

⁶⁸ NATO Sets "Irreversible" But Risky Course to End Afghan War, Reuters, May 21, 2012, <http://ca.reuters.com/article/topNews/idCABRE84J02C20120521?sp=true>.

(NGO-s), UN institutions, or other international institutions which offer much better salaries⁶⁹.

The local administration has another type of problems. First of all, we may observe the strong personal connections. Officials are mostly the nominees of local governors. Who, on their side, are usually strongly and personally connected with the province, in which they exercise authority. They are connected with local elites and power groups. Moreover, they have at their disposal their own military force, independent of the central government. In effect, the role of the Kabul government in their selection for the office, very often is limited to just the acceptance of the fact⁷⁰.

This situation is exacerbated by the condition of the army and police forces, which should be the armed forces of the government, and should guarantee the safety of the state and the citizens. Both formations are still in the process of organisation and still did not reach their full capacity. Both the police and army are still undermanned. In the case of the police, they reached some 70–80% of the planned manpower⁷¹. In the case of the armed forces, they numbered in September 2014, some 195,000 soldiers and officers, when according to the specialists they should number circa 250,000, because only then will they be able to carry out their mission to safeguard the security of the state⁷². There are several problems which plague both institutions: their training is deficient, their armament and equipment is not sufficient, they depend on foreign financing, and there is a high rate of desertion⁷³.

The next problem facing any Afghan president, is the financial one. More than thirty years of warfare led to the destruction of the economy, and deepened its backwardness and underdevelopment. In effect, the possibilities of exports of any goods

⁶⁹ World Bank, *Afghanistan: State Building, Sustaining Growth, and Reducing Poverty*, Washington 2005, p. 47.

⁷⁰ More about see: H. Malikyar, B.R. Rubin, *Center-Periphery Relations in the Afghan State: Current Practices, Future Prospects*, Center on International Cooperation, New York University, December 2002.

⁷¹ D.J. Planty, R.M. Perito, *Police Transition in Afghanistan*, United States Institute of Peace, Special Report, February 2013, <http://www.usip.org/sites/default/files/SR322.pdf>, p. 5.

⁷² T. Shanker, E. Schmitt, *U.S. Plans Vastly Expanded Afghan Security Forces*, „The New York Times”, March 18, 2009, <http://www.nytimes.com/2009/03/19/us/politics/19military.html>

⁷³ More on Afghan army and police see: Gautam Das, *The Afghan National Army in 2014*, „Small Wars Journal”, December 4, 2012, <http://smallwarsjournal.com/jrnl/art/the-afghan-national-army-in-2014>; Curt Tarnoff, *Afghanistan: U.S. Foreign Assistance*, Congressional Research Service, August 19, 2011, <http://www.hsdl.org/?view&did=688313>; North Atlantic Treaty Organization, *Afghan National Security Forces (ANSF): Training and Development*, May 2012, http://www.nato.int/nato_static/assets/pdf/pdf_topics/20120516_media_backgrounder_ANSF_en.pdf; S.Y. Ibrahim, *Afghan Police Part Of The Problem*, Institute for War & Peace Reporting, June 6, 2006, <http://www.rawa.org/police-3.htm>; Andrew Wilder, *Cops or Robbers? The Struggle to Reform the Afghan National Police*, Afghanistan Research and Evaluation Unit, July 2007; S. Chan, *Sentinels of Afghan Democracy: The Afghan National Army*, S. Rajaratnam School of International Studies, Singapore, 1 June 2007.

are very limited.⁷⁴ Afghanistan depends very heavily on the international funds, without which, in fact, this state would have no budget at all. It is estimated that 90% of the budget is derived from the foreign subsidies. Most of it (62%) comes from the United States, the rest (28%) from other donors. This is even more true in the case of defence spending. In this case 94% of the defence budget is derived from the foreign donations – 90% from the US, and 4% from other donors⁷⁵.

The office of president has been present in all of the Afghan constitutions since 1976, and in all of them it has been given broad competences in several fields of public affairs. But the circumstances have limited the real scope of the power of presidents. In effect, there is a very limited chance to evaluate the effectiveness of this function and its powers. This is also the case of the incumbent president Mohammad Ashraf Ghani, who took office on 29 September 2014. In fact this presidency will be the test of the constitutional prerogatives of the president, and his ability to exercise them in the situation when the international presence is limited to Resolute Support Mission, numbering just 12,500 soldiers, and eventually the real power will be in the hands of the Afghan government.

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⁷⁴ We should remember about the income from the production and exports of opium. It is an illegal activity prosecuted by the state, therefore it did not create any budgetary income. It is estimated that the profits from opium account for 10% of the Afghan budget. *Eksport opium stanowi 10 proc. PKB Afganistanu*, money.pl, 6 May 2013, <http://www.money.pl/gospodarka/wiadomosci/artykul/eksport;opium;stanowi;10;proc;pkb;afganistanu,108,0,1300588.html>.

⁷⁵ United States Government Accountability Office, Briefing of Congressional Committees, *Afghanistan's Donor Dependence*, September, 2011, GAO-11-948R, p. 12, <http://www.gao.gov/new.items/d11948r.pdf>.

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