CHAPTER THREE

THE LEGISLATIVE AND INSTITUTIONAL FRAMEWORK
IN AFGHANISTAN

3.1. Introduction

Since its birth in 1919, modern Afghanistan has been entangled in a net of intertwined and complex, national and international conflicts almost uninterruptedly, reflecting a multitude of different root causes and escalating factors. Many of these conflicts continue to the present day and are linked to the historical process of Afghanistan’s state formation, and the persistent weakness, if not partial absence, of the central state institutions and governance throughout its territory that reflects a continuous center-periphery conflict over power.

The first serious attempts to impose modern central state authority in the rural areas were undertaken in the 1920s after Afghanistan received its first written constitution in 1923, which changed the regime into a constitutional monarchy, with a council of elders, the so-called Loya Jirga, confirming the monarch as head of state. Revolutionary and introduced too hastily, these reforms failed, and the newly-adopted first statutory laws (the so-called “Nizamnema legislation”), including a general criminal and civil code and a catalogue of “fundamental rights,” were repealed when the Shah, or monarch, Amanullah Khan was toppled in 1929. Following a period of civil unrest and the long reign of a reactionary monarch, it was not until the 1960s that endeavours to reinforce widespread state governance were relaunched. In 1964 a new constitution was adopted under which Afghanistan made its first timid experiences with democracy under a still monarchical form of government. Indeed, the current...

364 The United Kingdom recognized Afghanistan as an independent state with the Treaty of Rawalpindi on 8 August 1919. For the legal history in this introduction, see M. Ewans, Afghanistan – A Short History of its People and Politics (Harper Collins Publishers, 2002), and N. Chishti, Constitutional Development in Afghanistan (Royal Book, 1998).

constiution, adopted in 2004, is widely based on the 1964 Constitution \footnote{See, also for a legal appraisal and comparison of the Afghan constitutions throughout the century, G. MOLTMANN, ‘Die Verfassungsentwicklung Afghanistans 1901–1981: Von der absoluten Monarchie zur sozialistischen Republic’, (1982) Mitteilungen des Deutschen Orientinstituts.} and thus retains extensive powers for the presidency. The process of expansion of centralized state authority continued but was marked by internal power struggles after a regime overthrow in 1973 and the introduction of the communist “People’s Democratic Party of Afghanistan.” It eventually came to a halt with the invasion of Afghanistan by the then Soviet Union in 1979.

The year 1979 not only marks the beginning of fierce Afghan resistance to Soviet occupation by the armed so-called mujahadeen groups until the complete withdrawal of the Soviet Union in 1989, it has also been referred to as the starting point for Afghanistan’s civil war\footnote{GOODHAND & SEDRA, ‘Bribes or Bargains?’} that—with a short interruption during the first decade of the 21st century starting with the end of the Taliban regime—arguably lasts until today.

The rise of the Taliban is linked to this long period of violence, which entered a new stage with the withdrawal of the formerly common enemy of the Soviet Union, and which led first to a complete fragmentation of the state into competing spheres of influence by the leaders of the mujahadeen groups but eventually to an almost complete control of the Afghan territory by the Taliban by 1998. The Taliban established a regime based on a strict interpretation of Islamic law and Pashtun tribal values. The main internal opposition force against the Taliban was an alliance of different remaining mujahadeen groups, known as the “Northern Alliance.”\footnote{C. VIGIER, Conflict Assessment Afghanistan (2009), available at www.afsc.org, at 5.}

In 2001, the Northern Alliance supported the US-led military action code-named \textit{Operation Enduring Freedom}.\footnote{The so-called Coalition Forces that launched \textit{Operation Enduring Freedom} understood the operation as a reaction to the terrorist attacks on US territory in September 2001, and as application of Art. 5 North Atlantic Treaty and Art. 51 UN Charter that guarantee the right to individual and collective self-defence in the case of an armed attack, after the UNSC had unequivocally condemned the terrorist attacks as a threat to international peace and security. UNSC Resolution 1368 (2001) Threats to international peace and security caused by terrorist acts, UN Doc. S/RES/1368 (2001). The Coalition Forces were re-organised in 2008 as USFOR-A. On the non-ISAF troops, see AREU, \textit{The A to Z Guide to Afghanistan Assistance} (AREU, 2012), available at www.areu.org.af.} After the first successes of this operation in the autumn of that year, representatives of the various