

For both historical and practical reasons the drafters of the 2004 constitution provided for a strong Executive Branch. Not only was power centralised at the centre but the executive was also granted extensive powers to keep the whole of government functioning. The executive has significant powers to legislate and make appointments to all levels of the judiciary. This has significantly undermined both the separation and balance of powers among the three branches of government. As a result, executive overreach has been one of the biggest challenges to constitutionalism in Afghanistan over the last decade. There have been a number of troubling instances; for example, the use of legislative decrees under Article 79 as well as the failure to follow constitutionally mandated procedures when making appointments to senior levels of the judiciary.

In the context of Afghanistan, these problems posed by an overly strong executive are made worse by a weak judiciary and a weak Parliament. Textual weaknesses in the constitution and a historical lack of institutional capacity have made the judiciary unable to fulfil its constitutionally mandated role as an independent arm of government. Similarly, in the absence of strong political parties, Parliament has been unable to form functioning alliances and has often resorted to using the most convenient oversight powers at its disposal - that of questioning and dismissing ministers, and objecting to their confirmation.

## Executive

The President has extensive powers to act as both head of government and head of state. During the drafting process there was a consensus among stakeholders that Afghanistan's first priority should be to establish strong state institutions. Given the long history of armed conflict, lawlessness and the presence of strongmen and armed groups in various parts of the country, a conscious decision was made to centralise power in a strong executive branch. However, in practice the executive has taken on a much broader role than envisaged under the constitution. The executive has not shied away from exploiting ambiguities or at times acting in a plainly unconstitutional manner to suit its convenience.

As an example, under Article 79 when Parliament is in recess the government can issue legislative decrees in cases of 'immediate need'. Once passed by the President, such decrees take automatic effect. However, following the return of Parliament, within one month any decrees under Article 79 must be tabled before Parliament. If both houses of Parliament vote accordingly, they have the power to reject the decree. In practice this provision has been used on numerous occasions where there was no 'immediate need' to pass a law during Parliament's recess.

Similarly in the judicial sphere, the President has the power to appoint the justices of the Supreme Court with the approval of the WJ. When it comes to the lower courts, the President has significant control over both the appointment and dismissal of judges. Thus, in effect the President has significant control over appointments to all levels of the judiciary.

## Parliament

The 2004 constitution provides for a range of oversight powers and duties to the Parliament. The WJ has the power to establish special commissions to investigate actions of government, the power to question ministers, the power to approve or reject key government and civil service appointments, review and decide on development programs and provide oversight to the budget process. However, in practice, Parliament's record on exercising these constitutional checks has been limited. For example, to date Parliament has yet to use its powers under Article 89 of the constitution to establish a special commission to investigate the actions of government. The Parliament's legislative record is particularly poor. During its first two terms the only piece of legislation that Parliament initiated was the Amnesty Law, which granted amnesty to perpetrators of gross human rights abuses, including some members from its own ranks.

The reasons for Parliament's failures range from institutional to individual factors. Many commentators identify the Single Non Transferable Voting System (SNTV) as a key impediment to the functioning of Parliament. The SNTV system incentivises candidates to run on their own platforms and discourages the formation of political parties. As a result, two rounds of Parliamentary elections have produced highly fragmented Parliaments that are unable to form stable and functioning alliances capable of acting in a

concerted manner to check the excesses of the executive. Other factors, such as the lack of individual capacity among Parliamentarians and lack of institutional capacity in the form of a professional secretariat or staff that can assist members of Parliament (MPs) to draft and review legislation, have also impacted Parliament's poor performance.

## Judiciary

The 2004 constitution provides for a relatively strong framework for an independent judiciary. However, the way the judiciary has functioned in practice has done little to demonstrate its independence. A 2014 national survey found that Afghans view the judiciary to be among the most corrupt government institutions.<sup>1</sup> When examining how the judiciary has functioned in practice it is important to keep in mind its institutional history. Since 1980, judicial independence has been absent in Afghanistan both in theory and in practice. The concept of an independent judiciary was removed under the provisional constitution of 1980. The judiciary was merely a tool used by the regime to defend its own interests. Under the mujahidin and the Taliban, judicial independence hardly improved. Thus, the judiciary under the 2004 constitution was built on this extremely weak institutional history. In particular, the lack of an institutional culture or tradition of an independent judiciary has severely impacted the performance of the current judiciary.

In addition to this weak institutional history, some of the provisions of the 2004 constitution have also undermined the judiciary's capacity to act as an equal branch government. Traditionally, the power of judicial review is one of the most important mechanisms at the disposal of the judiciary by allowing it to check the excesses of the other two branches of government. However, in Afghanistan the judiciary's capacity to exercise its powers of judicial review are severely limited. Under Article 121, the Supreme Court can only exercise its judicial review function in response to a request from the government or a lower court. Thus, no one politically opposed to the President, whether it is an MP, a member of the opposition, a member of the public or civil society, has standing to request judicial review.

Additionally, the way a number of provisions have been implemented in practice has severely undermined the independence of the judiciary. In theory, the 2004 constitution contains a rigorous mechanism governing appointments to the Supreme Court. However, the provisions of the constitution in this regard have not been followed. For example, despite an express prohibition on renewing the term of a Supreme Court Judge, President Karzai bypassed the constitutional requirements and extended the term of Chief Justice Azimi so that he ended up serving on the Supreme Court bench for three and a half years longer than his constitutionally mandated term. Similarly, the executive has regularly exerted pressure on the judiciary during the course of developing and approving its budget. Additionally, poor remuneration of judges has not helped widespread issues of corruption within the judiciary.

As a result, over the past decade the judiciary has routinely sided with the government in a number of high stakes cases. Whether it was in the constitutionality of the no-confidence vote against Minister Spanta, the validity of extending the electoral timetable for the 2009 presidential election or the debacle over the Special Election Tribunal, the judiciary has regularly sided with the executive. This has undermined the confidence in the judiciary, not just in the eyes of the public but also in the view of Parliament.

## Battle between Parliament and Executive

One area where Parliament has been particularly zealous in exercising its powers of oversight is in its power to question government ministers. In 2007, Parliament summoned Foreign Minister Dr Rangin Spanta and Minister Akbar Akbar to question their role in the mass deportation of Afghan refugees from Iran. Following the questioning, no-confidence votes were passed against both ministers. President Karzai accepted the vote against Minister Akbar but referred the vote against Spanta to the Supreme Court. The constitution is unclear on the effect of a no-confidence vote against a minister. When the President accepted the vote against Akbar, he in essence signalled that he accepts the power of Parliament to dismiss ministers via a no-confidence vote. The Supreme Court went on to decide that the procedure used to cast the vote against Spanta was unconstitutional, and therefore the vote against him was invalid. As a result, Minister Spanta stayed on in office, leading to a prolonged period of crisis between Parliament and the executive.

The WJ retaliated against the government and the Supreme Court by enacting a law that established Independent Commission for Overseeing the Implementation of the Constitution (ICOIC), granting it explicit power to interpret the constitution. It is important to note that this was the first and only time Parliament has unified to use its two-thirds majority to override a presidential veto. The President in turn referred the law to the Supreme Court, which determined that the law was unconstitutional. The WJ rejected the Supreme Court's decision arguing inter alia that the Supreme Court faced a conflict of interest in deciding the issue.

<sup>1</sup> The Asia Foundation, "Afghanistan in 2014: A Survey of the Afghan People" (Kabul: The Asia Foundation, 2014).

Thus at present both the Supreme Court and the ICOIC interpret the constitution, sometimes at the same time on the same issue.<sup>2</sup> There are a number of legal arguments based on the structure of the constitution and the intention of the drafters that indicate the Supreme Court should have exclusive jurisdiction to interpret the constitution.<sup>3</sup> However, at present there is no political consensus over who has the power to interpret the constitution or what the ICOIC's proper role is. Once an agreement is reached between all stakeholders, a solution could be found by enacting a law that clarifies the role of both bodies.

However, the prolonged battles between the executive and Parliament have undermined public confidence and the legitimacy of these institutions. Following the no-confidence vote against Ministers Spanta and Akbar, Parliament repeatedly sought to use its power to question and dismiss ministers. The executive has had varying responses to these dismissals - at times it has simply accepted the dismissals. On other occasions while seeming to accept the no-confidence votes, the President has allowed ministers to serve as 'acting ministers' or re-appointed them to a closely related portfolio.

Some argue that these battles over no-confidence votes and confirmation hearings are a crude but robust example of checks and balances at work. A Parliament that is dissatisfied with the executive but unable to form coherent, functioning alliances can rally behind the common cause of retaliating against the executive by targeting individual ministers. Even the current battle in Parliament over the confirmation of the first round of ministers from the National Unity Government is an example of constitutional checks and balances at work. By showing resistance to the nominations, and in particular insisting on no dual-citizenship candidates, Parliament is attempting to flex its muscles.

### Conclusion

In almost every system of government there are complaints relating to an overbearing executive. Afghanistan is no exception - over the last decade the executive has used its powers to exert control over all areas of government. However, in the context of Afghanistan the challenges posed by an overly strong executive are made worse by a historically weak judiciary and a Parliament that has no functioning political alliances. Similar to the judiciaries of Afghanistan's past, the present judiciary has demonstrated little appetite to stand up to the executive branch. This has left Parliament with a keen appetite for retaliation but with little capacity to act in a coherent or coordinated manner. As a result, it has often used the most convenient oversight powers at its disposal - such as questioning and dismissing ministers or objecting to their confirmation. Looking to the future, it is important that both the capacity and skills within Parliament and judiciary are strengthened so that they are better able to use the oversight powers at their disposal.

### Recommendations

- All three branches of government and the ICOIC should come to a common understanding as to the proper role for the ICOIC and the Supreme Court, and clarify who has the power to interpret the constitution. Following an agreement among all the key stakeholders, a law should be enacted and tabled before Parliament that clarifies the jurisdiction of the two organs.
- The government of Afghanistan should take steps to improve the independence of the judiciary, which should include the independence to develop its own budget and appropriate remuneration for judges.
- The judiciary should seek to actively create a culture of independence, and conduct its administrative affairs and discharge its judicial functions in a manner that does not undermine its independence.
- Government, civil society, and international stakeholders should continue to improve the institutional capacity of Parliament, as well as the technical capacity of members of Parliament to initiate and review draft legislation and government policies.

<sup>2</sup> Farid Hamidi and Aruni Jayakody, "Case Study of Separation of Powers in Practice: No Confidence Vote Against Foreign Minister Spanta" (Kabul: Afghanistan Research and Evaluation Unit, 2015).

<sup>3</sup> Ibid.

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