

# The Afghan Parliament: Constitutional Mandate versus Practice in the Post 2001 Context

## Introduction

Afghanistan has historically been ruled by powerful heads of state. The idea of separation of powers did not flourish until after the adoption of the 1964 Constitution, which attempted to institutionalise democracy by creating a parliament with noticeable legislative and oversight powers. However, Afghanistan's experience with parliamentary democracy was short-lived because the country lacked favorable conditions for its growth.<sup>1</sup> As such, the parliament was not effective and failed to build a bridge between the legislature and the executive. In less than ten years, the parliament removed five governments, leading to political instability and crises. From 1973, when the 1964 constitutional order collapsed, up until 2001, Afghanistan did not have a functioning parliament.

The fall of the Taliban regime in late 2001 marked the start of a new political era for Afghanistan. A new constitution, adopted in 2004, created a powerful bicameral parliament and embraced more mechanisms of checks and balances. The 2004 Constitution was indeed drafted in a way to grant the parliament significant legislative and political oversight powers, and those who drafted it expected that an elected parliament would be one of the most important foundations in achieving a representative democracy in war-shattered Afghanistan.<sup>2</sup> They further believed that such a parliament would be much more effective in overseeing the executive branch.

However, practice over the past 13 years shows that the parliament has performed less than what one might have expected in 2004. An ill-suited electoral system coupled with systematic government interference and personality-based politics have created an undisciplined, fragmented and uncoordinated parliament. Moreover, the parliament has not effectively exercised some of its powers such as the establishment of special investigatory commissions that could improve its institutional capabilities. Rather, members of parliament (MPs) have mostly used powers such as the right to impeach and remove government ministers as a tool to improve their individual, ethnic, religious or regional interests.

This policy note explores how the parliament has used its powers under the 2004 Constitution over the past decade. The note also makes recommendations on how to address existing problems and form a more effective and viable parliament in Afghanistan by improving its constitutional mandate.

## Methodology

Research for this paper was conducted through the collection of primary data and review of secondary materials. Primary data were collected through interviews with current and former members of the parliament, the drafters of the 2004 Constitution and with members of civil society who had been close observers of the parliament over the past decade. The research also reviewed and analysed primary archival materials on the 2002-2004 constitution-making process.

<sup>1</sup> It is argued that at the time the 1964 Constitution was promulgated, Afghanistan did not have registered political parties that could have helped parliamentary democracy flourish and succeed. Ethnic and tribal allegiances upset the evolution of a strong national identity, "while militant students and a traditionalist clergy assault[ed] central [governmental] authority". Marvin Weinbaum, "Nonparty Parliamentary Democracy," *The Journal of Developing Areas* 7 (1972): 57.

<sup>2</sup> Marvin G. Weinbaum, "Towards a More Effective Parliament?" in *Snapshots of an Intervention: The Unlearned Lessons of Afghanistan's Decade of Assistance*, ed. Martine Van Biljert and Sari Kouvo, 35 (Kabul: Afghanistan Analyst Network, 2012).

## Key Findings

### The Constitutional Mandate of the Parliament

#### Lack of a Clear Legal Mandate Regarding the Duties of the Parliament

The 2004 Constitution of Afghanistan vests in the parliament comparably more powers than any other Afghan constitution. However, the Constitution contains considerable ambiguities on the scope of these powers and how they should be exercised. These ambiguities have thus far negatively impacted the parliament's powers in practice. Furthermore, the executive has manipulated these constitutional ambiguities in a way that has undermined the parliament.

#### The Executive Has Too Much Legislative Power

The research showed that the parliament has achieved very little over the past two terms, mostly because the Constitution grants the executive too much legislative power. For instance, the Constitution gives the government the right to make regulations without the approval of the parliament; likewise, it authorises the president to make legislation through executive decrees during parliamentary recess and in urgent situations. Practice over the past years shows that the president used this right as an opportunity to promulgate legislation that he feared the parliament would reject. Most of these decree laws are not usually submitted to the parliament for approval and their status remains unclear.

#### An Ill-Suited Electoral System for Parliamentary Elections

The drafters of the 2004 Constitution did not specify a particular system for parliamentary election, and apparently left it to the Transitional Administration of President Karzai to determine.<sup>3</sup> The government chose the Single Non-Transferable Vote (SNTV) system because it was simple and political parties did not exist to support another system like Proportional Representation. Parliamentary elections over the past three terms (2005, 2010 and 2018) revealed that Afghan parliaments elected under SNTV were undisciplined and fragmented, and could not act in a coordinated fashion.

#### Lack of Coordination and Cohesion within the Parliament (Specifically in the Wolesi Jirga)

Results from the 2005 and 2010 parliamentary elections indicate that candidates from varied religious, ethnic and political backgrounds were elected to the Wolesi Jirga.<sup>4</sup> This diversity is not a bad thing; however, aside from occasional regional cooperation among legislators and the unity of a few ideologues, individuals coming from such diverse backgrounds were unable to form alliances that could transcend their group interests. As a result, there is no unified stance within the parliament. The Wolesi Jirga is sometimes described as “an atomized, institution and one in which numerous parties with fluid and often indistinguishable membership and platforms operate.”<sup>5</sup> It basically seems that there are almost as many political parties in the parliament as there are individual members, leading to lack of organisation, discipline and cohesion within the Wolesi Jirga.

### The Performance of the Parliament

#### The Parliament's Legislative Achievements

One of the key tasks given to the Afghan parliament under the 2004 Constitution is legislation. However, in practice, the parliament has performed poorly in this respect. Over the past two terms, the parliament has only managed to pass five laws on its own initiative.<sup>6</sup> All the rest of the legislation that Afghanistan adopted since the fall of the Taliban regime has come from the executive branch. Because the parliament does not have the required capabilities to make legislation on its own initiative, it has been relegated to the passive approval of laws and, in some instances, its decision on legislative matters has been simply ignored by the executive branch.

3 Andrew Reynolds, “Electoral Systems Today: The Curious Case of Afghanistan,” *Journal of Democracy* 17, no. 2 (2006): 104–117.

4 Nilofer Siddiqui, “Promoting Political Parties and an Independent Legislature in Afghanistan,” *Criterion Quarterly* 4, no. 4 (2013).

5 Siddiqui, “Promoting Political Parties”.

6 These laws include the 2007 Law on National Reconciliation and General Amnesty; the 2014 Law on the Privileges and Immunities of the MPs, the 2014 Law on Diplomatic and Consular Staff of Afghanistan and, the 2016 Law on the Prevention of Harassment against Women and Children, the 2017 Law on the Publication and Promulgation of Legislative Documents.

## The Parliament's Oversight Duties

The results of the parliament's oversight duties in practice have been mixed. From the very beginning, it rejected presidential nominees for high-ranking state positions and voted to require the cabinet of ministers to be approved individually rather than "en bloc".<sup>7</sup> Through these actions, the parliament attempted to increase its influence over the executive branch. Over time, however, the parliament began to struggle to exercise its oversight power efficiently, with MPs instead beginning to use oversight mechanisms (summoning, impeaching and using votes of no-confidence) for personal benefits rather than improving the parliament.

## The Hostile Executive-Parliament Relationship

The relationship between the executive and the parliament over the past years has been confrontational. The executive has on many occasions disregarded the parliament's decisions by keeping MPs in office who are voted out or by changing laws that the parliament approved. The parliament in turn targets individual MPs by removing them from office, making life difficult for the president. This tit-for-tat between the two branches has negatively affected the parliament's performance.

## Recommendations

The implementation of the Constitution over the past 14 years has revealed its weaknesses and highlighted the places that need serious attention and amendment. One needed constitutional reform in Afghanistan regards the duties and powers of the parliament. Specifically, Afghanistan should take the following steps to improve both the constitutional mandate and the performance of the parliament:

### In the short term

#### Strengthen Afghanistan's Electoral Institutions

Afghanistan's flawed system for electing parliaments has led to political crises every time the country has held elections. Electoral disputes are usually resolved through judicial or political mechanisms without the involvement of Afghanistan's electoral institutions, the Independent Electoral Commission (IEC) or the Independent Electoral Complaints Commission (IECC), weakening them both.<sup>8</sup> A transparent system for electing the members of the IEC and enhancing its integrity and clearer rules that define the duties and organisation of the IEC and the IECC might strengthen these two institutions. Afghanistan's most recent parliamentary elections in October 2018 revealed yet again the problems with the IEC and IECC. Unless these electoral institutions are reformed, Afghanistan might not be able to hold successful elections.

#### Change the Single Non-Transferable Vote System

This research found that the parliaments under the 2004 Constitution, elected using the SNTV system, have been considerably fragmented and undisciplined bodies that were not able to act as a check to the executive branch. Therefore, Afghanistan needs to replace SNTV with one that improves coordination and cohesion within the parliament. Most experts point out that some form of proportional representation system or a system based on first-past-the-post, single member small districts should be used.

#### Adopt a Parliamentary Oversight law

Though the 2004 Constitution vests in the parliament more powers than any other Afghan constitution, the parliament has made no effective use of them. The parliament should make greater systematic use of its oversight powers, particularly its right to approve and remove cabinet ministers. In this regard, a law should be adopted that will clearly define when and how the parliament will use its oversight mechanisms (summoning, questioning, interpellation and no-confidence votes). This law will have to further define the consequences of no-confidence votes.

<sup>7</sup> Kenneth Katzman, "Afghanistan: Politics, Elections, and Government Performance," (Washington DC, Congressional Research Service, 2015): 7. <https://fas.org/sgp/crs/row/RS21922.pdf> (accessed on 17 June 2018).

<sup>8</sup> For instance, the crisis that followed the 2010 parliamentary election was resolved through judicial means. In fact, President Karzai appointed a special court that would have supposedly resolved the crisis. Similarly, Afghanistan's most recent political turmoil that followed the 2014 presidential election was resolved through a special power-sharing agreement between the two front-runners, Ashraf Ghani and Abdullah Abdullah. In resolving these disputes, Afghanistan's electoral institutions were pushed to the corner and played no role.

## Encourage the Formation of Disciplined Parliamentary Groups

The SNTV system has been ineffective in encouraging political parties to run for elections, leading, instead, to the formation of a highly fragmented parliament. The parliament should take concrete steps to form groups around certain ideologies and viewpoints rather than around powerful individuals. This might arguably improve cohesion within the parliament and help it to act in a more coordinated fashion to oversee the executive branch.

### In the long term

## Amend the 2004 Constitution and Clarify the Constitutional Mandate of the Parliament

The 2004 Constitution includes provisions that undermine the parliament's legislative functions (e.g., legislations through presidential decrees, government's power to make regulations without parliamentary involvement). Unless the executive's power to legislate is limited, the parliament will remain curtailed. Similarly, the Constitution is ambiguous on when the parliament's five-year term ends. This ambiguity indeed created a massive constitutional crisis in 2015 when the parliament's term ended, but the government failed to hold elections in time to replace it. Therefore, a constitutional amendment should clearly articulate the legislative mandate of the parliament and, more importantly, specify its term.

## Adopt a Clear Executive-Legislative Dispute Resolution Mechanism

One of the missing elements in the Afghan constitutional system is the lack of a clear executive-legislative dispute resolution mechanism. The Supreme Court did try to resolve political disputes, but its power to do so was severely challenged, and it does not attempt to do so anymore. Therefore, Afghanistan needs an institution that could impartially resolve political disputes between the legislature and the executive. There is a growing consensus among Afghan political elites that the Constitution should be amended to create a separate constitutional court and empower it to resolve political disputes. Although the creation of such a court will require further amendments to the Constitution, it seems to be an effective recommendation.

The information and views set out in this publication are those of the authors and do not necessarily reflect the official opinion of AREU and United States Institute of Peace.

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