

# Separation of Powers in the New Afghan Constitution

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## I. Separation of Powers in the Afghan Constitutional Tradition

The concept of separation of powers was embraced by Afghanistan's rulers at a rather late stage of the country's political development, and then only for a brief historical period. Although the first written constitution was already adopted in 1923, it was not before 1964 that the ruling dynasty opted for the introduction of a Western-style constitutional monarchy with a meaningful separation between the legislative, executive and judicial branches of Government. The Constitution of 1 October 1964 was the result of a careful drafting process which tried to combine the Afghan-Islamic tradition with some core principles of modern Western constitutionalism, including the separation of powers.<sup>1</sup> To this end, King Zahir set up a constitutional committee, composed of seven members, which were assisted in their work by a French adviser, thus continuing the long-standing Afghan-French cooperation on legal matters.<sup>2</sup> The draft produced by the Committee was then comprehensively examined by a thirty-two member Constitutional Advisory Commission before it was submitted to the Constitutional Assembly or *Loya Jirga* (the name traditionally reserved for the highest deliberative body in the Afghan state) which, after considerable debate and some modifications,<sup>3</sup> approved the Constitution in September 1964.

The new Constitution, in a formulation which was modeled on the description of the head of state's constitutional role in Article 5 of the French Constitution, defined the King's functions as those of "the protector of the basic principles of the sacred religion of Islam, the guardian of Afghanistan's independence and territorial integrity, the custodian of its Constitution and the centre of its national unity".<sup>4</sup> Although the new Constitution granted the King a substantial measure of influence over the functioning of the legislative, executive and judicial powers of the State, namely through his extensive appointment powers with regard to the Government, the Upper House of Parliament (House of Elders) and the judges of the

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<sup>1</sup> Gerhard Moltmann, Die Verfassungsentwicklung Afghanistans von 1901 bis 1986, JöR N.F. 35 (1986), 509 (546).

<sup>2</sup> Ramazan Bachardoust, Afghanistan – Droit constitutionnel, histoire, régimes politiques et relations diplomatiques depuis 1747, Paris etc. 2003, 81 et seq.

<sup>3</sup> Including the amendment which extended the ban on members of the royal family to hold offices in Government, Parliament or the Supreme Court to their participation in political parties, see Martin Evans, Afghanistan – A Short History of Its People and Politics, New York 2002, 166.

<sup>4</sup> Constitution of 9 Mizan 1343/1 October 1964, Article 7.

Supreme Court and his right to dissolve Parliament, the powers themselves were assigned to distinct organs of the State, i.e. to Parliament, the Government and the Supreme Court. Members of the Royal Family were not permitted to hold the offices of Prime Minister or Minister, Member of Parliament or Justice of the Supreme Court. The legislative function was exercised by the *Shura* (Parliament) which consisted of two houses, the *Wolesi Jirga* (House of the People) and the *Mesbrano Jirga* (House of Elders). Whereas the members of the *Wolesi Jirga* were directly elected by the people of Afghanistan on the basis of a simple majority vote<sup>5</sup>, the members of the *Mesbrano Jirga* were partly elected and partly appointed by the King: one-third of its members were chosen by the representative assemblies of the Provinces, the Provincial Councils, another one-third were elected by the residents of each province and the remaining third were appointed by the King,<sup>6</sup> who also chose the *Mesbrano Jirga's* President from amongst its appointed members.<sup>7</sup> Laws were adopted by concurring resolutions of both Houses of Parliament and entered into force after they had been signed by the King.<sup>8</sup> In case an enactment voted by one House of Parliament was rejected by the other, the Constitution provided for a reconciliation procedure before a joint committee consisting of an equal number of members from both Houses. When the joint committee failed to resolve the differences, the *Wolesi Jirga* still retained the right to transform the original project approved by it into law through another affirmative vote during the next legislative session.<sup>9</sup> The Parliament did not have the power to adopt amendments to the Constitution, however. This power was reserved to the *Loya Jirga*, which thus retained its position as the highest deliberative body of the state. The amendment power had to be exercised in a rather complicated procedure which included, *inter alia*, the dissolution of Parliament before a draft amendment could finally be voted into law.<sup>10</sup>

Under the Constitution of 1964, the basic lines of the national policy were to be determined in the Council of Ministers.<sup>11</sup> The Government was dependent on the confidence of the Parliament for the implementation of its policies. The Prime Minister and the other members of a new Government could only be appointed by the King after they had received a vote of confidence in the *Wolesi Jirga* on the presentation of their policy.<sup>12</sup> The Prime Minister and the Ministers were collectively responsible to the *Wolesi Jirga* for the general policy of the Government, and individually for their respective ministerial duties.<sup>13</sup> The powers exercised by the

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<sup>5</sup> Ibid., Article 43.

<sup>6</sup> Ibid., Article 45.

<sup>7</sup> Ibid., Article 60.

<sup>8</sup> Ibid., Article 69.

<sup>9</sup> Ibid., Article 74.

<sup>10</sup> Ibid., Articles 120 to 122.

<sup>11</sup> Ibid., Article 95.

<sup>12</sup> Ibid., Article 89.

<sup>13</sup> Ibid., Article 96.

Government included the right to issue regulations within its sphere of competence – the legislative function of Parliament being limited to the (general) organization of the affairs of the country<sup>14</sup> – and additionally the competence to regulate urgent matters normally falling within the legislative competence of Parliament during its adjournment.<sup>15</sup>

Another important innovation of the Constitution of 1964 was the establishment of a secular judiciary. This reform had been vividly disputed between “traditionalists” and “modernists” during the discussions in the *Loya Jirga*.<sup>16</sup> The constitution of 1931 had limited the courts to the application of Sharia law in the lawsuits brought before them.<sup>17</sup> By contrast, Article 102 of the Constitution of 1964 explicitly required the courts to resolve the disputes under their consideration by applying the provisions of the Constitution and the laws of the State. Only in those cases where no applicable constitutional or statutory rule existed were the courts allowed to have regard to Sharia law as a subsidiary source of law. But even then they retained a substantial margin of discretion since the Constitution did not require the application of Sharia law as such but rather the adherence to the “basic principles” of Hanafi jurisprudence – within the limits established by the Constitution – in order “to secure justice in the best possible way”.

In practice, however, the separation of powers established by the Constitution of 1964 did not work well. This was due partly to the low level of development of the country at large. High illiteracy rates and the lack of a liberal middle class meant that the political basis for a smooth functioning of the representative institutions set up by the Constitution was non-existent. In these circumstances, it was no surprise that only 15–20 percent of population participated in the parliamentary election of September 1965.<sup>18</sup> The democratic process was in particular hampered by the lack of political parties which could have secured support for the Government’s reformist policies in Parliament. In the absence of such parties which could have provided a vital link between the Parliamentary majority and the Government, there was an immediate rift between the executive and legislative branches of Government. Parliament used its powers in a predominantly negative way, by indulging into obstruction and political witch-hunting.<sup>19</sup>

The importance of political parties for the proper functioning of a parliamentary regime had not been ignored by the Constitution, however. Article 32 of the Constitution tried to lay the foundations for a pluralist democracy by granting all Afghan citizens the right to form political parties. The exercise of this right was subject only to the condition that the aims and activities of a party and the ideas on

<sup>14</sup> This qualification of the legislative powers of Parliament was probably inspired by the famous Article 34 of the French Constitution of 1958, see *Bachardoust* (note 2), 95.

<sup>15</sup> Constitution of 9 Mizan 1343/1 October 1964, Articles 77, 95.

<sup>16</sup> *Ewans* (note 3), 166.

<sup>17</sup> Articles 87, 91 of the Constitution of 31 October 1931.

<sup>18</sup> *Moltmann* (note 1), 534.

<sup>19</sup> *Ewans* (note 3), 173.

which the organisation of the party was based were not opposed to the values embodied in the Constitution. In addition, a party's organization and its finances had to be transparent. Like the German Basic Law, the Afghan Constitution of 1964 afforded political parties a high degree of legal protection by denying the government the power to dissolve a party which had been formed in accordance with the provisions of the law. A dissolution order could only be issued by the Supreme Court after a trial in which the principles of due process of the law had been observed.

Article 32 of the Constitution was never successfully implemented. The two Houses of Parliament were unable to agree on the implementing legislation, after an earlier draft of a law on political parties had not been signed by the King.<sup>20</sup> This meant that political parties could not be officially recognised since there was no law which set out the conditions for registration. Although a number of semi-clandestine political groupings were formed during the 1960s and 1970s and succeeded in publishing newspapers which made their views known to a wider audience, none of these groupings, due to the lack of official recognition, was able to play an overt role in the nation's affairs.<sup>21</sup> They could therefore not contribute in a meaningful way to the stabilisation of the political process inside or outside Parliament, either by supporting or criticising the Government on the basis of a clear-cut political program. As a result, the representative institutions fell into increasing disarray and were no longer able to exercise their constitutional powers effectively.

The Afghan constitutions which followed the Constitution of 1964 did not make a major contribution to the further development of the concept of separation of powers. On the contrary, they were based on political premises which largely excluded a sensible implementation of this principle. The Constitution of 1977, which was already influenced by socialist thinking, provided for a unicameral parliament and a one-party state, with the *Loya Jirga* as the "supreme manifestation of the power and will of the people". In reality, the *Jirga* was largely composed of presidential nominees and representatives of the armed forces, the Party of National Unity and the Government, and did no more than provide a vestige of democratic legitimacy to an extremely autocratic, centralized and repressive regime.<sup>22</sup> Nor could the constitutions adopted under Communist rule, given their limited legitimacy and their even more limited relevance, be considered as an authentic expression of anything remotely resembling an effective separation of powers.

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<sup>20</sup> Moltmann (note 1), 550.

<sup>21</sup> Evans (note 3), 173; Moltmann (note 1), 535.

<sup>22</sup> Moltmann (note 1), 537; Evans (note 3), 181.

## II. The Framework for the New Constitution Established by the Bonn Agreement

After the fall of the Taliban, the road which would in the end lead to a new constitutional settlement for Afghanistan was mapped out in the Bonn Agreement of December 5, 2001. In the Agreement the participants in the UN Talks on Afghanistan envisaged the establishment of democratic institutions of government in three stages. The first phase started with the establishment of an Interim Administration for Afghanistan in the Agreement itself. The members of the Interim Administration were chosen by the participants in the UN Talks “on the basis of professional competence and personal integrity” and “with due regard to the ethnic, geographic and religious composition of Afghanistan and to the importance of the participation of women”.<sup>23</sup> The Interim Administration was entrusted with the day-to-day conduct of the affairs of the state. It was also given the mandate to prepare a reform of the judicial sector and of the administration through the establishment of a Judicial Commission and a Civil Service Commission.<sup>24</sup>

At the same time, a Special Independent Commission was created for the Convening of the Emergency *Loya Jirga*. The main task of the Special Commission was the drafting of the rules and procedures for the Convening of the Emergency *Loya Jirga* and the selection of its members.<sup>25</sup> The first phase of the transition ended with the election of Hamid Karzai as President of the Transitional Administration of Afghanistan and the approval of his cabinet by the Emergency *Loya Jirga* in June 2002.<sup>26</sup> With the establishment of the Transitional Administration, the Interim Authority ceased to exist.<sup>27</sup> Although the functions and powers of the Transitional Administration were not explicitly defined in the Agreement, it was clear that they would be identical to those of the preceding Interim Authority.

During the second phase provided for in the Bonn Agreement, a new Constitution was to be adopted by a Constitutional *Loya Jirga* with the help of a Constitutional Commission appointed by the Transitional Administration. The Constitutional *Loya Jirga* was to be convened within eighteen months of the establishment of the Transitional Authority.<sup>28</sup> After public consultations on the new Constitution in the summer of 2003, the Constitutional Commission submitted its draft to

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<sup>23</sup> Chapt. III A 3 of the Bonn Agreement.

<sup>24</sup> Chapt. II 2 of the Bonn Agreement. In addition, a Human Rights Commission was to be set up for the investigation of human rights violations and the development of domestic human rights institutions, Chapt. III C of the Bonn Agreement.

<sup>25</sup> Chapt. IV of the Bonn Agreement.

<sup>26</sup> E w a n s (note 3), 292 et seq. The election of Karzai had become possible after Zahir Shah, who had returned from exile, had rejected calls to stand himself and given his support to Karzai instead.

<sup>27</sup> Chapt. I 5 of the Bonn Agreement.

<sup>28</sup> Chapt. I 6 of the Bonn Agreement.

the Government in late September.<sup>29</sup> The Government published its own draft on November 3. The second phase of the democratic transition was brought to a successful conclusion when the Constitutional *Loya Jirga* accepted the draft presented by the Government with minor amendments at the beginning of January 2004.

The third phase started with the proclamation of the new Constitution by the President of Transitional Administration, Hamid Karzai, on 26 January 2004. It covers the run-up to the first presidential and parliamentary elections under the new Constitution, and will end with the inauguration of the first freely elected Parliament, some time in the spring of 2005.<sup>30</sup>

In order to prevent the transition process from taking place in a legal void, the Bonn Agreement contained some provisions on the legal framework which had to be observed by the Interim Authority and the Interim Administration during the transition period. Most importantly, this framework included the Constitution of 1964, to the extent that its provisions were not inconsistent with those contained in the Agreement and with the notable exception of the provisions relating to the monarchy and to the executive and legislative bodies: they were replaced by the relevant sections in the Agreement defining the competences of the Interim Authority and Transitional Administration. Other existing laws and regulations which were consistent with both the Agreement and the applicable provisions of the Constitution of 1964 were also declared to remain valid, subject to their subsequent repeal or amendment by the Interim Authority or the Transitional Administration.<sup>31</sup>

The provisions of the Constitution of 1964 which remained in force in accordance with the limitations mentioned above concerned mainly the basic rights and duties of the people, the *Loya Jirga* and the judiciary. The rules relating to the judiciary were modified by Chapter II (2) of the Agreement, however, which reaffirmed the independence of the judiciary and granted the Interim Authority the power to create new courts in addition to the Supreme Court already established by the Constitution of 1964. The Agreement also provided for safeguards against a one-sided approach towards future judicial reform by laying down the relevant parameters for the reconstruction of the domestic justice system, i.e. Islamic principles, international standards, the rule of law and Afghan legal traditions.

The continued validity of several sections of the Constitution of 1964 enabled the Transitional Administration to adopt several important measures preparing the ground for a pluralist democracy already during the transition period. These measures include the Press Law of February 2, 2002 and the Law on Political Parties of September 2003, which are both based on the relevant provisions of the Constitu-

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<sup>29</sup> On the consultation process see International Crisis Group, Afghanistan Briefing 12 December 2003, Afghanistan: the Constitutional Loya Jirga, 1 et seq.

<sup>30</sup> Thus the original deadline which had been set in the Bonn Agreement for the establishment of a truly representative government – two years at the latest after the convening of the Emergency *Loya Jirga*, which took place in June 2002 – will not be met.

<sup>31</sup> Chapt. II 1 of the Bonn Agreement.

tion of 1964.<sup>32</sup> With the enactment of a Law on Political Parties the Transitional Administration has met one of the most important requirements for a functioning democracy and succeeded in an area where the reformist governments in the 1960's and early 1970's had failed (see I. above). But the significance of the Constitution of 1964 has not been limited to its function as a legal framework for the transition period. It has also served as a point of reference and a model for the substantive provisions which have been incorporated in the new Constitution, as will be shown in greater detail in the following section.

### III. Separation of Powers Under the New Constitution

#### 1. Introductory Remarks

The new Afghan Constitution of 4 January 2004 provides in fact an institutional framework not only for one, but for three different political regimes. The first regime is strictly limited in time. It only applies in the period following the adoption of the Constitution until the date of inauguration of the first Parliament elected under the new Constitution.<sup>33</sup> During this period, the "transitional period" in the terms of the Constitution, the Administration of President Hamid Karzai enjoys a wide range of powers with regard to the establishment of the basic institutions of the country. They include the power to take the necessary measures for the preparation of the presidential and parliamentary elections, including the adoption of an Electoral Law<sup>34</sup> and the establishment of an Independent Electoral Commission.<sup>35</sup> But the Government is also provided with a mandate to implement far-reaching reforms of the judicial system and of the administrative structures of Afghanistan, reforms which in normal times would be subject to Parliamentary approval. These specific competences are complemented by a general authorisation to adopt all necessary measures for preparing the ground for the enforcement of the Constitution.<sup>36</sup> If that were not enough, Article 160 in addition provides that the powers enjoyed by Parliament under the Constitution shall be exercised by the Government until the establishment of the National Assembly. Since it is already clear now that the Parliamentary election will take place considerable time after the election of the President, this provision prolongs the concentration of powers in the hands of the Government for a further substantial period.

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<sup>32</sup> Article 1 of the Press Law; Article 1 of the Law on Political Parties.

<sup>33</sup> Article 159 of the Constitution of 14 Djadi 1382/4 January 2004.

<sup>34</sup> The Electoral Law has been adopted pursuant to this provision by Presidential decree of 27 May 2004. It covers the Presidential and Parliamentary Elections as well as the elections to the Provincial and District Councils.

<sup>35</sup> The relevant provisions are contained in the Presidential Decree of 18 February 2004 on arrangements for holding elections during the transitional period.

<sup>36</sup> Although these decrees may be modified or abrogated later, they remain in force until annulment by the National Assembly, Article 161.

Even after the end of the transitional period the Government may exercise some of Parliament's prerogatives during a state of emergency. The state of emergency can be declared if, due to war, threat of war, serious rebellion, natural disasters, or situations similar to these, the protection of Afghanistan's independence or the nation's survival can no longer be guaranteed if the normal provisions of the Constitution continue to apply. Given the unstable security situation in substantial parts of Afghanistan, the declaration of the state of emergency is more than just a theoretical possibility. The declaration is made by the President but needs to be confirmed by the National Assembly (which means that in the crucial period prior to the establishment of the National Assembly the President enjoys unfettered discretion when deciding on the imposition of a state of emergency). The state of emergency allows the President to transfer some – not all – powers from the National Assembly. The powers which may be transferred are not specified in the Constitution and may thus be determined by the President in accordance with his assessment of current security needs. The President has to consult the Presidents of both Houses of Parliament and the Chief Justice of the Supreme Court on the matter, but is not bound by their advice.<sup>37</sup>

Finally, the Constitution provides for a distribution of powers between the executive and Parliament which shall apply during “normal”, peaceful times, after the democratic institutions have finally been established. Although the relevant provisions of the Constitution give Parliament and the judiciary a greater role in the management of public affairs, they still display a strong bias towards a concentration of powers in the hands of the executive, as will be shown in the following paragraphs.

## **2. Horizontal Separation of Powers: The Respective Roles of the President, Parliament and the Judiciary**

### **a) A Dominant Presidency**

With regard to the horizontal separation of powers between the supreme organs of the central government, the authors of the new Afghan Constitution have opted for a strong presidential system. This obviously resulted from the insistence of the President of the Transitional Administration, Hamid Karzai, and his allies that in the present unstable circumstances, which are likely to persist in the foreseeable future, Afghanistan cannot afford a weak and fragmented central authority.<sup>38</sup> According to the new Constitution, the President of the Islamic State of Afghanistan combines the powers which had been exercised by the King and by the Prime Minister under the Constitution of 1964. The monarchical origin of the functions of the President are still visible in the constitutional definition of his role in Article

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<sup>37</sup> Article 144 of the Constitution of 14 Djadi 1382/4 January 2004.

<sup>38</sup> See the quotation of President Karzai in International Crisis Group (note 29), 3 note 14.

60, which states that the President is the head of state of the Islamic Republic of Afghanistan and conducts his authorities in the executive, legislative and judiciary branches in accordance with the provisions of the Constitution. Unlike the US Constitution which unequivocally ties the powers of the President to his position as head of the executive branch of government, the new Afghan Constitution deliberately transcends the classical division of powers in order to assign to the President a comprehensive responsibility for the smooth functioning of the state as a whole.

At the same time, however, the President is the head of the Government which works under his Chairmanship (Article 71). The necessary democratic legitimacy for the exercise of these sweeping powers is provided through the Presidential election, in which a candidate has to obtain more than 50% of the votes cast through free, general, secret and direct voting in order to win the Presidency (Article 61). Nobody can be elected for more than two terms as President (Article 62). The President has two Vice Presidents, who are elected together with him on one Presidential "ticket". The Vice Presidents do not have any decision-making powers of their own. As in the US, the function of the first Vice President is merely to act as a stand-in for the President in case of his impeachment, resignation, death or a serious illness that could hinder the performance of his duties (Article 67). The second Vice President, on the other hand, has no constitutional role at all attached to his title, which is merely of a honorary nature. The Constitution does not exclude the possibility, however, that the Vice Presidents may be appointed Ministers in the Government and may acquire political clout as heads of important ministerial departments.<sup>39</sup>

While the Constitution provides that the President is responsible to the *Wolesi Jirga*, a closer look at the relevant provisions reveals that this responsibility is much more limited than that of his ministers. The political responsibility of the President towards the *Wolesi Jirga* is tied in a rather obscure manner to his criminal responsibility for serious misdemeanour. According to Article 69, the President cannot be removed from office for political misconduct or a failure of his policies, but only for wrongdoings which can be qualified as a crime against humanity, national treason or any other crime. This mechanism bears a much greater resemblance to a Presidential impeachment under the US Constitution than to the devices which are used in parliamentary systems to sanction the Government, but which under the Afghan Constitution are available only against Government ministers. The (criminal) charges against the President have to be brought by the *Wolesi Jirga* with a two-thirds majority. The *Wolesi Jirga* cannot decide on the charges itself, but has to convene a *Loya Jirga*, which can then dismiss the President by approving the accusation with a two-thirds majority. The decision by the *Loya Jirga* is not a verdict on the criminal responsibility of the President, however.

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<sup>39</sup> Article 72 of the Constitution, which formulates the qualifications for Ministers, does not bar the Vice Presidents from becoming Ministers. This corresponds to the practice of the Transitional Administration where the Vice Presidents have also held ministerial posts.

His criminal responsibility can only be determined in a lawsuit before a special court, to which the case is referred by the *Loya Jirga* after approval of the accusation by the required majority. The special court is a mixed political-judicial body with three members taken from the *Wolesi Jirga* and three others from the Supreme Court which will render the judgement whether the – former – President is guilty of the alleged misdemeanor under criminal law. Even if he is acquitted of the charges brought against him by the special court, this does not mean that he is automatically reinstated in his Presidential functions: he only has the chance to stand again in the Presidential election, which has to be held within three months after his dismissal.<sup>40</sup>

The concentration of the functions of head of state and of Prime Minister confers upon the President an impressive number of powers. They include the power to determine the fundamental policies of the state (Article 64, No. 2) and to issue the regulations necessary for the implementation of these policies and for the execution of the laws (Article 76). In addition, the President wields the traditional prerogatives of the head of state, like the supreme command of the armed forces (Article 64, No. 3), the appointment of Government ministers and ambassadors (Article 64, Nos. 11, 14) or the signing of laws adopted by Parliament (Article 16). Of special interest are those prerogatives which allow the President to exert some influence on the composition and the activities of the legislative and judicial branches of government.

Like the King under the 1964 Constitution, the President of the Islamic Republic of Afghanistan appoints one-third of the members of the House of Elders (*Meshrano Jirga*) and thus is in a position to strongly influence the composition of one of the two Houses of Parliament. While this power may have seemed innocuous in the hands of a constitutional monarch who was somewhat removed from the political frontline, they acquire a different meaning in the hands of a head of state who is at the same time the leader of the government and actively pursues his own political and legislative agenda for which he needs, at least in some instances, the approval of Parliament (see c) below).

The President also enjoys a strong position in relation to the judiciary. Whereas the members of the Supreme Court are appointed by the President with the approval of the *Wolesi Jirga* and can only be dismissed on a motion of more than a third of its members which is adopted by a two-thirds majority (Article 127), the appointment and dismissal of the judges on the lower courts do not require the approval of Parliament. Moreover, the President is in a position to exert considerable influence over the review practice of the Supreme Court with regard to the constitutionality of laws, legislative decrees and international treaties, i.e. those matters which are politically most sensitive. The Court cannot exercise these powers on its

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<sup>40</sup> The same applies if the trial against him is still pending before the Special Court at the time of the election, since Article 62 only bars candidates who have already been convicted of crimes against humanity, a criminal act, or deprivation of civil rights by a court. If he wins the election and is afterwards convicted by the special court he would be subsequently disqualified from office, however, so that the first Vice President would take over his functions and a fresh election would have to be called.

own initiative, but only upon request of the Government (chaired by the President) or of the lower courts (Article 121). Whether the courts, whose members owe their appointment to the President, will be prepared to make use of their right to initiate constitutional review in cases where they know that the measure in question is politically important for the Government remains to be seen.

### **b) A Government Without Political Autonomy**

The constitutional position of the Government in the new Constitution is much weaker than it was under the Constitution of 1964. Its main task is to assist the President in the implementation of his policies. Unlike the Constitution of 1964, the Constitution of 2004 leaves no room for a politically autonomous role of the Government, which is caught in the crossfire between the President and Parliament. The Ministers are not only appointed by the President, they are also responsible to him (Article 77), which practically means that they can be sacked by unilateral Presidential decision.

At the same time, they depend on the confidence of the National Assembly for the discharge of their duties. At the beginning of their term of office, they shall be introduced for approval to the National Assembly (Article 71). During their term, they are constantly under the threat of an interpellation by the *Wolesi Jirga*. Based on a proposal by one-tenth of all members, the *Wolesi Jirga* can interpellate each of the Ministers at any time. If the responses given upon interpellation by the relevant Minister are deemed to be unsatisfactory, the *Wolesi Jirga* may, with the majority of its members, emit a vote of no confidence in the Minister. Although the Constitution does not define explicitly the legal consequences of such a vote, it is hardly conceivable that he could stay in office without provoking a major political crisis in the relations between Parliament and the Executive.

As to the functions of the Government, they are of a primarily administrative nature and include the following: execution of the constitutional and statutory provisions, maintenance of law and order, preparation of the budget, report to the National Assembly at the end of the fiscal year about the tasks accomplished, etc. (Article 75). The main policy-making functions, on the other hand, are explicitly reserved for the President, who does not depend on the approval of the Cabinet for their exercise (Article 64, No. 2).

### **c) A Parliament With Reduced Legislative and Political Functions**

With regard to the basic structure of Parliament, the authors of the Constitution have to a large extent followed the model provided by the 1964 Constitution. The new Parliament, like its predecessor, consists of two houses, the House of the People (*Wolesi Jirga*) and the House of Elders (*Meshrano Jirga*). The members of the *Wolesi Jirga* are elected by the Afghan population through general and direct elections (Article 83). The members of the *Meshrano Jirga*, on the other hand, are

partly elected and partly appointed: one-third of its members are chosen by the provincial councils from among its members (one per council); one-third are elected by the district councils of each province from among their members (one per province); and the remaining one-third is appointed by the President from among experts and experienced personalities. As with the House of Elders under the Constitution of 1964, the length of the term of office is different for the three categories of members of the *Meshrano Jirga*: The presidential appointees serve a term of five years, whereas the members elected by the provincial and the district councils serve four, five or three years, respectively. The presidential appointees thus enjoy a certain precedence over the other members of the *Meshrano Jirga* because of their seniority. A major innovation of the new Constitution is the obligation of the President to choose 50% of his appointees from among women.

The electoral system under which the *Wolesi Jirga* is elected has not been fixed in the Constitution itself. This task has been relegated to an implementing law, with the important proviso that the system to be adopted shall provide "general and just representation for all the people of the country" (Article 83). Under the Constitution of 1964, the members of the House of the People were elected by simple majority voting. The candidate who had received the largest number of votes cast in his constituency was recognised as the representative of that constituency in the *Wolesi Jirga*.<sup>41</sup> The Electoral Law adopted by Presidential Decree in May 2004 provides for a more proportional voting system. Under this system, seats are awarded in each province according to the number of votes obtained by each candidate.<sup>42</sup> Each province is allocated at least two seats,<sup>43</sup> which means that not only the candidate who obtains the largest number of votes, but also the second or even the third, fourth or fifth placed candidate will get elected to the *Wolesi Jirga*.<sup>44</sup> Since the Electoral Law has been adopted by the Government under the constitutional provisions governing the transitional period, the newly elected Parliament remains free to strengthen the proportional elements of the system even further by using its powers to legislate on electoral matters granted by Article 83 of the Constitution.

According to the new Constitution, Parliament has two main functions: to legislate and to control the President/the Government in the exercise of their powers. The main function of the National Assembly consists in the adoption of new laws and the abrogation of old ones (Article 90, No. 1). The legislative powers of the two Houses of Parliament are not strictly identical, however. Although, in principle, a bill must be adopted by both Houses (and approved by the President) before

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<sup>41</sup> Constitution of 9 Mizan 1343/1 October 1964, Article 43.

<sup>42</sup> Article 22 (1) Electoral Law.

<sup>43</sup> Article 19 (2) Electoral Law.

<sup>44</sup> The Law does not provide for the allocation of seats to party lists, which is typical for proportional voting systems practised in most European countries. It does go some way in that direction, however, by allowing political parties to nominate a number of candidates in each province of up to 100% of the seats to be filled in that province, Article 20 (4) Electoral Law.

it can become law, the *Wolesi Jirga* has the last word if a bill is rejected by the *Meshrano Jirga*. In the case of a disagreement between the two Houses over a bill a combined committee composed of an equal number of members from each House has to be formed in order to resolve the disagreement. But if the joint committee fails to reach a compromise, the *Wolesi Jirga* retains the right ultimately to adopt a bill which it had previously approved through a second affirmative vote during the next parliamentary session. This procedure also applies with regard to the ratification of international treaties and agreements and all other decisions which have to be approved not only by one House, but by the National Assembly as a whole. In case the disagreement in question concerns legislation involving financial affairs, the *Wolesi Jirga* does not even have to wait until the next parliamentary session before it can adopt the relevant bill. It may approve the controversial draft over the opposition of the *Meshrano Jirga* by a majority vote of its members without any delay after the conciliation procedure in the joint committee has failed (Article 100).

Although the Constitution calls the National Assembly the “highest legislative organ” of the Islamic Republic of Afghanistan, its legislative powers have been severely curtailed. The Constitution places the legislative process in Parliament firmly under Government control. The National Assembly is obliged to give priority to the discussion of bills and treaties introduced by the Government if the latter formally requests their urgent consideration (Article 97). Even tighter are the constraints in respect of financial decisions. The *Wolesi Jirga* cannot delay the approval of the budget for more than one month or the permission to grant or take a loan for more than fifteen days. In the latter case, the proposal is considered as approved if the *Wolesi Jirga* does not take any decision within the prescribed period (Article 98). Should Parliament, despite these limits on its legislative freedom of action, happen to adopt some legislation which the Government does not like, the President can still use his veto to prevent the bill from becoming law. The presidential veto cannot be overruled except by a two-thirds majority in the *Wolesi Jirga*, which in most cases will be difficult to achieve (Article 94).

Moreover, the Government enjoys substantial lawmaking powers of its own, which it can use independently of Parliament. Article 76 grants the Government the power to devise and approve regulations that are not contrary to the text and spirit of any law. The use of the regulatory powers of the Government is thus not dependent upon a prior parliamentary authorisation. In the absence of any contrary constitutional or statutory provision, the Government can freely enact the rules which it deems necessary for the implementation of its policies. In addition, in case of recess of the House of the People, the Government can legislate in its place if this is necessary to confront an “emergency situation” (Article 79). The “emergency situation” within the meaning of Article 79 has to be distinguished from a formally declared state of emergency, which entitles the President to transfer specific powers which normally belong to Parliament to the Government (see 1. above). By contrast, in an “emergency situation” under Article 79, the transfer of legislative powers takes place automatically, without any formal Presidential deci-

sion on the matter being necessary. Since the Constitution does not define the situations covered by Article 79 more precisely, the Government is free to adopt its own criteria in determining whether an “emergency” does in fact exist. The only way for Parliament to take back its powers would then consist in the rejection of the legislative decrees adopted by the Government during recess after it has reconvened.

Another means for circumventing the legislative competence of Parliament, albeit one fraught with logistical difficulties, is the organisation of a referendum.<sup>45</sup> According to Article 65, the President can call a referendum on important national, social or political issues. The decision to call a referendum is not subject to any substantive or procedural constraints. The appreciation whether an issue is so important that it has to be submitted to a popular vote is left entirely to the President.

Parliamentary prerogatives which concern the control of the Government outside the legislative process are primarily vested in the *Wolesi Jirga*. The *Wolesi Jirga* must approve the appointment of Government ministers (Article 71)<sup>46</sup> and can force their resignation through a vote of no confidence (Article 92). On the other hand, it cannot dismiss the President on its own initiative, but only propose his dismissal to the *Loya Jirga* (see a) above). The *Wolesi Jirga* has a *de facto* veto over several important presidential appointments which require its approval. These decisions include the appointment of the Attorney General, of the Director of the Central Bank and of the members of the Supreme Court (Article 64, Nos. 11, 12). The most important presidential decisions have to be approved by both Houses of Parliament, however. The determination of the fundamental policies of the state (Article 64, No. 2), the declaration of war (Article 64, No. 4), the sending of troops to foreign countries (Article 64, No. 6) and the declaration of the state of emergency (Article 64, No. 8) fall into this category. If the presidential decision in question is approved by one House of Parliament, but rejected by other, the dispute-resolution procedure provided for in Article 100 applies. This means that a negative vote by the *Wolesi Jirga* is final if no compromise can be reached in the discussions on the joint committee, whereas a veto by the *Meshrano Jirga* can be overruled by a second affirmative vote of the *Wolesi Jirga*. This unequal distribution of powers between the two Houses of Parliament reflects the precedence which the directly elected House of the People enjoys in terms of democratic legitimacy over the partly appointed, partly indirectly elected House of Elders.

#### d) A Judicial Power Ill-Defined

One of the most important features of the separation of powers in modern constitutionalism is the role of independent judicial bodies in the control of the exer-

<sup>45</sup> International Crisis Group (note 29), 4.

<sup>46</sup> Article 71 talks unspecifically of the approval of the “National Assembly”. It results from Article 64 No. 11, however, that only the approval of the *Wolesi Jirga* is needed for the appointment of Ministers.

cise of public power, and in particular its conformity to the provisions of the Constitution. While ordinary courts mainly apply laws that have been passed by the competent institutions, they may also be called upon to interpret the ordinary law in the light of the relevant constitutional norms in order to preserve the unity of the legal order based on the primacy of the Constitution. Article 130 of the new Afghan Constitution requires the courts accordingly to apply the provisions of the Constitution and other laws in the processing of individual cases. In the last instance, however, control of adherence to the Constitution is ensured by the Supreme Court or by a specialised constitutional court. The Government's draft, which was finally backed by the *Loya Jirga*, abandoned the proposal of the Constitutional Review Commission for the creation of a separate constitutional court and opted instead for a Supreme Court with certain limited powers to review the constitutionality of laws, legislative decrees, international treaties and international conventions.<sup>47</sup> According to Article 121 of the new Constitution, the exercise of this review power is dependent on a specific request either by the Government or by the (lower) courts. By contrast, neither the members of Parliament nor the political parties can initiate constitutional review proceedings before the Supreme Court.

This approach is unduly restrictive. Even the French Constitution, which went to great lengths to strengthen the position of executive and curb the powers of Parliament, did not hesitate to grant the right to initiate proceedings before the Constitutional Council to the Presidents of both Houses of Parliament, and later extended it to a certain quorum of members of the opposition parties.<sup>48</sup> The new Afghan Constitution, by contrast, denies all political forces which do not support the Government access to constitutional review proceedings. This bias in favour of the incumbent administration could well reduce the effectiveness of constitutional review and seriously undermine the credibility of the concept as such.

A number of constitutions grant ordinary citizens the right to bring an individual complaint alleging that their fundamental rights as established under the constitution have been infringed by state action. The new Afghan Constitution does not provide for such an individual complaint procedure. It does, however, establish an Independent Human Rights Commission with which everyone can file a complaint alleging that his or her fundamental rights have been violated. The Commission may then refer the case to the "legal authorities", i.e. the courts, which are obliged to apply the Constitution and may thus redress human rights breaches. It is only through this avenue that an individual complaint may finally reach the Supreme Court.

The Constitution does not specify what happens if the Supreme Court concludes that a law or a legislative decree does not comply with constitutional requirements. It only envisages the adoption of the law in which these and other

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<sup>47</sup> International Crisis Group (note 29), 3.

<sup>48</sup> Dominique Rousseau, *Droit du contentieux constitutionnel*, 5<sup>th</sup> edition, Paris 1999, 24 et seq., 66 et seq.

questions concerning the review proceedings are regulated. However, Article 162 of the new Constitution leaves no doubt that upon its entry into force laws and decrees contrary to the provisions of the Constitution are automatically invalid. It must therefore be assumed that the Supreme Court possesses the power to declare void laws and legislative decrees which it holds to be in violation of the Constitution. This is the consequence which has been explicitly drawn in most European countries with special constitutional review procedures. It seems to be inevitable in all legal systems which cannot rely upon the doctrine of precedent if the primacy of the Constitution in these cases is to produce any tangible effect at all.

In its general structure, the organisation of the court system in chapter seven of the new Constitution follows the model of a secular judiciary established in the Constitution of 1964. Article 151 provides for the subsidiary application of Hanafi jurisprudence only in cases where there is no provision in the Constitution or other laws on the specific issue to be determined. The formulation of the relevant principles is somewhat more ambiguous than in the Constitution of 1964, however. Whereas Article 102 of the Constitution of 1964 obliged the courts only to follow the “basic principles” of the Hanafi jurisprudence on Sharia law, thus giving them a considerable measure of discretion in adapting these rules to the changing circumstances, Article 130 of the new Constitution requires compliance with Hanafi jurisprudence as such, not only with its basic principles. Moreover, the present Constitution explicitly allows the appointment of judges to the Supreme Court who have an education in Islamic jurisprudence only. This is a notable deviation from the Constitution of 1964, which simply stated that Supreme Court judges should be versed in the laws of Afghanistan, a provision that had widely been interpreted as requiring familiarity with both Islamic and non-Islamic sources of law.<sup>49</sup> This is of considerable importance, because it is to be expected that the Supreme Court in the future will also have to adjudicate on the conformity of laws with the principles of Islam. If Article 3 of the new Constitution, according to which in Afghanistan no law can be contrary to the beliefs and provisions of the sacred religion of Islam, is to have any practical effect, the Supreme Court must also have the power to assess the conformity of laws with the religion of Islam. From this point of view, a law which is contrary to the beliefs and provisions of Islam would at the same time constitute a violation of Article 3 of the Constitution and would thus, by virtue of Article 162, be invalid. It would fall to the Supreme Court to declare the nullity of the law in this as in other cases, since no other body is given the power to adjudicate on the constitutionality of laws by the Constitution.

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<sup>49</sup> Article 118, No. 3: “A member of the Supreme Court [...] shall have a higher education in law or in Islamic jurisprudence [...]” See International Crisis Group (note 29), 8.

### 3. Vertical Separation of Powers: The Politics of Centralism

Recent attempts at constitution-making in societies torn apart by ethnic divisions like Bosnia-Herzegovina<sup>50</sup>, Kosovo<sup>51</sup> or Cyprus<sup>52</sup> have often used federal or quasi-federal arrangements in order to secure some meaningful power-sharing between the different ethnic communities which would make it easier for them to adhere to a common constitutional framework. By contrast, the new Afghan Constitution sticks firmly to the unitary tradition of the country which had already been embraced by the Constitution of 1964.<sup>53</sup> The overt recognition of the multi-ethnic character of the Afghan state in Article 4 did not figure in the Government draft and was only included upon insistence of the *Loya Jirga*. At the same time, the Preamble of the Constitution emphasises the fact that Afghanistan is a “a single and united country” and stresses the importance of consolidating national unity. The President and the members of the Government are expressly prohibited from basing their decisions on ethnic or regional considerations (Article 66) and from using their posts for regional or ethnic purposes (Article 80).

These prohibitions appear logical with regard to the highest organs of the Afghan State, which are under a constitutional duty to avoid any kind of discrimination between the citizens of Afghanistan (Article 22). However, their extension to the activities of political parties in Article 35, which explicitly forbids the formation or functioning of a party based on ethnicity, language, Islamic school of thought and region, is far more questionable. The Constitution of 1964 had adopted a more general approach by banning only those parties which were opposed to the values embodied in the Constitution. The introduction of a broadly formulated ban on ethnic parties is difficult to reconcile with the task of political parties in a pluralist society, which is to articulate and advance the demands and interests of their respective constituencies. By prohibiting the registration of ethnic parties, the Constitution limits the ability of ethnic groups to seek redress for perceived injustice or discrimination through the electoral process and tries to ban ethnicity as an unsuitable subject from political discourse altogether. This, together with the strong centralisation of powers in the presidency and the corresponding weakening of the role of Parliament, risks exacerbating the feeling of the smaller

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<sup>50</sup> See Paul Szasz, *The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia*, 19 *Fordham Int’l J.* 385 et seq. (1995); Oliver Dörr, *Die föderale Staatsstruktur als Element der völkerrechtlichen Friedenssicherung ? Lehren aus dem Friedensabkommen in Dayton*, in: J. Aulehner et al. (eds.), *Föderalismus – Auflösung oder Zukunft der Staatlichkeit?*, München 1997, 222 et seq.

<sup>51</sup> On the quasi-federal structures provided for in the Interim Agreement for Peace and Self-Government in Kosovo of February 23, 1999 see Marc Weller, *The Rambouillet Conference on Kosovo*, 75 *International Affairs*, 238 et seq. (1999).

<sup>52</sup> See the proposals of the Secretary General of the United Nations for a Draft Constitution for the United Republic of Cyprus, under <<http://www.cyprus-un-plan.org>> (last visited Nov. 15, 2004).

<sup>53</sup> See Article 1 of the 1964 Constitution: “Afghanistan is [...] an independent, unitary and indivisible state.”

ethnic groups outside the dominant Pashtoon community that they are excluded from any meaningful participation in the government of the country.

The danger is all the more real since the new Constitution devolves little authority from the centre to the provinces. On this issue the new Constitution reaffirms the principle of centralism, which had already figured prominently in the Constitution of 1964.<sup>54</sup> Chapter eight of the new basic law provides for the delegation of certain powers to the local administration units for the purpose of promoting the economic and social development of the country and increasing the participation of the people in the development process. However, chapter eight is silent on the exact delimitation of the respective powers of the centre and the provinces, particularly with regard to the crucial issue of revenue collection. The precise delineation of central and provincial governmental responsibilities is left to the implementing legislation, which may during the transitional period also be enacted by Presidential decree (Article 159, No. 2). The constitutional text makes explicit provision for the election of provincial councils to advise the provincial administrations on important issues falling within the domain of the provinces, but does not address the question how the provincial administrations themselves are to be selected. It is less cautious with regard to the governmental administration at the local level. The Constitution provides that municipalities shall be set up for the purpose of administering city affairs, and their main organs – the mayor and the municipal council – shall be elected by free, general and direct elections.

The Constitution's failure to address centre-province relations more comprehensively can at least partly be explained by the particular circumstances in which it was negotiated. The Transitional Administration which was struggling hard in order to assert its still fragile authority was understandably reluctant to formalise a situation in which regional administrations with potentially significant resources would retain considerable independence. The central government has so far secured only relatively limited transfers of revenue from those areas, and to seek a final constitutional settlement at this time would force it to give away one of the few negotiating chips which it may use to extract some measure of political loyalty from the regional leaders.<sup>55</sup>

#### IV. Perspectives for Future Development

The outcome of future negotiations on the issue of centre-province relations may thus well be determined by the success or lack of success which regional leaders encounter in their attempts to secure an effective representation of their interests within the central government. While it is true that the new Afghan Constitution implements a concept of separation of powers which concentrates the bulk of the state powers in the hands of the President and allows only for limited con-

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<sup>54</sup> Compare Article 108 of the Constitution of 1964 and Article 137 of the Constitution of 2004.

<sup>55</sup> International Crisis Group (note 29), 5.

straining roles of Parliament and of the courts, it also provides for institutions and mechanisms which can be used in order to accommodate the need for a truly inclusive and representative political process at the centre. To start with, the creation of two vice-presidencies instead of one is clearly intended to permit the representation of ethnic diversity in the central institution of the new Afghan State, the presidency, and has already been used by President Karzai to this effect.<sup>56</sup> The other main state organ in which the political, ethnic and cultural diversity of the Afghan nation has to be fully reflected is, of course, Parliament. The Constitution rightly stresses the need for an election law that provides “general and just representation for all the people of the country”. Parliament should therefore use its legislative powers under Article 83 to create a permanent electoral system which makes sure that all relevant groups of Afghan society are represented in Parliament. Finally, the extended appointment powers which the President enjoys under the Constitution could equally turn out to be a valuable tool in promoting the representative character of the central institutions of the Afghan State. This is obvious with regard to the selection of the presidential appointees in the *Meshrano Jirga*. But it applies also to the appointments in the executive and judicial branches, and in particular to those concerning the members of Government and the justices at the Supreme Court.

Much will therefore depend on the political practice of the institutions created by the new Constitution. While the separation of powers implemented by the Constitution grants the President far-reaching powers in the interest of a stable central government, it also provides ample opportunities for a close co-operation between the Government and the National Assembly in the determination of the main policies of the State (see III. 2. c) above). Whether this potential for co-operation can be fully realised will turn more on political than on constitutional factors, and in particular on the development of a functioning party system which is a vital – and indispensable – component of any pluralist democracy. In this context, it is important that the prohibition on ethnic and regional parties contained in Article 35 not be interpreted too narrowly, because this would seriously undermine the credibility of the democratic process in the eyes of the minorities which would thereby be deprived of any legal possibility to air their grievances in the political arena. Without meaningful representation of all relevant groups in the democratic institutions of the country, however, and a minimum degree of cooperation between the executive and legislative branches of government the new regime could well prove to be as short-lived as its ill-fated predecessor under the 1964 Constitution.

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<sup>56</sup> President Karzai has chosen as his First Vice-President for the Presidential election in October 2004 Ahmad Zia Massoud, the brother of the assassinated Shah Massoud, in an obvious attempt to seduce at least part of the Tadjik electorate to back his presidential bid.

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