

## Political Order in Post 2004 Afghanistan

**Nighat Mehroze Chishti**

Research Scholar, Area Study Centre (Russia, China & Central Asia) University of Peshawar, Pakistan.

Email: [mchishti2019@gmail.com](mailto:mchishti2019@gmail.com)

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**Shabir Ahmad Khan**

Professor/Supervisor, Area Study Centre (Russia, China & Central Asia)  
University of Peshawar

### ABSTRACT

After the ouster of Taliban in 2001, the international community was faced with the daunting task of bringing stability and lasting peace to the war-torn Afghanistan. Constitution was one and perhaps the most important starting point in this regard and Bonn Agreement was the first step towards this goal. The constitution of Islamic Republic of Afghanistan 2004 was drafted with considerable external involvement. Although this constitution has almost all features of a democratic constitution, its practical implementation is far from satisfactory. The 2014 Presidential elections were followed by the creation of a National Unity Government (NUG) with power sharing between the President and the Chief Executive Officer, a newly created post under the NUG Agreement, brokered with active intervention of the United States. This new set up was to be given constitutional cover through a Constitutional amendment within two years. But it never happened. Lastly, the results of 2019 elections were fiercely challenged by the runner up candidate Mr. Abdullah Abdullah, who declared a parallel government and took the oath as President of Islamic Republic of Afghanistan in Mazar Sharif, the same day as did Dr. Ashraf Ghani, the winning candidate at Kabul. In 2021, after the retake over of Afghanistan, the Taliban declared that the "Islamic Emirate" has been reinstated thus discarding the set up provided under the Constitution of 2004(Rahimi, 2022).

This research attempts to answer the main question as to why this Constitution could not achieve the desired results i.e. stability and prosperity in Afghanistan? Pragmatism as research philosophy being followed, allowing the researcher to use both subjective and objective interpretation to do content analysis.

**Key Words:** **Afghan Constitution 2004, Afghan Elections, Loya Jirga, Emergency Loya Jirga, Constitutional Loya Jirga, Bonn Agreement**

### Introduction

Afghanistan started her constitutional journey almost a century ago when the first Afghan Constitution was promulgated by King Amanullah. Over the last century, Afghanistan has experienced more constitutions than any other country of the world. This was due to the internal power struggle, political upheavals and foreign interventions. The current Constitution 2004, which was drafted and promulgated with considerable external involvement and after consultation with almost all

segments of the Afghan people, presents a balance between a strong Centre headed by a directly elected President and local autonomy through directly elected Councils with representation in House of Elders and Loya Jirga and delegation of „necessary powers“ at local level. However, the events that unfolded after the promulgation of this Constitution show that it never enjoyed the due sanctity. This research will attempt to find answer to the question as to why the Constitution of 2004 could not bring stability and peace in Afghanistan during the sixteen years of its total life span.

Most of the literature available about the Afghan Constitution of 2004, is in the form of research articles in Journals of Law, public policy, political science and governance studies as well as the post 2001 reports of international organizations including UN, OECD, ADB etc. These articles and reports discuss the nature and impact of international interventions for state-building in Afghanistan, including constitution making and implementing. The most recent literature also includes discourse on socio-political environment, human rights, economic development after governance (issues)after Taliban come-back in 2021. “An Introduction to the Constitutional Law of Afghanistan” compiled and published by the Stanford Law School, provides a very good starting point to understand and evaluate the Constitution 2004 of Afghanistan. It discusses in detail all phases of the preparation and implementation of the Constitution 2004 and in doing so it also compares it with other relevant constitutions of the world (ALEP, 2015).

OECD’s 2011 “Guidelines for State-building Process in Post-conflict Situation” (OECD, 2011)are based on the following three propositions:

1. Context should be the most important factor to be considered while strategizing the state-building process.
2. State-society relationship should be at the Centre of the state-building process; and
3. In order to succeed the state-building process should be endogenous and not exogenous.

These guidelines provide essential criteria for a realistic evaluation of the effectiveness of the Afghan Constitution 2004.

In 2016, Nazneen Barma in her article, “Political Order in Conflict states” (Barma, 2016)discussed the above guidelines and concluded that international peace-building interventions mostly fail due to a mis-match between the objectives

of the international community and local elite. She further adds that “post conflict political order is neo-patrimonial in nature”.

In 2013, Tom Ginsburg and Aziz Haq in their article, “How do Constitution Succeed: An Afghan Case Study” discuss the process of the formulation and implementation of the Afghan Constitution 2004 during the Karzai regime. (Haq, 2013). They build their evaluation on the following four parameters:

- a. The extent to which the Constitution has generated public good.
- b. Legitimization of the new government.
- c. Channeling political Conflict into formal institutions
- d. Cost of governance

Based upon their analysis, the writers conclude that while the constitution scores high on legitimization of the state and channeling political conflict into formal institutions but on the other two parameters, it’s score is not satisfactory. Sayed Qudrat Hashemy wrote two articles related to the Afghan Constitution. The first article written in 2022, traces the history of constitutional failures in Afghanistan (Hashemy, 2022). He concludes that in Afghanistan the constitutions failed because they were the “constitutions of the regime and not those of people” (Hashemy, 2022).

In his second article, Hashemy has compared the constitution-making process in Afghanistan with those in some other countries like USA, Italy, Germany and Japan (Hashemy, 2024). He concludes that over reliance on foreign models without considering the peculiar context and local political environment was one important cause of the constitutional failures in Afghanistan.

In addition to the literature discussed above, a large number of reports and articles have been written about different aspects of the implementation of this Constitution, specially the electoral process.

### **Theoretical Framework: Neo-Patrimonialism**

Neo-Patrimonialism is a three-dimensional concept comprising strong presidency, clientelism and the use of public and private resources for political purpose (Luhrmann, 2018). Barma defines Neo-Patrimonialism as a political order, isconstructed around subnational strongmen at the head of complex patronage networks endowed with alternative sources of authority, legitimacy, and wealth that empower them vis-à-vis the central government. (Barma, 2016).

Neo-Patrimonialism is generally considered a negative concept. However, if applied in a conducive environment, this approach can lead to the success of the process of democratization. For example, the president is popularly elected and represents the majority of the people, the resources are invested to channelize the political differences to strengthen the institutions. This research will analyze the implementation of the Constitution within the framework of Neo-patrimonialism.

## **Pragmatism as Research Philosophy**

The concept of Pragmatism as a research philosophy was first coined by Pierce Sanders in 1878. This philosophy focuses on the problem in hand and tries to find workable solutions through flexible methodology (Peirce, 1878). Pragmatism allows the researcher to use both subjective and objective interpretation to analyze the patterns present in the data (Mwite, 2025). Inductive research approach has been adopted. Also known as „Bottom-up Approach“ starts the research process from specific observations to identifying patterns observable in the data leading to a general conclusion. (Michael Joseph Prince & Richard M. Felder, 2006). Research strategy employed uses archival as well as contemporary research by means of longitudinal data.

## **The Process of 2004 Constitution Making**

After the fall of Taliban regime in 2001, the International community got together to fill the power vacuum in Afghanistan through a transitional set up and to prepare a roadmap for a new constitution of Afghanistan. In this regard an International Conference on Afghanistan was held at Bonn, Germany, in December 2001. The Conference was attended by a 25-member Afghan delegation<sup>1</sup> (AAN, 2001). In order to make the transitional set up sustainable, steps were taken to make the Afghan delegation representative of all segments of Afghan society (Agreement on Provisional Arrangements in Afghanistan , 2001). The participants of the Conference emphasised the need for an interim arrangement to bring stability in Afghanistan and steer the process of democratization in the country. The Agreement was signed on December 5, 2001. The Agreement formally recognized the role and sacrifices of Mujahidin in their war against oppression. In order to facilitate the process of constitution making, the Agreement provided for the establishment of following but temporary institutions to be replaced by permanent ones under the future Constitution.

- **Interim Authority (IA)** Section 1 of The Agreement provided for the establishment of an Interim Authority (IA) consisting of (a) an Interim Administration; (b) Special Independent Commission for the Convening of the Emergency Loya Jirga; and (c) a Supreme Court. Mr. Hamid Karzai was elected as the Chairman of the Interim Administration.

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<sup>1</sup>The names of the Afghan delegation are Amena Afzali, Mr. S. Hussain Anwari, Mr. Hedayat Amin Arsala, Mr. Sayed Hamed Gailani, Mr. Rahmatullah Mousa Ghazi, Eng. Abdul Hakim, Mr. Houmayoun Jareer, Mr. Abbas Karimi, Mr. Mustafa Kazimi, Dr. Azizullah Ludin, Mr. Ahmad Wali Massoud, Mr. Hafizullah Asif Mohseni, Prof. Mohammad Ishaq Nadiri, Mr. Mohammad Natiqi, Mr. Aref Noorzay, Mr. Yunus Qanooni, Dr. Zalmal Rassoul, Mr. H. Mirwais Sadeq, Dr. Mohammad Jalil Shams, Prof. Abdul Sattar Sirat, Mr. HumayunTandar, Mrs. Sima Wali, General Abdul Rahim Wardak, Mr. Azizullah Wasefi and Mr. Pacha Khan Zadran, Mr. Lakhdar Brahimi attended the meeting as Special Representative of the UN Secretary General for Afghanistan

- **Emergency Loya Jirga (ELJ)** to be convened within six months of the establishment of IA and appoint a Transitional Authority (TA) including a broad based“ Transitional Administration (Agreement on Provisional Arrangements in Afghanistan , 2001) to run the government till the time a truly elected government assumed the charge. The elections were to be held within two years of the convening of the ELJ.
- **Constitutional Loya Jirga CLJ** to be convened within eighteen months after the establishment of Transitional Authority to adopt the new constitution. The Bonn Agreement further provided for the establishment of a Constitutional Commission by the Interim Authority to assist the Constitutional Loya Jirga.

In addition to the above, the Bonn Agreement also provided for the establishment of a Supreme Court, a Judicial Commission, Central Bank of Afghanistan, Human Rights Commission and an independent Civil services Commission.

The Constitution of 1964 was to remain in force till the promulgation of the new constitution with the exception of the provision inconsistent with the Bonn Agreement and those related to Monarchy. The Agreement emphasized the importance of the due representation of all ethnic , religious and geographic groups in the Interim Administration.

Annex II of the Agreement explained the advisory and monitoring role of United Nations to ensure smooth, free and fair democratic process in Afghanistan. It also authorized the UN Secretary General to investigate the Human Rights violations in Afghanistan. Thus, apparently the Agreement provided a detailed roadmap for the future governance structure in Afghanistan. The journey from signing of the Agreement till the promulgation of the Constitution was completed in three phases. (ALEP, 2015)

- a. **Phase 1.** On 22<sup>nd</sup>December, 2001 Hamid Karzai announced the Interim Administration (IA) to run the state affairs. Interim Administration also established Emergency Loya Jirga. This phase lasted for six months till June 2002.
- b. **Phase 2.**Phase 2 started in June 2002 with the establishment of Transitional Administration (TA) and election of Hamid Karzai as President by the Emergency Loya Jirga. Emergency Loya Jirga also approved the Cabinet of Mr. Hamid Karzai.
- c. **Third Phase** On November 7, 2002, the former King Zahir inaugurated the nine-member Constitutional Commission to draft and submit the new Constitution of Afghanistan to the Constitutional Loya Jirga for approval. (ALEP, 2015) The Commission included two women also.

The process of constitution formulation was badly hampered by the disagreement rather conflicting views of Shahrani Group and Marufi Group.

However the Commission managed to present its first draft, reportedly based on Shahrani Group’s view, to the President in April 2003 (ALEP, 2015). Thereafter the Government appointed a larger 35 member Constitutional Commission, including six members of the previous Commission (Pasrlay, 2016), to finalize the draft after an all-inclusive public consultation. For this purpose, the members of the Commission travelled to the provinces during July-August, but surprisingly, at no stage the draft was made public as a complete document (ALEP, 2015).

The second draft was presented to the President in late September 2003. At this stage the government amended some sections of the draft constitution to secure greater authority for the Executive. On November 3, 2003, the draft constitution was made public. On December 13, 2004, Constitutional Loya Jirga (CLJ) consisting of 502 members including 20 percent female members met to discuss the draft. Various provisions of the Draft Constitution especially those related to the role of Islam, status of women, human rights, national languages and the structure of the government were intensely debated. Finally, the new Constitution was approved by CLJ on 4<sup>th</sup> January 2004. The President Hamid Karzai officially ratified it on January 26, 2004 (ALEP, 2015).

#### **Salient Features of the Constitution 2004**

#### **The Islamic Provisions**

The Constitution declared Afghanistan an “Islamic Republic” and Islam as the religion of Afghanistan (Articles 1 &2). It further stated that no law of the land could be in conflict with the tenets of Islam” (Art.3). Hijri calendar would be the calendar of the country while solar calendar will be followed in offices. The weekly holiday would be on Fridays. (Art. 18) The Afghan national flag will have first Kalima i.e., “there is no God but Allah and that Muhammad (PBUH) is His Prophet” and the words “Allah is Great” (Art. 19). The words “Allah is Great” will be part of the national anthem. (Art. 20)

#### **The State**

The Constitution envisaged a “unitary and indivisible Afghanistan” headed by a President directly elected by the people of Afghanistan through direct, free, general and secret elections.

Both Pashto and Dari were declared as official languages of Afghanistan. However to accommodate other ethnic and linguistic groups, Article 16 of the Constitution provided that in areas where any of the other six major languages, i.e. Uzbeki, Turkmani, Pachaic, Nuristani, Pamiri and Baluchi-was spoken by a majority of the people, that language would be the third official language of that area.

Chapter One of the Constitution stipulated the functions of the state of Afghanistan as given below:

- a. Creation of a prosperous and progressive society in Afghanistan where human dignity and human rights are protected, and all ethnicities and areas of the country are treated on equal basis.
- b. Adherence to the UN Charter and all international agreements to which Afghanistan is a signatory.
- c. Prevention of narcotics" trade and terrorist activities.
- d. Foreign Policy focused on protection of vital national interests such as national security, sovereignty, independence and territorial integrity while following the principles of good neighborliness and mutual respect.
- e. Effective management and utilization of national resources and public properties including historic relics.
- f. Economic development through trade, investment and private enterprises, both domestic as well as foreign.
- g. Design and implement developmental plans for agriculture, livestock and rural development.
- h. Provision of affordable housing to deserving Afghan citizens.
- i. Protection of forests.

## **The Citizens**

Chapter Two of the Constitution prescribed the rights and duties of Afghan citizens. The Afghan Constitution 2004 guaranteed the inviolability of life and liberty of Afghan citizens and protection against any type of discrimination (Arts. 22-24). Extradition of any Afghan citizen to any other country was prohibited except in case of bilateral agreement to this effect. (Art.28).Articles 29 and 30 protect the Afghan citizens against the use of torture and persecution for the purpose of investigation or confession. The other fundamental rights guaranteed by the 2004 Constitution include:

- a. Right to elect and be elected (Art.33);
- b. Freedom of expression (Art. 34);
- c. Right to form association subject to the provisions of Art.35 and any other relevant laws;
- d. Right to assembly and peaceful demonstrations (Art.36);
- e. Confidentiality of personal communication (Art. 38);
- f. Inviolability of home (Art.39);
- g. Freedom of Movement (Art. 40);
- h. Right to own property (Art. 41). However foreigners could not own immovable property (Art. 42);
- i. Right to free education upto BA (graduation level) in publicinstitutions (Art. 43);
- j. Right to choose and pursue occupation (Art. 48);
- k. Right to information (Art. 50)
- l. Access to medical facilities both preventive and curative (Art.42);

- m. Art.43 of the Constitution elaborated the rights of marginalized segments of society such as widows, orphans, disabled and retirees with special reference to martyrs and missing persons.
- n. Art. 58 of the Constitution provided for the establishment of an Independent Human Rights Commission of Afghanistan to ensure protection of human rights in Afghanistan.

The Constitution explicitly barred the exercise of these rights against the national interest or national unity.

**Duties:** Every citizen was required to perform the following constitutional duties:

- a. Pay taxes and state duties (Art.43.)
- b. Actively participate /help the government in case of any threat to public life or national security (Art. 49 and 55).
- c. Observe and respect laws of the land (Art. 56)

## **The Government**

The Government of Afghanistan as defined by Art. 71 of the Constitution consisted of a directly elected President and the Ministers appointed by the President, as heads of Administrative units. Chapter Three of the Constitution specified the election, powers, accountability and removal of the President. If a member of national Assembly became a Minister, he /she will have to forego his/her membership of the National Assembly. A person with dual nationality could become a Minister only after the approval of the National Assembly. Chapter Four of the Constitution listed the following duties of the Government:

- a. Implementation of the Law of the Land;
- b. Protection of vital National interests, national sovereignty and territorial integrity;
- c. Maintenance of Law and Order and eradication of administrative corruption; and
- d. Financial Management including budget preparation and fiscal policy.

The Constitution obligated the government to present annually a report to the National Assembly about the tasks completed and development program proposed for the next fiscal year. The Ministers were accountable to the House of People for the performance of their respective departments.

Chapter 8 (Art. 136-142) of the Constitution envisaged, in addition to the Central Government, a three-layer administration i.e. at provincial, district and village levels to support and work as per the advice of respective councils.

## **The National Assembly / Parliament**

Chapter Four of the Constitution 2004 provided a bi-cameral legislature i.e. House of People (The Wolesi Jirga) and House of Elders (Masharano Jirga). Article Ninety of the Constitution empowered the National Assembly to

- a. Ratify, modify or abrogate laws and legislative decrees.
- b. Approve development programs.
- c. Approve state budget.
- d. Approve the acceptance of grants and loans.
- e. Create, modify or abrogate administrative units; and
- f. Ratify or withdraw from international treaties and agreements.

In case of any disagreement between the two houses, a joint Commission with equal representation from both houses would resolve the issue. The decision of such Commission was enforceable after the Presidential endorsement. In case the Joint Commission could not resolve the issue, House of People would pass it with two-third majority in its next session. This decision, after the endorsement by the President, shall be promulgated without submission to the House of Elders.

### **House of People (Wolesi Jirga)**

The House of People, elected on the 1<sup>st</sup> of Sirtan<sup>2</sup> of every fifth year through free, general, secret and direct elections, was to be comprised of representatives from each constituency in proportion to its population.

House of People had the following special powers:

- a. To remove a minister if demanded by twenty percent of its members and approved by the majority of its members after a thorough enquiry into the issue at hand;
- b. To decide on the development program as well as the state budget as submitted by the House of Elders.

### **House of Elders**

The House of Elders comprised of the members elected in following manner:

- a. One member from each Provincial Council for a term of four years;
- b. One member from each District Council for a term of three years; and
- c. One-third of its members, including two from physically challenged and two from Nomads, to be appointed by the President for five years.

### **Loya Jirga**

Chapter Six of the Constitution 2004 formalized the role of the traditional institution of Loya Jirga as the „highest manifestation of the will of the people of Afghanistan“. Loya Jirga comprised of the members of National Assembly and the Presidents of all the Provincial as well as district assemblies. In addition the Ministers, Chief Justice and the members of the Supreme Court as well as the

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<sup>2</sup>June 21<sup>st</sup> of Solar Calendar

Attorney General would attend the sessions of the Loya Jirga without voting rights.

The Loya Jirga was to be convened to

- a. Decide on issues of national importance such as threat to national sovereignty, independence, territorial integrity or supreme national interests.
- b. Amend the Constitution; and

Impeach the President under Article 69 of the Constitution.

The decisions of the Loya Jirga were to be adopted by a majority of its members present in the session.

## **The Judiciary**

The Constitution provides for an independent Judiciary that consisted of Supreme Court, Courts of Appeal and Primary Courts. The Supreme Court comprised of nine members to be appointed by the President and endorsed by the House of People. For the first ten years after the promulgation of the Constitution, these nine members were to be elected for three different terms; three for four years, three for seven years and three for ten years. Thereafter the appointments were to be made for ten years. The President will appoint one of the justices of the Supreme Court as the Chief Justice of Afghanistan.

In order to ensure the independence of Judiciary, once appointed, the members of Supreme Court could not be removed except if accused of a crime. Article 127 of the Constitution prescribed the procedure for removal of the judges if accused of a crime.

Article 64 (13) empowers the President to appoint, retire, accept the resignation or dismissal of judges. Thus, the President could exert sufficient influence over the judiciary.

## **Emergency Provision**

Article 143 of the Constitution empowered the President to proclaim state of emergency in case of war or threat of war, threat to national independence or national life, serious rebellion or natural disaster, or any other national emergency, with the approval of the National Assembly. During such state of emergency, the President, after „consultation“ with the Presidents of National Assembly and the Chief Justice of Supreme Court, transfer „some“ powers of the National Assembly to the Government (Art. 144). However these „some“ powers were not defined or listed in the Constitution thus practically any or all powers of the National Assembly to the Government.

Art. 145 empowered the President to suspend, with the approval of the Presidents of National Assembly and the Chief Justice of the Supreme Court of Afghanistan, any or all of the following fundamental rights:

- a. Right to due process (Art. 27)

- b. Right to peaceful assembly and unarmed demonstrations (Art. 36)
- c. Right to confidentiality of correspondence and communication (Art. 37)
- d. Right to protection of property (Art. 38).

Article 146 clearly barred any amendment in the Constitution during the state of emergency.

## **Amendment in the Constitution**

In order to meet the requirements of changing circumstances and like constitutions of all other countries, the Afghan Constitution 2004 also stipulated the procedure for constitutional amendment. As per Article 150 of the Constitution, the process for constitutional amendment was to be initiated by the President through formation of a Commission consisting of members from National Assembly, Government and Supreme Court. The draft was to be presented to the Loya Jirga for approval and if the Loya Jirga approved it by two-thirds majority, the President would enforce the amendment. However, the constitutional provisions related to the „adherence to the tenets of Islam and Islamic Republicanism could not be amended. Thus apparently any amendment in the constitution could not be initiated by National Assembly.

## **Analysis**

### **The Context**

In order to succeed, the constitution should be framed keeping in view the local context. Afghanistan is a multi-cultural and multi-ethnic country with a long history of monarchy, dictatorial and quasi-dictatorial types of government. A careful study of the Afghan history shows that strong central government were frequently challenged by the tribes living in the outer or peripheral regions.

The Constitution 2004 once again established a strong central government led by the President. Although, in order to address the multi-ethnicity and the requirements of geographical administrative units, it did provide for the delegation of „necessary powers“ to provinces and at local level. (Art. 137). Paradoxically, these powers were not listed in the constitution thus making it dependent on the sweet will of the President. This reminds us an essential element of neopatrimonialism i.e. strong presidency.

The Upper House of the Parliament included representatives from the Provincial and District Councils. But one third of the total members were the direct appointees of the President and for a period longer period (five years) than that of the representatives of the Provinces (four years) and the District Councils (Four years) thus enhancing President’s influence in the Parliament.

### **Institution**

Art. 64 of the Constitution empowered the President to make important appointments including the Justices of the Supreme Court and the judges of Lower Judiciary.

Art. 145 of the Constitution further strengthened the hands of Executive, headed by the President. It allowed the President that in a state of emergency, he could transfer „some” powers of the National Assembly to the Government. It didn’t specify the powers which could or couldn’t be transferred. Moreover, for this purpose the President did not require approval of the National Assembly. The Constitution mentioned only „consultation with the Presidents of National Assembly and Chief Justice of Supreme Court”.

## **The Process**

The Afghan Constitution of 2004 came into force on January 26, 2004 after the endorsement by Loya Jirga. Many delegates in the Emergency Loya Jirga (ELJ) complained that they could not vote on the structure and composition of the Transitional Administration and thus it was not a representative government (Rubin, 2004). Barnette also pointed out the inability of the Karzai government to ensure the security of the voters and that of the delegates elected for the ELJ. The composition of Constitutional Commission as appointed by President Karzai also caused criticism of the process (ALEP, 2015).

Another much criticized factor was the non-inclusive nature of the whole process. Although defeated, Taliban was still an important stakeholder in the future of the state of Afghanistan. It has been opined by some writers that if Taliban had also been engaged in all this process, there were better chances of avoiding the civil war like situation that followed. Pasarlay opines that the exclusion of the Taliban from the whole process led to serious problems later on (Pasarlay, 2016). According to Hashemy, the Constitutional Commission consisted of warlords and powerbrokers who had no experience of statesmanship. He further points out that it was dominated by Panjshiris which spoiled the representative character of the Constitutional Commission (Hashemy, 2022).

In order to be successful, the constitutional process should be internally driven. But in case of Afghanistan, a multi-ethnic society in a politically fragmented state, the process was not only initiated by the international community but was continuously driven and monitored by the international players till the end when a compromise was reached between the two contenders of the Presidency -Dr. Ashraf Ghani and Dr. Abdullah Abdullah- through creation of the extra-constitutional position of Chief Executive Officer (CEO). Such external interventions, although very essential, lead to lack of ownership as well as no sense of responsibility among the local elite.

Lack of transparency is another very common objection raised against this whole process of constitution making. There was no public debate or discussion specially on divisive issues (Hashemy, 2024).

Within two days after the promulgation of the new Constitution, a group of twenty members of Loya Jirga, headed by Mr. Abdul Hafez Mansur claimed that the Constitution as promulgated, was different from the one approved by the Loya Jirga. They identified at least fifteen such points (Tarzi, February 2004). The

Constitutional Commission responded that” the Loya Jirga was handed over the document on the night of January 3, before the Assembly made final changes in the document thus implicitly conceding to the objection raised by Hafez Manus and his colleagues. Mr. Kalim Ranjbar, the President of Afghan Lawyers Association claimed that the changes do not affect the content of the Constitution. (Tarzi, February 2004).

## **Institutional Framework**

In all democratic constitutions, the structure and linkages between the three organs of the state -the executive, the legislature and the judiciary – are defined on the basis of two principles; Separation of Power and checks and Balance. It means that it is important that these three organs should be independent of each other’s influence but at the same time there should be an effective system of checks and balance

The President, directly elected by the people, was head of the State as well as the Government. He could not be removed from his office through a No-confidence vote by the Parliament. But as a check on his powers, Art. 69 of the Constitution made him responsible to the People of Afghanistan through the House of People (which represents the people of Afghanistan). If one-third members of the House of People accused the President of crime against humanity or national treason and two third majority of the House supported this accusation, Loya Jirga shall be convened. If the Loya Jirga also supported the motion, the President would be removed from his office and the case shall be referred to a special court, constituted under Article 69 of the Constitution.

The National Assembly was the highest legislative body. However, the laws passed by National Assembly could be rejected by the President within fifteen days of its submission albeit with clear reason(s) for rejection. If the House of People reapproved it with two-thirds majority, it would become enforceable without being referred to the President. (Art.94).

The members of National Assembly could not be prosecuted for their views expressed during the performance of their duty. However, if any member of national Assembly is accused of a crime, he /she will be proceeded against under Article 102 of the Constitution. Thus, the actions of National Assembly are subject to executive and judicial check.

The House of People 2009 included an effective opposition bloc which practically rejected some of the proposals forwarded by President Karzai e.g. the removal of Chief Justice Fazal Hadi Shinwari. In 2010, when the House of People started its second term, it rejected 17 out of 24 cabinet nominations by the President. In 2010 when the issue of the appointment of a special tribunal by the Supreme Court to deal with the election complaints led to another standoff between the judiciary, the Parliament and the President. (Haq, 2013).

## **Independence of Judiciary**

In today's democratic states, Judiciary is considered „the Guardian of the Constitution“. The independence of the Afghan Judiciary has been guaranteed by Article 116 of the Constitution 2004. In order to ensure this independence, the judges of Supreme Court, once appointed, could not be removed from their office before the end of their term. But this freedom is not unbridled. Article 127 of the constitution places the check of House of People on the members of Supreme Court and prescribes the process of dismissal if he or she was found guilty of any crime. However, the powers of the President such as all important appointments including those in the Judiciary, his representation in the House of Elders, and his powers during state of emergency, blur the fine line defining the jurisdiction of these three organs of the Afghan state.

The “Spanta no-confidence case” is a glaring example of the influence of President over legislature and Judiciary. In April 2007, Iran started mass deportation of Afghan refugees and illegal workers. This was taken as a failure of the then Foreign Minister, Dr. Rangin Spanta and the Minister for Refugees and Repatriation Mr. Akbar. On May 9, 2007, the Parliament, exercising the power granted by the Article 121 of the Constitution, summoned both the Ministers and questioned them about their role in the mass deportation. Since they could not satisfy the Parliament, vote of no-confidence was moved against both the Ministers on May 10. The result of move against Mr. Spanta was inconclusive because of some „doubtful votes“. A second voting was held on May 12, 2007 and Dr. Spanta lost by 68 votes. Nonetheless, President Karzai rejected the no confidence vote and referred the case to the Supreme Court for review. The Supreme Court affirmed the power of Parliament under Art.121 to question a Minister regarding the performance of respective administrative unit, but at the same time, gave the decision in favor of the President on the grounds that “the Minister had not committed any fault or omission, and therefore the justification used for casting a no-confidence vote was “outside the provision of law.” (Farid Hamidi and Arun Jayakody, 2015). Here it is pertinent to mention that the Constitutional jurisdiction of Supreme Court is limited to the review of „laws, legislative decrees, international treaties and international covenants“. Review of Parliamentary actions such as vote of no-confidence doesn't fall under the jurisdiction of Supreme Court. The decision of the Supreme Court was not only beyond its constitutional jurisdiction but was also violation of the jurisdiction of House of People.

The Parliament rejected the decision of the Supreme Court and as a collective reaction passed a Bill that established the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC). When the President did not ratify the Bill on the grounds that the ICOIC could only oversee the „implementation of the Constitution“ while „the interpretation of the Constitution“ was beyond its jurisdiction. Parliament exercised its power under Article 94 of the Constitution

and passed the bill with two-thirds majority(Farid Hamidi & Aruni Jayakodi, 2015).

This struggle for power between the Supreme Court, the Parliament and the Independent Commission for Supervision of the Implementation of the Constitution blocked the way to amend the constitution to bring about clarity in the roles of these constitutional bodies. The Constitution didn't provide any mechanism to resolve such conflicts. Hashemy has rightly pointed out that the courts in Afghanistan never acted as the guardians of the Constitution (Hashemy, 2022).

Some writers have termed this set up as “paradoxical institutional design”. (Mir Wais Ayobi and Haroun Rahimi, 2018).

## **Legitimization of the Government**

Political legitimacy of a government is an essential tool to test the effectiveness of any democratic constitution. Elections are an important measure to gauge the political legitimacy of a government because they are not only a reliable indicator of public support for a regime or a candidate but also offer peaceful means to change a regime which no longer enjoys the public support.

In Afghanistan, four Presidential and three Parliamentary elections were held under the Constitution 2004. A brief overview of these elections will explain the extent to which these elections have contributed to legitimize the successive Afghan governments.

**First Presidential Elections** under the new Constitution were held on October 9, 2004. This election witnessed significant popular enthusiasm although the credibility of these elections has been questioned by many observers. Scott S. Smith in his article, “The 2004 Elections in Afghanistan” has concluded that “the elections happened but democratization did not follow”(Smith, 2012).

**First Parliamentary Elections** under the new Constitution were conducted on September 18, 2005, through universal suffrage and with considerable external involvement. Initial results were released on 9<sup>th</sup> October 2005 while final official results could not be announced till 12<sup>th</sup> November 2005 due to irregularities and complaints about the process of elections. A report prepared by Afghan Research and Evaluation Unit gives a long list of election day irregularities such as display of and use of force to intimidate voters, partiality of local government officials and JEMB staff, inappropriate location of polling stations, use of money to buy votes, use of more than one registration cards for multiple voting, use of female voters’ cards for proxy voting, stealing and stuffing of ballot boxes by the candidates etc.(Wilder, 2005)

**Second Presidential Elections 2009** held on August 20, 2009, were also fraught with allegations of corruption and fraud. Even the United Nations’ officials overseeing Afghan elections also admitted widespread fraud in the Presidential election(New York Times, 2009). Doubts about the neutrality of

Election Commission and controversial results further tarnished the integrity of the process.

**Second Parliamentary Elections** were held on 18<sup>th</sup> September 2010 under Electoral Law 2010. This Law was adopted through a Presidential Decree without any consultation with the Parliament, which created doubts about the transparency and fairness of these elections. This Law empowered the President to appoint all members of the Election Commission to the exclusion of International representatives and without reference to any other Institution. This was followed by closure of almost 1000 polling centers on security grounds. Moreover, 25 percent of total vote cast were rejected as being doubtful. The key deficiencies in the election system that observers and stakeholders had identified since the first post-Taliban election in 2004, were also not addressed.(DIEOM, 2011). All these points create doubts about the fairness and transparency of the whole election process.

**The Third Presidential Elections** held on April 5, 2014, brought a new turn in the constitutional history of Afghanistan. Although it led to peaceful transfer of power, but the international community did not consider it a “democratic process”(Byrd, 2015). The results of the first round of the election were followed by a runoff on June 14, 2014 between Dr. Ashraf Ghani and Dr. Abdullah Abdullah. Again there were many complaints about fraud in the run-off elections, too. But the approaching timeline of US withdrawal from Afghanistan compelled US to broker an agreement that resulted in formation of a post-election National Unity government under which Dr. Ashraf Ghani assumed Presidency and Dr. Abdullah, the runner up, became “Chief Executive Officer” (CEO) of the government<sup>3</sup>.Both the President and the CEO agreed to share the administrative powers (Timor Sharan & Srinjoy Bose, 2016). As per Agreement the newly created posts of Chief Executive Officer of Afghanistan and his „cabinet“ were to be constitutionalized through an amendment in the constitution with the approval of the Loya Jirga to be convened within two years of the signing of this Agreement. But this never happened.

**The third General Elections** for legislative and district councils in Afghanistan were held on 20<sup>th</sup> October 2018, after a delay of more than three years. As per Art.83 of the Constitution, these elections should have been held on 22<sup>nd</sup> June 2015 but were postponed because of security issues and disputed presidential elections. But on 22<sup>nd</sup> June 2015, Afghan Parliament voted to extend its own term until fresh elections. Although apparently this decision was taken with the concurrence of all the three organs of the State of Afghanistan but still the legality of this extension has been questioned by legal experts. These elections were finally held on 20<sup>th</sup> October 2018. Around 2,300 candidates participated in the elections. The new House of People- was inaugurated by President Ashraf Ghani

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<sup>3</sup>The Agreement was witnessed by the Special Representative of the UN Secretary General Mr. Jan Kubis and the US Ambassador to Afghanistan, Mr. James B. Cunningham.

on 26th April 2019 although election results from Kabul were still awaited due to allegations of fraud.

**Fourth Presidential Elections** were held on 28<sup>th</sup> September 2019. The preliminary results declared Dr. Ashraf Ghani as the winner with a very thin majority securing 50.64% vote whereas the runner up candidate secured 39.52% votes(Constable, 2019). Final results were announced on February 18, 2020, after a delay of almost five months and the oath taking ceremony of President Dr. Ashraf Ghani took place on March 9, 2020. However, the election results were rejected by Mr. Abdullah Abdullah who announced a parallel government after taking presidential oath on the same day i.e. March 9, 2020 at Mazar Sharif. On March 12, 2020, President Ashraf Ghani cancelled the previous decree whereby the posts of CEO and his staff were created and thus abolished these posts (The Kabul Times, 2020). This step explains the reason why Loya Jirga was never convened to make the required constitutional amendment. It seems both sides didn't want to make the post of Chief Executive Officer (or Executive Prime Minister<sup>4</sup>) for the fear of resultant power sharing. Interestingly the constitutional ambiguity about the post of Chief Executive Officer was never discussed in political public debates.

Interestingly, Mr. Hamid Karzai, former President of Afghanistan had opposed the holding of Presidential elections. (Jennifer Brick Murtazashvili and Mohammad Qadam Shah, 2020).

## **Conclusion**

After going through the above discussions, we can conclude that the following factors contributed to the failure of Constitution 2004.

Firstly, the process of constitution development in Afghanistan suffered from a „lack of constitutionalism“ meaning thereby that the constitutions were mostly used as a symbol of democratization rather than as functional document to run the government.

Secondly, the Constitution 2004 was drafted and implemented through a process which lacked inclusiveness with heavy footprints of external interventions. This deprived it of the ownership by local stakeholders.

Thirdly, a powerful central government was not in line with the dynamics of Afghan society. A federal structure with sufficient autonomy to the provincial governments would have been more workable as it would have minimized the internal conflicts.

Fourthly, the successive governments after the promulgation of the Constitution in 2004 could not gain legitimacy due to the flawed electoral process.

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<sup>4</sup> The post of Chief Executive Officer was to be renamed as Executive Prime Minister through the Constitutional amendment.

Last but not the least, the Judiciary did not or could not act as the guardian of the constitution.

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