



Review Article

# Assessing Power Dynamics: Afghanistan's Constitutional Framework of 2004

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## ARTICLE INFO

## ABSTRACT

### Keywords:

Afghanistan constitution,  
Balance of powers,  
constitutional provisions,  
Separation of powers

### Article History:

Received: 20-02-2024  
Accepted: 10-04-2024  
Published: 18-04-2024

This study provides a detailed analysis of the Afghanistan Constitution of 2004, focusing on the principles of separation and balance of powers as outlined in the renowned theory originating from influential political thinkers such as Thomas Hobbes, John Locke, Rousseau, and Montesquieu. The theory of separation of powers has gained widespread acceptance globally, serving as a fundamental tenet of political thought and constitutional law. Through a meticulous examination, this research investigates the incorporation of the theory within the 2004 Afghan constitution, scrutinizing its manifestation across various constitutional provisions. The constitution explicitly delineates executive authority to the government, legislative power to the National Assembly, and judicial power to the judiciary. However, the concentration of extensive powers in the presidency raises valid concerns regarding the preservation of the principle of balance of powers within the constitutional framework. This study aims to elucidate these concerns and provide insights into the potential ramifications for the effective separation and balance of powers within Afghanistan's governance structure. The analysis delves into the mechanisms established by the constitution to ensure the independence and accountability of each branch of government. It examines the interplay between the executive, legislative, and judicial branches, evaluating their respective roles and responsibilities in maintaining the integrity of the constitutional order. Furthermore, the study explores avenues for enhancing the balance of powers and strengthening democratic governance in Afghanistan, considering the evolving political landscape and future prospects for constitutional reform.

### Cite this article:

Niaz, A. W. (2024). Assessing Power Dynamics: Afghanistan's Constitutional Framework of 2004. *Sprin Journal of Arts, Humanities and Social Sciences*, 3(4), 47-51. <https://doi.org/10.55559/sjahss.v3i4.287>

## 1. Introduction:

The theory of the separation of powers stands as a fundamental concept in political theory and constitutional law, delineating the structure of government into three distinct branches: legislative, executive, and judicial. This notion asserts that each branch should possess discrete functions and powers, effectively acting as checks on the others to prevent the concentration of authority and uphold democratic principles (Johari, 1995: pp. 356-357).

The origins of this theory can be traced back to ancient Greece, where Aristotle first outlined the concept of the three functions of government: legislative, executive, and judicial (Boushahri, 1995: p. 79). However, it was during the seventeenth century that scholars such as Thomas Hobbes, John Locke, and Montesquieu revolutionized the understanding of the separation of powers, introducing new perspectives and laying the groundwork for modern governance structures (Asadian, 2011: pp. 187-188).

John Locke, a seminal figure in political philosophy and considered the father of classical liberalism, advocated for the separation of legislative and executive powers, emphasizing the

importance of their independence to prevent abuses of authority (Tabatabayi, 2001: p. 120).

Montesquieu, however, played a pivotal role in refining and popularizing the theory of the separation of powers. In his renowned work "The Spirit of Laws," he articulated the necessity of separating powers to prevent the accumulation of power in the hands of a single entity, which he identified as a precursor to tyranny and corruption (Chaudhary, 2016: p. 29). According to Montesquieu, the dispersion of power among different branches of government serves as a bulwark against tyranny and ensures the preservation of individual liberties.

In essence, the separation of powers is grounded in the philosophy of limiting governmental authority to safeguard liberty and prevent abuses of power. By distributing powers among distinct branches of government, the theory aims to establish a system of checks and balances that promotes accountability, transparency, and the rule of law (Chaudhary, 2016: p. 29).

The separation of powers represents a foundational concept in modern governance, serving as a crucial mechanism for controlling and distributing power within a government structure. At its core, this principle mandates that governmental

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<https://doi.org/10.55559/sjahss.v3i4.287>

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authority be divided among different branches, with each branch possessing defined responsibilities and operating within specified limits. By establishing such a framework, the separation of powers aims to prevent the concentration of power in any single entity and mitigate the potential for abuse of authority.

In contemporary political systems, the separation of powers signifies a departure from traditional modes of governance, where power was often centralized in the hands of rulers or governing bodies. Instead, modern governance structures disperse authority among multiple branches of government, such as the executive, legislative, and judicial branches. Each branch is entrusted with distinct functions, such as formulating and enforcing laws, interpreting and upholding the constitution, and administering justice.

This dispersion of power serves several critical purposes within a democratic society. Firstly, it facilitates effective leadership by ensuring that no single individual or group possesses unchecked authority. "The concept of separation of powers, as articulated by influential political theorists such as Montesquieu (Grote, 2004) and Madison (Madison, 1788), plays a crucial role in safeguarding against authoritarianism and tyranny. By dividing power among executive, legislative, and judicial branches, this principle establishes a system of governance that prioritizes accountability and transparency (Hamilton et al., 1788). Each branch serves as a check on the others, ensuring that no single entity can wield unchecked authority. This framework not only prevents the concentration of power in the hands of a few but also fosters a culture of cooperation and balance within the government. Ultimately, the separation of powers promotes a democratic ethos where the rule of law prevails, and the rights of citizens are protected (Locke, 1690)."

Moreover, the separation of powers fosters governmental efficiency by delineating clear lines of responsibility and preventing conflicts of interest. By assigning specific tasks to each branch, this principle enables the government to function smoothly and effectively, thereby enhancing its ability to address the needs and concerns of its citizens.

Additionally, the separation of powers serves to protect the rights and liberties of individuals by establishing mechanisms for oversight and accountability. Through the division of authority, each branch of government acts as a check on the powers of the others, ensuring that no single branch can infringe upon the rights of citizens or act beyond the scope of its mandate.

In the context of the 2004 Afghanistan Constitution, the principles of the separation and balance of powers take on particular significance. As the foundational document guiding the governance of Afghanistan, the constitution plays a pivotal role in shaping the country's political landscape and safeguarding the rights of its citizens. Therefore, an examination of the extent to which the constitution establishes and upholds the separation of powers is essential for understanding the dynamics of governance within Afghanistan.

This paper adopts a descriptive-analytical approach to explore the separation and balance of powers within the 2004 Afghanistan Constitution. By critically evaluating the distribution of power among the branches of government and assessing the degree of balance and accountability inherent in the constitutional framework, this study aims to provide valuable insights into the functioning of Afghanistan's governance structure and the protection of citizens' rights.

## 2. Power; the Generator of Political Tyranny

The principle of the separation of powers finds its roots in a sober assessment of the nature of power, viewed with suspicion and condemnation, particularly when concentrated in the hands of a few rulers. This pessimistic perspective on power suggests that its accumulation often leads to despotism and self-indulgence among those in authority. Bertrand Russell, in his seminal work, highlights the insatiable human desire for power and glory, underscoring the profound impact that power can have on individuals and institutions (Russell, 1971, p. 23). Similarly, Lord Acton's famous aphorism, "Power tends to corrupt, and absolute power corrupts absolutely," serves as a stark reminder of the dangers posed by unchecked authority (Bradley & Ewing, 1997, p. 4).

This interpretation of power, coupled with an acknowledgment of the inherent weaknesses of human nature, necessitates the development of mechanisms to prevent potential abuses of power. At its core, the theory of the separation of powers rests on the premise that no individual or institution can resist the corrupting influence of concentrated authority indefinitely. This recognition of human fallibility forms the bedrock of the theory, asserting that the concentration of power in one person or entity inevitably breeds corruption and oppression (Habib Zada & Aajerlo, 2012, p. 105).

Throughout history, the tragic consequences of centralized power have been all too apparent, as oppressive regimes have subjected populations to tyranny and injustice. In response to these experiences, advocates of freedom have sought to challenge the status quo and champion the dispersal of power among different branches of government. This pessimistic view of power serves as a driving force behind the establishment of an anti-despotic ethos and the quest for a more equitable and just society.

Indeed, the principle of the separation of powers, now a cornerstone of democratic systems worldwide, owes its origins to this recognition of the corrupting influence of concentrated authority. By dispersing power among distinct branches of government, democratic societies seek to mitigate the risks of corruption and oppression, laying the groundwork for a more accountable and responsive governance structure.

In essence, the theory of the separation of powers emerges from a realistic appraisal of power and its potential for abuse. By acknowledging the inherent weaknesses of human nature and the dangers posed by unchecked authority, this theory provides a framework for safeguarding individual liberties and promoting the common good.

## 3. The Concept of the Separation of Powers:

The idea of separation of powers is very old. The doctrine of the separation of powers implies that there should be three separate organs of government with their sets of functions and powers. In other words, it implies that the three organs of government should be kept apart from each other in the interest of individual liberty (Johari, 1995, p356).

Today, many intellectuals, jurists, and politicians have spoken about the separation of powers and developed theories on this subject. Among ancient philosophers, Greek statesmen, especially Plato and Aristotle, discussed various functions of governance in their works. Plato, in his works, spoke of the necessity of dividing and distributing the duties of government among different bodies, considering it as a means to eliminate concentration in governance and prevent turmoil and conflict in the political system (Parwin & Aslani, 2012, p. 186). According to Aristotle, "Every government has three powers, and a wise ruler must recognize the limits of each of these three powers. The first

of these three powers is a body that deals with discussion and consultation about public interests. The second is related to rulers and their qualifications, limits of authority, and the method of their selection. The third power encompasses judicial affairs." (Aristol, 1992, p.187). Writing of the Roman Republic, Polybus and Cicero attributed its excellence to the system of separation of powers and check and balances in its organization. Towards the end of the middle age, it was stressed by Marsiglio of Padua who drew a clear line between the legislative and executive functions of government (Johari, 1995, p. 357).

The concept of the separation of powers, also, can be found in the works of three of the most prominent founders of natural and international law: Grotius, Puffendorf, and Wolf, who, based on their views, considered the number of duties and authorities of the government to be countless and varied. Jean Bodin was also inclined towards the separation of powers. Therefore, he considered the judgment of the king risky and advocated entrusting the duty of judgment to independent judges. James Harrington also pondered the separation of legislative and executive powers and valued measures to ensure the power and supervision of authorities (Johari, 1995, p. 357).

John Locke, in his significant work "Two Treatises on Government," explained the power of the government. John Lock is generally regarded to be the father of modern democracy, for, it was he who advanced the idea of polity having limited authority, separation of powers with the system of check and balances and inviolability of a people's right and fundamental liberties (Chaudhary, 2007, p. 228).

To Locke, government has three functions: legislative, executive and federative. Locke by elucidating and explaining the legislative and executive powers and describing their duties and functions in the first stage concerning the nature of legislation, then delving into the analysis of the executive power, clarifying their differences, and finally highlighting the mixing of the two powers as a cause of dangerous human weaknesses (Qazi, 2001, p 170). In addition to these two powers, Locke mentions the "federative power," which is distinct from the executive power and includes the authority to declare war, make peace, and conclude international agreements.

The precise explanation of the concept of the separation of powers was undertaken in Montesquieu's book "The Spirit of Law." Montesquieu's chief interest is to set forth the government organization that will best safeguard political liberty. This demands security under individual caprice, and implies subjection to law rather than to the will of a man. Liberty is possible only where government powers are subject to limitations (Chaudhary, 2016, p. 29). Montesquieu believes that the best safeguard against tyranny and the surest guarantee of liberty is the separation of powers among different organs of the government. According to him, each power must be exercised by a separate organ (Chaudhary, 2016, p. 29). He explained his theory in these words: "in every government there are three sorts of power: legislative, executive and judicial. The liberty of the individual required the neither all three powers nor any too of theme should be placed in the hands of one man or none body of men. (1) When the legislative and executive powers are united in the same person or body of person, there can be no liberty, because apprehension may arise that the king who is also lawmaker, might make and enforce the laws in a tyrannical manner. (2) If the judicial power is joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. (3) Where the judicial power joined to the executive power, the judge might behave with violence and oppression. (4) There would be an end of everything if the same man or the same body, whether of the nobles or of the people, were to exercise those three powers, that

of enacting laws, that of enforcing them and of trying the cases of individual" (Mazhar UL Haq, 2010, p. 418).

By framing political power within the legislative, executive, and judicial frameworks, while dividing the governmental responsibilities among the three powers, he imposed the principle of "checks and balance". Thus, according to the principle of "checks and balance," the government powers are divided among the three branches, and each branch intervenes and monitors the other branch in a balanced manner.

Rousseau addressed the concept of the separation of powers in his famous work "The Social Contract." Despite being influenced by the theories of Locke and Montesquieu, he presented the subject differently from his predecessors. Montesquieu did not specify how the hierarchy among the three powers should be determined, but Rousseau placed the legislative power at the top of the government pyramid because the establishment of laws and decisions that the executive power is obligated to implement belongs to the ruler, i.e., the people. Thus, Rousseau introduced a vertical and hierarchical separation of powers (Asadian, 2011, p. 56).

In a general summary of the above theories, the division of power among different branches of government is beneficial. Firstly, the separation of powers prevents governments from acting solely based on the interests of rulers or the majority (as they will be controlled by other branches of government). Secondly, the three branches of government are mutually accountable because one or more branches can balance the actions of another branch that violates its role according to the constitution, creating a balanced control (Hamidi, 2015, p. 3).

#### 4. The separation of powers in Afghanistan Constitution 2004

In the historical context of Afghanistan's constitutional development, the embrace of the separation of powers concept emerged relatively late and within a narrow timeframe. Despite the establishment of Afghanistan's first written constitution in 1923, it wasn't until 1964 that significant strides were made towards adopting a Western-style constitutional monarchy. This transition marked a pivotal moment in Afghanistan's political trajectory, signaling a departure from traditional governance structures towards a system characterized by distinct branches of government, each with defined roles and responsibilities (Grote, 2004, p. 1).

The 2004 Afghan Constitution represents a culmination of this evolution, enshrining the principle of the separation of powers as a cornerstone of the country's governance framework. Within this constitutional framework, power is meticulously allocated among the three branches of government: the executive, the legislative, and the judiciary. At the apex of the executive branch sits the President, wielding authority over the executive functions of the state. The legislative branch is represented by the National Assembly, responsible for the formulation and enactment of laws. Finally, the judiciary, led by the Supreme Court, serves as the arbiter of legal disputes and guardian of constitutional principles.

The separation of powers under the 2004 Constitution is intended to establish a delicate equilibrium among the branches of government, preventing any single branch from monopolizing authority or infringing upon the prerogatives of others. Each branch operates with a degree of autonomy and independence, allowing it to fulfil its mandate without undue interference or influence from other branches. This institutional autonomy is essential for ensuring the effective functioning of government and upholding the rule of law.



Moreover, the distribution of power among the branches of government serves as a safeguard against authoritarian tendencies and abuse of authority. By dispersing authority among multiple institutions, the 2004 Constitution seeks to prevent the consolidation of power in the hands of a single individual or entity, thereby mitigating the risks of tyranny and oppression.

Overall, the separation of powers as delineated in the 2004 Afghan Constitution represents a significant milestone in Afghanistan's constitutional evolution. It reflects a commitment to democratic principles, institutional integrity, and the protection of individual rights and freedoms. However, the effective implementation of the separation of powers requires ongoing vigilance, oversight, and adherence to constitutional principles, ensuring that the balance of power is maintained and the aspirations of the Afghan people are realized.

#### 4.1 Institutional Independence:

With regard to the horizontal separation of power, the Afghan Constitution authors adopted institutional division between supreme organs of the central government. This obviously exposes each branch of government, especially the executive and National assembly, are separated; and to be a master of specific functions and duties. The dual elections for the presidency and parliament, as well as the organizational separation of the executive and legislative branches, emphasize the institutional independence of the branches. The national governance is equally divided between the executive and legislative branches, with neither deriving authority from the other (Niaz, 2012, p 108).

The executive branch of government is composed of a popularly elected President, two Vice Presidents who are elected together with him, and the Cabinet. President 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 function of the president are visible in the constitutional definition of his role in Article 60, which states the President is the head of state of the Islamic Republic of Afghanistan and conduct his authorities in the executive, legislative and judiciary branches in accordance with the provisions of the Constitution (Grote, 2004, p. 8).

To show off democratic legitimacy, the President is directly elected by the people and must secure more than 50% of the votes. This election grants legitimacy to the President, enhancing their credibility and authority.

It is crucial to highlight one of the fundamental aspects of the separation of powers in modern constitutionalism, which is the pivotal role of independent judicial bodies in overseeing the exercise of public power (Grote, 2004, p. 15). In accordance with this principle, the Afghan Constitution underscores the importance of an independent judiciary, as enshrined in Article 116. The judiciary is established as a distinct pillar of the Afghan government, comprising the Supreme Court, Courts of Appeal, and Primary Courts. This constitutional provision underscores the imperative of ensuring the judiciary's independence from the legislative and executive branches.

Furthermore, the behavioral independence of judges is safeguarded through various constitutional provisions, notably Article 119. This article emphasizes principles such as judicial impartiality, the absence of administrative hierarchies within the judiciary, and the procedures for the removal of judges from the Supreme Court and regular courts (Constitution, Articles 127 and 133). These principles serve to reinforce the institutional and functional independence of the judicial branch from the other branches of government.

In essence, the constitutional emphasis on the independence of the judiciary underscores its critical role as a check on the exercise of governmental power. By ensuring the judiciary's autonomy and impartiality, the Afghan Constitution seeks to uphold the rule of law, protect individual rights, and maintain the integrity of the democratic system.

#### 4.2 Interactions and Relations between Branches:

##### 4.2.1 Executive Intervention in Legislative Affairs:

In light of Afghanistan's unstable circumstances during the ratification of the 2004 Constitution, the framers of the constitution made a deliberate decision to establish a strong central government. This decision was driven by the recognition that Afghanistan could ill-afford a new policy direction or achieve progress with a weak and fragmented executive power.

Under this framework, the executive branch wields significant influence over the legislative process. The President plays a pivotal role in shaping legislative agendas, issuing legislative decrees (Constitution, Article 64 (9)), establishing regulations through delegated legislation (Constitution, Article 76), and presenting proposed laws to the National Assembly for approval. The President's active involvement in the legislative process, including prioritizing government proposals, requesting extraordinary sessions, participating in National Assembly meetings, introducing necessary bills, and defending them, underscores the executive's substantial impact on legislation (Constitution, Article 103).

While the government assumes responsibility for budget preparation, the legislative branch retains authority to review and approve the budget. However, the legislative branch is constrained by a limitation that prevents it from delaying the confirmation of the budget for more than a month. Importantly, the executive does not possess the power to dissolve the parliament, thus preserving the separation of powers and ensuring the independence of the legislative branch.

##### 4.2.2 Legislative Intervention in Executive Affairs:

The legislative authority in Afghanistan is bicameral: National Assembly with a House of People (Wolesi jirga) and a house of Elders (Meshrano jirga). Members of the House of the People are directly elected, while members of the Senate are both elected and appointed (Hamidi, 2015, p. 18). The Parliament exercises inherent oversight within the constitutional framework.

The Parliament's authority includes approving or rejecting proposed ministers, conducting oversight through questioning (Constitution, article 92) and impeachment (Constitution, article 92), approving, amending, or repealing legislative decrees, making decisions regarding development programs and the national budget, establishing special commissions to investigate government actions (Constitution, article 89), approving international treaties or canceling Afghanistan's accession, pursuing legal action against the President with one-third of members alleging crimes against humanity, national treason, or any other crime (Constitution, article 69). It is due to mention, first; Wolesi jirga cannot decide on the charge itself, hut has to convene a Loya Jirga, which can then dismiss the president with a two- third majority (Grote, 2004, p. 9); and second; according to Article 69, the president cannot be removed from office for political misconduct or a failure of his policies.

Also, both chamber of National Assembly is able to addressing citizen complaints against the government, and summoning responsible authorities to the Parliament. However, the Parliament cannot collectively dismiss the entire Cabinet.

On the other hand, the President can be removed if the Parliament fails to approve ministers nominated by the President

within the specified time frame, or if the Parliament approves their removal with a two-thirds majority. This dual mechanism ensures checks and balances between the executive and legislative branches.

Interference of executive and legislative branches in judicial affairs is limited due to the independence of the judiciary and inherent differences in their functions. However, the President can influence the judiciary by appointing members to the Supreme Court, including the Chief Justice, and being involved in the appointment, retirement, acceptance of resignation, and removal of judges (constitution, article 64). The President can also propose laws, participate in budget allocation for the judiciary (constitution, article 95), and have an impact on the appointment of administrative staff within the judiciary.

In comparison to the executive branch, the National Assembly has less influence over the judiciary, although judges are obliged to align their decisions with constitutional principles and laws (Constitution, Article 131). Judicial bills prepared by the judiciary, when approved by the National Assembly, may undergo changes based on its general competence.

Another avenue of influence is outlined in Article 127 of the Constitution, allowing more than one-third of the National Assembly members to request the trial of the Chief or a member of the Supreme Court. If the National Assembly approves this request with a two-thirds majority, the accused is transferred to a special court.

The judiciary's influence on other branches is crucial in democratic systems, providing effective control over government actions and serving as a guarantee for individual rights and freedoms. In the executive domain, the judiciary reviews legal commands, legislative acts, international treaties, and decisions related to extraditing criminals to foreign governments. The judiciary also plays a role in addressing crimes committed by ministers.

Furthermore, the judiciary has the authority to scrutinize the actions of ministers within the jurisdiction of the Supreme Court. In the legislative field, the Supreme Court influences legislation by examining the compliance of laws and legal commands with the constitution, contributing to the legislative process. Judicial procedures act as complements to laws, representing another aspect of the judiciary's influence on legislative matters (constitution, article 121).

Although members of the National Council enjoy parliamentary immunity for their expressed opinions during the execution of their duties, they are not entirely immune from legal consequences and can be held accountable for unlawful acts. However, the process of pursuing and prosecuting them is subject to specific and distinct conditions from those applicable to ordinary individuals.

## 5. Conclusion

The establishment of Afghanistan's political system based on the principle of the separation of powers, as determined by the Loya Jirga, underscores a deliberate effort to allocate executive, legislative, and judicial responsibilities to distinct and independent organs. However, the manner in which power is distributed suggests a departure from a purely parliamentary or presidential regime, giving rise to a system with "mixed" or "semi-presidential" characteristics, blending elements from both regimes.

The dual elections for the presidency and parliament, alongside the institutional separation of powers, contribute to this nuanced system, combining features of parliamentary oversight with executive accountability to the National Assembly. While efforts are made to uphold the independence of powers, structural separation and checks and balances mechanisms are

implemented to prevent hierarchical dominance and foster accountability.

The Constitution includes mechanisms for inter-branch accountability, enabling each power to act as a check on the others. The National Assembly holds powers such as impeachment and confidence votes for ministers, influencing judicial appointments, and limited control over the budget. However, the executive branch, particularly the President, possesses significant authority, including veto power over legislation, appointments to the judiciary, and control over one-third of the Senate.

Despite the executive's formidable powers, the constitution restrains its ability to dissolve the parliament, ensuring continuity and stability in governance. This measure, while preventing executive overreach, maintains the balance of power and safeguards against undue influence.

Looking ahead, the future of Afghanistan's political system may hinge on the effective implementation of these constitutional mechanisms, as well as ongoing efforts to strengthen democratic institutions, promote transparency, and ensure the rule of law. By upholding the principles of separation of powers and checks and balances, Afghanistan can navigate the complexities of governance, foster accountability, and advance the aspirations of its people.

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