

## Summary: The Constitution of Afghanistan

The constitution of Afghanistan, created by a special Loya Jirga (13 December 2003 - 4 January 2004), was ratified by President Karzai on 24 January 2004. In essence, it ensures an Islamic republic, as stated in the benediction: “In the name of Allah, the Most Beneficent, the Most Merciful,” (which also happens to begin the preamble). The constitution contains 162 articles, covering matters of faith, government structure, and national composition.

### The Writers

The Constitution was written by the 502 members of the Constitutional Loya Jirga (CLJ) formed on 14 December 2003. The CLJ was formed by a general election of a 19,000-strong electoral college. The CLJ was to replace the Emergency Loya Jirga, which was composed of Afghan notables, including a number of warlords and a disproportionate number of Panjshiri Tajiks. After the electoral college was put in power, 408 members were elected to the CLJ (344 men and 64 women), 50 appointed by Karzai (25 men and 25 women), followed by 24 refugee representatives, 9 nomadic representatives, 6 internally displaced persons representatives, and 3 non-Muslim (Hindu and Sikh) representatives. The inclusion of so many women ensured that women’s rights would feature prominently in the debate and in the constitution itself.<sup>1</sup>

### The Special Position of the *Loya Jirga*

The *Loya Jirga* (“Grand Council”) holds a special place in Afghan history and governance. The first loya jirga was thought to be that which elected Ahmad Shah Abdali, later known as Ahmad Shah Durrani, as king of all Afghanistan in 1747. At present it may be convened for three reasons: “to decide on issues related to independence, national sovereignty, territorial integrity as well as supreme national interest,” in order to alter or amend the constitution, or to impeach the president (Article 111). In its constitutional mandate, a loya jirga “...is the highest manifestation of the will of the people of Afghanistan,” and is composed of the National Assembly, and presidents of all provincial and district assemblies (resulting, at present, in slightly less than 800 members). Members of the Supreme Court, ministers, and the attorney general may participate as non-voting members (Art. 110).

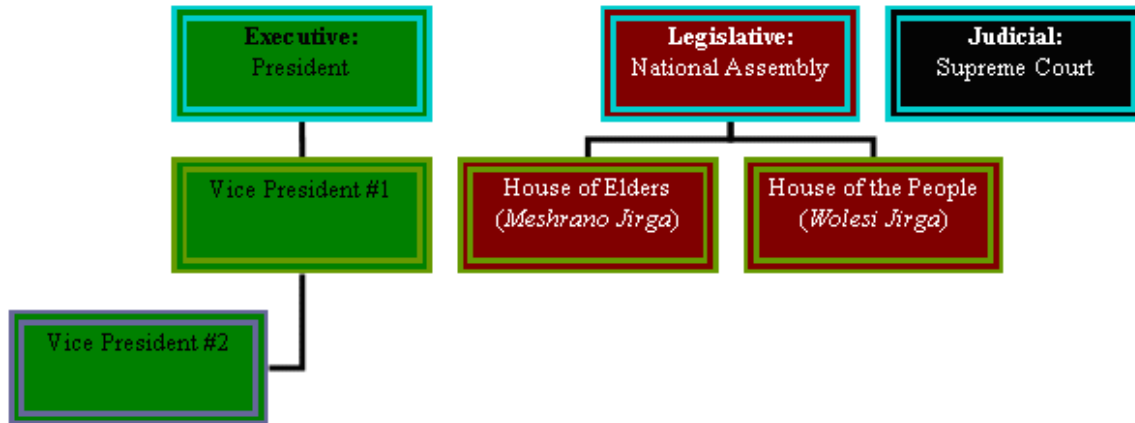
### Division of Power

As a republic, Afghanistan has a standard three-tier government: executive, legislative, and judicial. It should be noted that except for especially heinous crimes (such as murder and crimes against humanity), current office holders in any of the three branches of government have immunity from prosecution.

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<sup>1</sup> Zoe Bernadette Sherman, *Afghanistan’s Constitutions: A Comparative Study and their Implications for Afghan Democratic Development*, March 2006, Monterey: Naval Postgraduate School, 2006.

## Afghan Government Structure



**The executive branch** is led by the president, followed by the first vice president and then the second vice president. The president and vice presidents are elected for five year terms, and none may hold office for more than two terms (Art. 60 & 62). The President upon election must be at least 40 years old and a Muslim born in Afghanistan, free of conviction for genocide or crimes against humanity, and hold Afghan citizenship.<sup>2</sup> The president, with the approval of the National Assembly, has the ability to appoint ministers (Art. 71). The president may be impeached by a Wolesi Jirga two-thirds majority, which then convenes a loya jirga, where again a two-thirds majority is required, and then conviction by a specially convened court of high government officials (Art. 69). The executive line of succession flows from the president to the first vice president to the second vice president to the president of the Meshrano Jirga to the president of the Wolesi Jirga to the foreign minister (Art. 68).

**The legislative branch** consists of the National Assembly, divided into two bodies: the *Wolesi Jirga* (House of the People or lower house) and the *Meshrano Jirga* (House of Elders or the upper house). The Wolesi Jirga is limited to 250 members, and two of the members from every province must be women (Art. 83). It can overpower an objection of the Meshrano Jirga by a two-thirds majority (Art. 100).

The Meshrano Jirga contains at present 102 members, and is the less powerful of the two houses. It is one-third elected by district councils (for three- year terms), one-third elected by provincial councils (for four-year terms), and one-third appointed by the president (for five-year terms). Of those appointed by the president, 50% must be women, two must be nomadic, and two must be physically disabled (Art. 84). At present the head of the Wolesi Jirga is Muhammad Yunus Qanoni. The National Assembly has a website at [www.nationalassembly.af](http://www.nationalassembly.af).

<sup>2</sup> This is not as ridiculous as it may sound; many educated and wealthy Afghans left the country long ago and had subsequently taken up citizenship in their respective adoptive countries. While at the assembly level positions one may carry the passport of another nation, the president may certainly not.

**The judiciary** is led by the supreme court, consisting of nine members. As in the U.S., the justices are nominated by the president and subject to approval by the Wolesi Jirga. Initially, the first three justices were appointed for a term of four years, the second three for terms of seven years, and the last three for terms of ten years. Subsequent justices will serve ten year terms, and no justice will serve more than one term (Art. 117). The court's loyalties, in order, are to Islam, the constitution, and the other laws of Afghanistan (Art. 119). The court follows the Hanafi school of Sunni jurisprudence, except in cases involving Shiites (Art. 130). When Shiites are involved (although the degree of Shiite involvement necessary is not stated), Shia jurisprudence will be used (Art. 131). The Hanafi school is widely regarded to be one of the most moderate schools of thought.

The supreme court also has managerial duties. It may nominate, hire, fire, and transfer judges as it sees fit, with the approval of the president (Art. 132). The police and prosecutors remain under the executive branch of government (Art. 134).

At the provincial level the constitution is careful to keep power devolved and democratic. Provincial councils, elected for four-year terms (Art. 138), are enshrined in the constitution, as are municipal councils (Art. 141), and district councils, which are elected for three-year terms (Art. 139). From among these councils, council presidents are elected. Strangely perhaps, the constitution makes little mention of the provincial governors President Karzai has been so adept at transferring, appointing, and firing in order to discourage the consolidation of regional powerbases.

### Emergencies

In certain cases, the constitution provides for a state of emergency. This may be declared "...because of war, threat of war, serious rebellion, natural disasters or similar conditions, protection of independence and national life becom[ing] impossible through the channels specified in this Constitution..." (Art. 143). After 60 days of emergency, or if the president should seek to transfer powers to the presidency, the president must seek the endorsement of the majority of the National Assembly (Art. 144). The constitution may not be amended during a period of emergency (Art. 146).

### Notes

#### *On faith-*

Seemingly of the utmost importance, Afghanistan is a stated Islamic nation. The first three articles set out the supremacy of Islam in Afghanistan, and prohibit its contradiction. Article two does allow for followers of other faiths to practice their faiths, however. The first priority of the Supreme Court is to uphold Islam, the second to preserve the constitution (Art. 119). Similarly, the fundamental disqualification under the rights of association is a contravention of "the Holy religion of Islam" (Art. 35). The pre-eminence of Islam in Afghanistan and in the constitution cannot be subverted or altered (Art. 149).

### *On race and ethnicity-*

The recognized ethnicities of Afghanistan are, in constitutional order (and in debatable order of size): “Pashtun, Tajik, Hazara, Uzbek, Turkman, Baluch, Pachaie, Nuristani, Aymaq, Arab, Qirghiz, Qizilbash, Gujar, Brahwui, and other tribes” (Art. 4). The official languages of the nation are Dari and Pashtu, although Uzbeki, Turkmani, Pachaie, Nuristani, Baluchi or Pamiri may be an official language in any province which features a *majority* population of any of these ethnicities (Art. 16). It should be noted that the national anthem as enshrined in the constitution is in the Pashtu language (Art. 20). Although not a major point, it has been reported that many minorities in Afghanistan are uneasy about the prominence of Pashtu.<sup>3</sup>

### *On sex-*

As previously stated, places are reserved for women in the National Assembly. Article twenty-two clearly states “any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights and duties before the law.”

### *On responsibilities of office-*

Justices and judges, security and military personnel may not retain membership of political parties during their time in office (Art. 153). “The president, vice-president, ministers, supreme court justices, attorney general, heads of the Central Bank and National Directorate of Security, governors and mayors ... shall not engage in profitable business with the state” (Art. 151). The president, vice president, justices and judges, ministers, and members of the National Assembly cannot hold other jobs during their terms of office (Art. 152). Furthermore, the finances of the president, vice presidents, ministers, members of the Supreme Court, and the attorney general are subject to publication both before and after their terms of office (Art. 154).

### *Elections-*

An independent elections commission oversees elections in Afghanistan. The commission is appointed by the president and subject to endorsement by the Wolesi Jirga (Art. 156).

### *On the role of the king-*

Although a moot point now, King Mohammad Zahir’s title “Father of the Nation,” as originally awarded by the ELJ, was enshrined in the constitution. The title died with the king on 23 July 2007 (Art. 158).

### *Perceptions of-*

The constitution was not an easily crafted document. As the ELJ held the election for the electoral college, and the electoral college elected the CLJ, Afghans were learning the ropes of democracy, and many complained it was too soon to write a constitution. Indeed, many continue to see the constitution an idealistic document, unconcerned with

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<sup>3</sup> Zoe Bernadette Sherman, *Afghanistan’s Constitutions: A Comparative Study and their Implications for Afghan Democratic Development*, March 2006, Monterey: Naval Postgraduate School, 2006.

the problems of warlordism and factionalism that have plagued Afghanistan since the fall of the Taliban.

Constitutions, however, are by their very nature documents of lofty ideals; in order to embody national aspirations a certain optimism must be injected into any such document. As a framework, the laws and lawmakers that follow are what will remove the impediments of the day. If they fail to do so, the failure rests with them. The Afghan constitution is a living document, and can be altered with a two-thirds majority of a loya jirga and the approval of the president (Art. 150).

An online English translation of the constitution can be accessed at  
<http://president.gov.af/english/constitution.mspix>.