



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

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January 2019





Afghanistan Research and Evaluation Unit  
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The information and views set out in this publication are those of the authors and do not necessarily reflect the official opinion of AREU.

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Shamshad Pasarlay and Zalmay Mallyar

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## Foreword

We are delighted to present the second paper from phase three of research work under the thematic area of Constitutional Law in partnership with United States Institute for Peace (USIP). We would like to express our gratitude to USIP and financial partners for their generous financial support on this project and the authors for their great contribution to this research.

In the first phase, the research on Constitutional Law focused on overall constitutional reform topics, such as separation of power, electoral systems, citizens' fundamental rights and ten years of the constitution. In the second phase, our authors expanded the research into the 2004 Constitution, mainly studying the evolution of the Executive Branch and the process of judicial review in Afghanistan. In phase three, a paper was launched focusing on research regarding chapter eight of the constitution related to Administration.

This paper, based on research conducted by Dr Shamshad Pasarly and Mr Zalmay Mallyar, compares the constitutionally-prescribed mandates of the Afghan parliament and its legislative functions in practice.

In this paper, the authors found, while the drafters of the 2004 Constitution intended to create a strong bicameral parliament, which represents Afghan citizens, drafts and passes legislations, and puts a check on the executive powers, these intentions have not come to fruition as planned and the parliament struggles to assert its authority as an independent but coequal branch of the government. Instead of exercising its constitutionally-endowed powers in a manner that could improve its institutional capabilities and acting as a cohesive body, the study finds that MPs have mostly used their powers to benefit their individual interests and have not acted in a coordinated manner. The study has also shown that the parliament has not been very successful when it comes to passing legislation in the past 13 years. Meanwhile, many key legislations have been passed through constitutionally-mandated presidential decrees during parliamentary recess, which undermines the parliament's role as a legislative body.

Given the recent parliamentary elections, the findings in this paper could not be more timely. The authors offer a set of short term and long term recommendations that could help to improve the constitutional mandate and performance of the parliament. I hope that this paper serves as a resource for those involved in any potential and future reforms in the areas of parliamentary functions and oversight as well as the electoral system.



Dr Orzala Nemat

AREU Director

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## Glossary

Etimād	Trust
Farmān-e Taqnīnī	Legislative Decree
Istehza	Interpellation
Istema	Report Hearing
Istejwab	Questioning
Loya Jirga	Grand Assembly
Meshrano Jirga	House of Elders
Qanun	Law
Ray-i Ādam-e-Etimād	Vote of no Confidence
Saratan	June (Start of the Parliamentary Term)
Wolesi Jirga	House of Representatives

## Acronyms

CDC	Constitutional Drafting Commission
CRC	Constitutional Review Commission
CLJ	Constitutional Loya Jirga
IEC	Independent Election Commission
IECC	Independent Election Complaint Commission
ICSIC	Independent Commission for the Supervision of the Implementation of the Constitution
IRPWJ	Internal Rules of Procedure Wolesi Jirga
KEI	Key Expert Interview
MJ	Mishrano Jirga
MML	Mass Media Law
MJRIP	Mishrano Jirga Rules of Internal Procedure
NEIC	National Electronic Identification Cards
PR	Proportional Representation
RTA	Radio Television of Afghanistan
SNTV	Single Non-Transferable Vote
SMD	Single Member District
WJ	Wolesi Jirga

## Executive Summary

Legislatures or parliaments, as the highest law-making bodies in a country, are seen to manifest the will of their people. They play an important role in the life of a nation by performing three fundamental functions: (1) making, changing and repealing laws; (2) representing and articulating the views and demands of the people in all types of decision-making processes; and (3) overseeing the actions of the executive branch to ensure that the government is accountable to the people. Performing these three core functions successfully requires a strong, effective and efficient parliament. Clear constitutional provisions defining the powers and authorities of parliaments, the existence of a culture of institutionalized political parties, a proper system for electing parliaments, procedural precision regarding how parliaments should work, and constructive relationships between a country's parliament and executive branch play an important role in establishing and maintaining a viable and effective parliament. In the absence of these conditions, parliaments are likely to perform less than what the people might hope and may not be effective in monitoring the actions of the executive branch. Similarly, it is argued that parliaments will fail to perform effectively in the absence of favorable conditions, social cohesion, lack of discipline and freedom from constant political pressure by powerful executives.

By this logic, the outlook for a successful and effective parliament does not look very promising in Afghanistan. Afghanistan has a long history of powerful heads of state who accepted no checks on their power. The ideals of separation of powers and an independent national parliament entered the Afghan constitutional and political development process only at the beginning of the 20th century. The idea of establishing a national parliament was discussed by the framers of Afghanistan's first written constitution in 1923, but that document did not officially create one. In fact, it was the 1964 Afghan Constitution that effectively separated legislative, executive and judicial power and created, for the first time in Afghan history, a national parliament elected by the people. However, Afghanistan's experience with this parliament was short-lived as the country lacked suitable conditions for its growth and the parliament was under constant pressure by the head of the state. From 1973, when the 1964 constitutional order collapsed, up to 2004, when the current Constitution was adopted, Afghanistan experienced a brutal civil war and a series of regimes change - none of which established an effective parliament.<sup>1</sup>

The drafters of the 2004 Constitution chose to create a strong parliament and embraced more checks and balances as compared to previous Afghan constitutions. They defined a bicameral parliament and vested in it considerable legislative and oversight power. The 2004 Constitution was basically drafted to endow the bicameral parliament with a significant role in representing the ordinary Afghan citizens, making required laws and controlling the excesses of executive power. The drafters hoped that, equipped with these powers, the parliament would be more efficient and play a productive role in fulfilling its constitutional mandate.

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<sup>1</sup> Carol Wang, "Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability," *Harvard International Law Journal* 55 (2014): 211-249, 218-219.

However, as this study finds, the parliament has performed less in all three departments than what one might have expected in 2004, with the parliament struggling to establish itself as an independent and co-equal branch of the government. The parliament has not exercised some of its powers in a way that could improve its institutional capabilities. Rather, it appears that the MPs have mostly used those powers (such as the parliament's right to impeach and remove government ministers) that improve their individual, ethnic, religious or regional interests. The parliament over the past two terms has not acted in a coordinated fashion and is an undisciplined and non-cohesive body. Moreover, the government seems to disregard the parliament on most occasions, complying with the parliament's decisions on very few occasions and trying, instead, to undermine it in every way possible.

Similarly, on its legislative function, the parliament has been the least successful. Over the past 13 years, the parliament has managed to pass only five pieces of legislation on its own initiative. This research found that the 2004 Constitution includes provisions that undermine the parliament's role as the only legislative organ in the country. For instance, the Constitution gives the government the right to draft and adopt regulations. These regulations indeed do not require the approval of the parliament. Likewise, the Constitution gives the president the right to make laws through executive decrees during parliamentary recess. The Constitution requires that, in order to be enforced, presidential decrees should be approved by the parliament, but evidence shows that most of such decrees are not submitted for approval.

## Recommendations

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

### In the short term

#### *Strengthen Afghanistan's Electoral Institutions*

Afghanistan's flawed system for electing parliaments and resolving electoral disputes has led to political crises every time the country has held elections. Electoral disputes are usually resolved through the judicial or political mechanisms without the involvement of Afghanistan's electoral institutions, the Independent Electoral Commission (IEC) or the Independent Electoral Complaints Commission (IECC).<sup>2</sup> Afghanistan will not be able to hold successful democratic elections with weak electoral institutions. A transparent system for electing the members of the IEC and enhancing its integrity and clearer rules that define the duties and organization of the IEC and the IECC might help strengthen these two institutions. Afghanistan's most recent parliamentary elections in October 2018 revealed yet again the problems with the IEC and IECC. Unless these electoral institutions are reformed, Afghanistan might not be able to hold successful elections.

#### *Change the Single Non-Transferable Vote (SNTV) System*

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

#### Adopt a Parliamentary Oversight law

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

<sup>2</sup> For instance, the crisis that followed the 2010 parliamentary election was resolved through judicial means. In fact, President Karzai appointed a special court that would supposedly resolve the crisis. Similarly, Afghanistan's most recent political turmoil that followed the 2014 presidential election was resolved through a special power-sharing agreement between the two front-runners, Ashraf Ghani and Abdullah Abdullah. In resolving these disputes, Afghanistan's electoral institutions were pushed to the corner and played no role.

## Encourage the Formation of Disciplined Parliamentary Groups

The SNTV system that is used to elect the parliament in Afghanistan has been ineffective in encouraging political parties to run for elections, leading, instead, to the formation of a highly fragmented parliament. The parliament was therefore not successful over the past two terms to act cohesively, and it never emerged as a disciplined body. The establishment of parliamentary groups might be a useful alternative in this respect. The parliament should take serious and concrete steps to form groups around certain ideologies and viewpoints rather than around powerful individuals. This might arguably improve cohesion within the parliament and help it to act in a more coordinated fashion to oversee the executive branch.

### **In the long term**

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

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

#### Adopt a Clear Executive-Legislative Dispute Resolution Mechanism

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

## Introduction

Afghanistan has a long history of strong heads of state. Afghan rulers did not embrace the idea of the separation of powers until the mid-20th century. Although, for the first time in the country's history, the drafters of the 1964 Constitution separated executive, legislative and judicial powers;<sup>3</sup> in practice, Afghanistan did not see real separation of powers up until the promulgation of the 2004 Constitution. The 2004 Constitution embraces more mechanisms of checking the executive power and creates a comparably powerful bicameral parliament and vests in it significant legislative and oversight powers. The 2004 Constitution was indeed drafted in a way to bestow upon the parliament a significant role in representing the ordinary Afghan citizen, making required laws and controlling the excesses of power by the executive branch.

However, practice over the past decade and a half shows that, although the Constitution vests in the parliament significant legislative and oversight power, the parliament has struggled to emerge as a cohesive body and has not acted in a coordinated fashion to fulfill its constitutional mandate. The executive has also played its role in curtailing the parliament by disregarding its decisions and exercising too much legislative power. As a result, the relationship between the two branches has not been productive.

This paper presents the findings of empirical research regarding three fundamental questions concerning the current Afghan parliament: (1) what powers does the 2004 Constitution of Afghanistan vest in the bicameral parliament? (2) How did the Afghan parliament use its constitutional powers in practice over the past decade and a half and whether it lived up to the demands of the constitution-makers? And (3) what can be done to improve the prospects for a viable parliament in Afghanistan? The findings of this research suggest that despite the comparably adequate amount of powers that the 2004 Constitution in theory grants to the parliament, practice shows that the parliament has apparently performed less than what one would have expected. Ethnic politics, an ill-suited electoral system for electing the parliament (the SNTV), lack of political parties and organized parliamentary groups, fragmentation within the parliament, the interference of the executive branch in parliamentary matters, lack of individual and institutional capacity in the parliament, patronage and lack of public accountability for how MPs cast their votes have negatively impacted the performance of the parliament over the past two terms.

The parliament tends to mostly exercise those powers that advance and foster the individual interests of the MPs instead of those that improve its institutional viability and capacity as a cohesive, independent and co-equal branch of the government. Some of the most important powers and duties of the parliament (e.g., establishing special commission to investigate the actions of the government) that enrich the parliament's supervisory functions have either not been used to this day or used in an ineffective manner. The ambiguous legal framework concerning the constitutional mandate of the parliament, personality-driven politics, lack of literacy and lack of an effective mechanism to hold MPs accountable by their constituencies are among the key factors that have impeded the parliament's ability to use some of its key oversight powers under the 2004 Constitution.

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<sup>3</sup> Rainer Grote, "Separation of Powers in the New Afghan Constitution," *ZaoRV* 64 (2004): 897-915.

This research paper first briefly considers the history of parliaments in Afghanistan and examines the constitutional frameworks for competitive politics. It then describes how nearly a decade and a half without organized political parties and groups have shaped and guided the parliament under the 2004 Constitution and how it has helped or hindered its performance. The paper specifically focuses on parliament's powers under the 2004 Constitution and discusses how they were exercised in practice. Then, the paper explores the executive and legislative relationship and how it impacted the parliament's performance. In the final section, the paper discusses the future of parliamentary politics in Afghanistan, including the important question of whether or not the end of the current parliamentary term in June 2015 with no elections held until 20 October 2018 has affected the performance of the parliament. In this context, this research recommends some necessary mechanisms for a viable Afghan parliament and a realistic separation of powers. Changing the electoral system and encouraging the growth of political parties might be useful steps that Afghanistan should take to enrich the performance of the parliament.

## Methodology

This research investigated both primary and secondary sources related to understanding the constitutional powers of the Afghan parliament and how, over the past decade and a half, the parliament exercised those powers in practice. To shed light on these questions, this paper conducted an exhaustive literature review of the secondary material. Then primary data were collected through key expert interviews (KEIs).

## Primary Data

For this research, primary data were collected on the 2002-2004 constitution-making process and the performance of the parliament under the 2004 Constitution. A total of 21 interviews were conducted with the makers of the 2004 Constitution, current and previous members of the parliament, political analysts, civil society members, university professors and foreign experts of Afghan parliament. For these KEIs, each expert was selected based on his/her experience and knowledge about the Afghan parliament and its constitutional powers. Each expert interviewed for this research has been closely involved with the Afghan parliament as a constitutional drafter, a member of the parliament or a close observant of the parliament over its past two terms.

In addition to KEIs, archival materials on the 2002-2004 constitution-making process from the Afghanistan Center at Kabul University were also examined. Most of these materials are in Dari and Pashto, while a handful are in English. These archival materials include the earlier drafts of the 2004 Constitution; records of the debates during each session of the Constitutional Drafting Commission (CDC), reports of the different committees of the Constitutional Review Commission (CRC); reports of the working groups of the Constitutional *Loya Jirga* (CLJ); reports of the CLJ Reconciliation Committee and records of expert opinions on the earlier drafts of the 2004 Constitution. These materials provided invaluable data on the structure, powers and duties of the parliament during the drafting of the 2004 Constitution.

## Secondary Data

The secondary data included materials written in the official languages of Afghanistan (Dari and Pashto) and those written in English by both Afghan and western scholars. These sources included previous papers by AREU, other reports produced by Afghanistan-based and international think tanks and organizations, books, journal articles, online sources and newspaper articles.

## Historical Background: Parliaments in Afghanistan

The idea of an independent national parliament in Afghanistan dates to the reign of King Amanullah Khan and his 1923 Constitution.<sup>4</sup> The establishment of a national representative parliament was one of the key demands of the constitutionalist movement that had fought to limit the power of an executive monarch over the decade prior to the adoption of the 1923 Constitution.<sup>5</sup> When King Amanullah Khan came to power in 1919, the Afghan constitutionalists convinced him to establish a parliament that would promulgate a series of laws and oblige the state to respect them.<sup>6</sup> King Amanullah and his constitutionalist supporters in fact considered a national parliament with legislative powers as “the only sacred place where the nation manifests its will”,<sup>7</sup> but the 1923 Constitution did not really set up a parliament, creating instead a state council with legislative powers and stipulated that a parliament would be created at a later date.<sup>8</sup> However, that date never came as King Amanullah was ousted from power in 1929.

Amanullah Khan’s successor, Mohammad Nadir Shah, also believed that a parliament should be formed and that its formation should not be postponed.<sup>9</sup> However, Nadir Shah envisioned the parliament not as a place where ordinary people would be represented, but a place where tribal leaders and those who had helped him come to power would gather and advise the King on state policies rather than limiting the King’s power. Nadir Shah first moved to establish a proto-parliament institution that in 1931 adopted a new constitution that created a bicameral parliament with a house of nobles and a house of commons.<sup>10</sup> The parliament under the 1931 Constitution was a symbolic institution staffed by tribal elders and those who were loyal to the King. The 1931 constitution did not separate power between the executive and legislative at all. The royal family of King Mohammad Zahir (who succeeded his father Nadir Shah in 1933) indeed exercised all state power.<sup>11</sup> In the 1950s, reform in the country’s electoral system, which allowed ordinary citizens to elect the parliament, resulted in the formation of a fairly “liberal parliament” that threatened the royal family’s autocratic rule.<sup>12</sup> However, for most of the three decades in which the 1931 Constitution remained in force, the parliament “was relegated to the passive approval of laws or was simply ignored”.<sup>13</sup>

4 Marvin G. Weinbaum, “Afghanistan: Nonparty Parliamentary Democracy,” *Journal of Developing Areas* 7, no. 1 (1972): 57-74, 58.

5 For more information on the constitutionalist movement, see Abdul Hai Habibi, *The Constitutionalist Movement in Afghanistan (1387)* [1999].

6 Amin Tarzi, “Islam and Constitutionalism in Afghanistan,” *Journal of Persianate Studies* 5 (2012), 205-243, 207-211.

7 Ludwig W. Adamec, “Egypt’s Relations with Afghanistan,” *Encyclopedia Iranica* VIII/3 (1998), available at <http://www.iranicaonline.org/articles/egypt-x> accessed on 11 July 2018.

8 Fundamental Principles of the Exalted State of Afghanistan [*Constitution of Afghanistan*] (1301) [1923], arts 30-49.

9 In July 1931, Nadir Shah observed to an advisory council, “Although the nation has up to now expressed no desire for . . . [a parliament], I . . . still hold a national assembly to be the foundation of prosperity and a special instrument for the reform of the country”. See Weinbaum, “Afghanistan: Nonparty Parliamentary Democracy”, 58.

10 Fundamental Principles of the Exalted State of Afghanistan [*Constitution of Afghanistan*] 192 (SY 1301), arts 27-39.

11 Louis Dupree, *Afghanistan*, (Princeton: Princeton University Press, 1973), 494.

12 In 1946, Shah Mahmud, uncle of the King Zahir Shah, replaced his brother, Mohammad Hashim, as prime minister. A group of young Western-educated Afghans encouraged him to introduce social and political reforms. In response, Shah Mahmud made modest attempts to bring about free elections, at least relative to past elections. The resulting parliament elected in 1949 was called by foreign observers of Afghanistan as the “Liberal Parliament”, and it had a hard core of 40 to 50 (of the total 120) “reform-minded members who took their roles as parliamentarians seriously”. They began to question individual government ministers about budgetary and other financial issues, and in a country like Afghanistan in the 1950 “where corruption often serves as a major path to riches and power”; these types of parliamentary investigations deeply offended entrenched patterns and caused trouble. Dupree, *Afghanistan*, 494.

13 Weinbaum, “Afghanistan: Nonparty Parliamentary Democracy”, 58.

It was not until the adoption of the 1964 Constitution that executive and legislative power was effectively separated and a fairly independent parliament was established.<sup>14</sup> Like the 1931 Constitution, the 1964 Constitution created a bicameral parliament and vested in it the power to pass legislation and oversee the actions of the executive branch.<sup>15</sup> The parliament was given the power to approve government ministers and remove them if it found the government's performance unsatisfactory. However, Afghanistan's experience with this parliamentary democracy was short-lived due to the lack of registered political parties, low levels of participation in parliamentary elections, the government's firm control over the election process and results, high illiteracy rate, low development levels and the absence of a "liberal middle class".<sup>16</sup> Additionally, because political parties were not legal, Afghanistan lacked an important tool for institutionalizing the democratic order that the 1964 Constitution had promised, and the parliament could not monitor the executive branch.<sup>17</sup> As such, there was no productive connection between the parliament and the executive branch.<sup>18</sup> By contrast, the parliament used its powers in a negative and retaliatory way by indulging itself in "obstruction and [political] witch-hunting".<sup>19</sup>

In July 1973, Daoud Khan instigated a bloodless coup that ousted his cousin, King Zahir Shah, and put an end to the monarchy and the 1964 constitutional order.<sup>20</sup> Daoud opted to rule the country with an iron fist, adopting a constitution in 1977 that instituted an authoritarian government with no separation of powers at all.<sup>21</sup> Although the 1977 Constitution in theory did create a unicameral parliament, it did not have any meaningful powers.<sup>22</sup> From 1978, when the People's Democratic Party of Afghanistan ousted Daoud, up to 2001, when the Taliban were driven out of power, Afghanistan either had no parliament or only a symbolic one.

The fall of the Taliban regime in late 2001 provided Afghanistan with new hopes of separating executive, legislative and judicial power, establishing a national parliament and limiting executive power. Powerful Afghan elites who had won the war against the Taliban with massive international support took this opportunity seriously and sat together to draft a new constitution that would differ from previous versions in terms of its mechanisms to limit the executive.<sup>23</sup> However, the international community did have a say on the question of executive power; in fact, they favored a powerful president as the head of the executive branch.<sup>24</sup> The drafters of the 2004 Constitution thus created a powerful executive led by a strong president, but they also created a powerful parliament to keep the strong head of the executive branch in check.

14 Grote, "Separation of Powers", 897.

15 *Constitution of Afghanistan*, Official Gazette no. 12 (1343) [1964], chapter 4.

16 Grote, "Separation of Powers", 899.

17 Rosalind Dixon and Tom Ginsburg, "Deciding not to Decide: Deferral in Constitutional Design," *International Journal of Constitutional Law* 9, no 3-4 (2011), 636-672, 664.

18 Weinbaum, "Afghanistan: Nonparty Parliamentary Democracy", 57-74.

19 Martin Ewans, *Afghanistan: A Short History of its People and Politics* (New York: Harper Collins, 2002), 125.

20 Mohammad Hasan Kakar, "The Fall of the Afghan Monarchy in 1973," *International Journal of Middle East Studies* 9, no. 2 (1978), 195-214.

21 *Constitution of Afghanistan*, Official Gazette No. 360 1977 (SY 1355), chapter seven.

22 *Ibid.* Chapter five.

23 For a detailed description of the process for the drafting of the 2004 Constitution of Afghanistan, see J Alexander Thier, "The Making of a Constitution in Afghanistan," *New York Law School Law Review* 51 (2007), 557-579.

24 Barnett R. Rubin, "Crafting a Constitution for Afghanistan," *Journal of Democracy* 15 (2005), 5-19, 12. Katharine Adeney, "Constitutional Design and the Political Salience of "Community" Identity in Afghanistan," *Asian Survey* 48 (2008), 535-557, 541.

This cursory history of parliaments in Afghanistan suggests that Afghan heads of state have not taken parliaments seriously. This trend apparently did persist after the adoption of the 2004 Constitution and negatively affected the executive-legislation relations, leading to troubles for the parliament to successfully perform its duties and fulfill its constitutional mandate.

## The Post-Taliban Era: The Bonn Process and the Drafting of the 2004 Constitution

Following the removal of the Taliban regime in October 2001, the United Nations (UN) invited four leading Afghan groups to Bonn, Germany, to discuss a future government in Afghanistan.<sup>25</sup> In Bonn, Afghan representatives and their international partners signed an agreement on “Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions”, otherwise known as the Bonn Agreement.<sup>26</sup> The Bonn Agreement arranged for a timetable for a two-year transitional period; more specifically, it set up an interim government that would be followed by a transitional administration.<sup>27</sup> It also provided that the transitional administration should supervise the drafting of a new constitution for Afghanistan.

The process for the drafting the 2004 Constitution began in October 2002, when the then-president of the transitional government, Hamid Karzai, appointed the Constitutional Drafting Commission (CDC).<sup>28</sup> After the CDC finalized a first draft of the constitution, Karzai appointed another larger commission, the Constitutional Review Commission (CRC), to review the CDC draft.<sup>29</sup> The CRC consulted the public in the summer of 2003, and it later submitted its draft to the government in late September of that year. The government revised the CRC draft and publicized its own draft on 3 November 2003.<sup>30</sup> Next, a specially convened Constitutional *Loya Jirga* (Afghanistan’s constitutional convention) approved the draft constitution publicized by the government with a few amendments on 4 January 2004.<sup>31</sup> Finally, on 26 January 2004, President Karzai signed and promulgated Afghanistan’s first constitution of the twenty-first century.<sup>32</sup>

25 These groups included the Northern Alliance Group, the Rome Group, the Cyprus Group and the Peshawar Group. The Northern Alliance Group was the coalition of the former Islamists who had been hostile to the Taliban and who eventually helped the U.S.-led coalition to oust the Taliban regime. It represented diverse interests and ideologies, including a mixture of ethnic groups, each of whom wished to secure a role in governance and protect its group’s interests. The Rome Group, headed by Abdul Satar Sirat, Minister of Justice under Zahir Shah, consisted mostly of exiles living in the West, individuals associated with King Zahir Shah and ideologically linked to the 1964 Constitution of Afghanistan. The Cyprus Group included prominent members of Shia Hazaras who were supported by Iran. The Peshawar Group was comprised of Afghan Pashtuns (members of the Afghan Millat, or the Social Democratic Party that rose in the 1970s), who had supported the former King in the 1990s and had links with the Mahaz-i Islāmi Mujahideen Party. For a complete discussion of the negotiations in the Bonn Conference, see Zalmay Khalilzad, *The Envoy: From Kabul to the White House, My Journey Through a Turbulent World* (New York: St. Martin’s Press, 2016). James Dobbins, *After the Taliban: Nation-Building in Afghanistan* (Potomac Books, 2008).

26 Thier, “The Making of a Constitution in Afghanistan,” 566.

27 Agreement on Provisional Arrangements in Afghanistan Pending the Re- Establishment of Permanent Government Institutions, U.N. DOC. S/2001/1154, at 3 (accessed 5 December 2001), <http://www.refworld.org/docid/3f48f4754.html> (1 (6)) (accessed on 13 June 2018).

28 Shamshad Pasarlay, “Restraining Judicial Power: The Fragmented System of Judicial Review and Constitutional Interpretation in Afghanistan,” *Michigan State International Law Review* 26, no. 2 (2018), 245-295, 250-251.

29 Thier, “The Making of a Constitution in Afghanistan,” 566-567.

30 Shamshad Pasarlay, “Making the 2004 Constitution of Afghanistan: A History and Analysis through the Lens of Coordination and Deferral Theory,” *University of Washington*, Unpublished PhD Dissertation (2016), chapter four.

31 Saïd Amir Arjomand, “Constitutional Developments in Afghanistan: A Comparative and Historical Perspective,” *Drake Law Review* 53, no. 4 (2005).

32 Barnett R. Rubin, “Crafting a Constitution for Afghanistan,” *Journal of Democracy* 15 (2005).

The structure of the post-Taliban political system was the key issue both in the Bonn negotiations and during the drafting of the 2004 Constitution: whether the new system should be presidential or one in which a president will share executive power with a prime minister. Initially, the Bonn Agreement provided that the 1964 Constitution, with the exception of its provisions related to the King and the legislature, would remain operative until the new constitution was adopted.<sup>33</sup> Therefore, structuring the political system was left to the drafters of the 2004 Constitution.

During the interim and transitional periods set up by the Bonn Agreement, Afghanistan did not have a constitutional parliament. During this time and until the first post-Taliban parliament was elected, the cabinet of ministers became a *de facto* parliament and adopted a number of key legislation, with some of these laws eventually having considerable ramifications for the parliament that would be elected in 2005. For instance, it was during this time that the government introduced a Single Non-transferable Vote system (SNTV) to elect the parliament.<sup>34</sup> The 2004 Constitution had left the question of parliamentary electoral system open. The government therefore had to choose between the SNTV and some form of a more proportional representation system (PR), it ultimately preferred the SNTV system because of the simplicity of voting notwithstanding the technical difficulties associated with SNTV.

One of the most important issues during the drafting of the 2004 Constitution centered on the powers of the parliament.<sup>35</sup> The drafters of the Constitution (members of the CDC and CRC) maintained that the establishment of a powerful parliament is necessary to steer Afghanistan's post-Taliban democratic transition.<sup>36</sup> However, supporters of President Karzai and the international community favored a powerful executive with fewer checks on the powers of its president.<sup>37</sup> As finally written, the 2004 Constitution defines a powerful executive in which the president is the head of the state and the government.<sup>38</sup> Many powerful individuals, specifically former *mujahiddin* leaders, however, saw a powerful parliament as the only way to constrain a strong president with massive international support.<sup>39</sup> Thus, although the Constitution creates a presidential system with a strong head of state, it gives significant powers to the parliament to keep the strong executive under checks.<sup>40</sup>

Nevertheless, since September 2014, the politically brokered National Unity Government Agreement has created a *de facto* semi-presidential system in Afghanistan. In this new arrangement, executive power is, in theory, divided between a president and the Chief Executive Officer (CEO) who is effectively a prime minister.<sup>41</sup> When signed in 2014, the National Unity Government Agreement provided that within two years, meaning by September 2016, the government would convene a *Loya Jirga* (LJ) to amend the 2004

33 Bonn Agreement (2001), art. II (1).

34 Andrew Reynolds, "Electoral Systems Today: The Curious Case of Afghanistan," *Journal of Democracy* 17, no. 2 (2006), 104-117, 106.

35 Archival materials on the process for the drafting of the 2004 Constitution, records of debates in the CDC and the CRC (2002-2004) [files available with one of the authors].

36 *Ibid.*

37 Farid Hamidi and Aruni Jayakody, "Separation of Powers under the Afghan Constitution: A Case Study," (Kabul: Afghanistan Research and Evaluation Unit, 2015).

38 *Constitution of the Islamic Republic of Afghanistan*, Official Gazette no. 818 (1382) [2004], chapter 3.

39 Adeney, "Constitutional Design," 541.

40 *Constitution of Afghanistan* (2004), chapters 3, 5.

41 Kawun Kakar, Thomas Kraemer and Hamayoun Raoofi, "Evolution of the Executive Branch in Afghanistan: A Look Back and Recommendations on the Way Forward," (Kabul: Afghanistan Research and Evaluation Unit, 2017), 4.

Constitution and include a post for an executive prime minister.<sup>42</sup> However, as of this writing, the proposed LJ has not been convened.

## The Parliament under the 2004 Afghan Constitution

Modern constitutions articulate the procedures and the structures by which the representatives of the people in the legislative and executive branches make shared decisions. Constitutions around the world, however, differ broadly in dividing political power in different branches of the government and laying out the rules that regulate the interaction between the legislative and the executive branches. It is up to a country's constitution to include suitable mechanisms such as separation of power and checks and balances, to enable parliaments to play their roles of representation, supervision and legislation effectively.

With this view in mind, the drafters of the 2004 Constitution of Afghanistan created a parliament and equipped it with fairly sufficient oversight and legislative powers.<sup>43</sup> A powerful independent parliament according to the drafters of the 2004 Constitution was the only institution that could check the executive branch, especially because the drafters failed to include a supreme constitutional court in the draft constitution - a court that was expected to function as another effective check on executive power.<sup>44</sup>

The 2004 Constitution defines a bicameral parliament with a Senate (*Mishrano Jirga*) and a House of Representatives (*Wolesi Jirga*).<sup>45</sup> The Constitution designates this bicameral parliament as the supreme legislation organ in Afghanistan that should represent the entire nation. As such, although members of the parliament are elected by a single local constituency around the country, they are obliged to take into consideration the general welfare and supreme interests of the whole nation in performing their delegated tasks.<sup>46</sup> The Constitution basically defines members of the parliament as the representatives of the entire nation rather than of a particular community or constituency.

## Parliamentary Elections

The parliament's two houses are elected through different mechanisms and, as the paper discusses later, they enjoy different powers. Members of the *Wolesi Jirga* (WJ) are all elected through general, free, secret and direct voting for a term of five years.<sup>47</sup> The *Mishrano Jirga* (MJ), by contrast, includes both elected and appointed members.<sup>48</sup> To elect the MJ, the Constitution provides that, (1) provincial councils (there is one such council in each of the 34 provinces) should each elect one representative for a four-year term to the MJ; (2) all district councils within a province should elect one

42 Agreement Between the Two Campaign Teams Regarding the Structure of the National Unity Government, *The Los Angeles Times* (September 21, 2014), available at <http://documents.latimes.com/agreement-between-two-campaign-teams-regardingstructure-national-unity-government/> (accessed on 15 June 2018).

43 See *Constitution of Afghanistan* (2004), chapter 5.

44 See Dempsey, John and Their, J. Alexander, "Resolving the Crisis over Constitutional Interpretation in Afghanistan." United States Institute of Peace (USIP) Peace Briefing. Washington, DC: United States Institute of Peace, 2009. [http://www.usip.org/sites/default/files/USIP\\_0309\\_2.PDF](http://www.usip.org/sites/default/files/USIP_0309_2.PDF); (accessed on 13 June 2018).

45 See *Constitution of Afghanistan* (2004), art. 82.

46 *Ibid.* Art 81.

47 *Ibid.* Art 83.

48 *Ibid.* Art 84.

representative from amongst themselves for a three-year term;<sup>49</sup> and (3) the president of the country should appoint one-third of the members of the MJ for a period of five years.<sup>50</sup>

The Constitution requires that 50 percent of the president's MJ appointees shall be women. Besides this certain quota for women, the Constitution does not limit the president's choices in appointing one-third of the MJ members. Therefore, in appointing members to the first MJ under the 2004 Constitution in December 2005, President Karzai selected representatives from a broad cross section of the Afghan communities. His list of 34 appointments to the MJ included individuals from the *mujahiddin* groups, tribal elders and representatives from the Hindu, Sikh and Nomad minorities.<sup>51</sup> Individuals who become members of the MJ lose their membership in their related district or provincial councils. New members will be elected to fill the vacant seats in local councils.

According to the Constitution, parliamentary candidates shall only be Afghan citizens; shall not have been convicted of a crime against humanity, deprived of a civil rights, or any other crime; and shall be a minimum of 25 and 35 years of age for the WJ and the MJ respectively.<sup>52</sup> The Independent Election Commission (IEC) reviews the credentials of the candidates for membership in the parliament and makes sure they satisfy the requirements for candidacy. During both the 2010 and the 2018 parliamentary elections, the IEC made use of this power and dismissed candidates who did not satisfy the requirements. The IEC was still criticized for permitting some candidates with allegations of human rights violation.<sup>53</sup> However, it has to be noted that the IEC cannot simply block people from running for parliamentary elections without a court conviction.<sup>54</sup>

The Afghan Constitution does not specify a particular system to elect the parliament, specifically the WJ. It merely states that the system for electing the members of the WJ should provide a general and just representation for all the people of Afghanistan.<sup>55</sup> As this paper discussed earlier, in order to satisfy the general and just requirement, the drafters of the 2004 Constitution had initially made a decision that some form of proportional representation

49 District councils are not yet elected. As a result, there are no district councils to elect one-third of the MJ. For the first time, after the 2005 parliamentary election, it became clear that the government could not hold district council elections to elect the MJ. President Karzai asked the Supreme Court for advice. The Court advised that until district councils are elected, provincial council should elect to members to the MJ. As such, provincial councils elected two-thirds of the MJ while President Karzai appointed the remaining one-third.

50 *Constitution of Afghanistan* (2004), art. 84.

51 Akram Gizabi, Upper House of Afghan Parliament Begins to Take Shape, Afghan Hindus and Sikhs: Culture, Religion, History and News (16 December 2005), at <https://afghanhindu.wordpress.com/2005/12/>, [Accessed on 28 December 2018].

52 *Constitution of Afghanistan* (2004), art. 85.

53 Hamidi and Jayakody, "Separation of Powers Under the Afghan Constitution", 12.

54 More recently, in August 2018, the Independent Election Commission removed the names of dozens of parliamentary candidates from the ballot. The IEC alleged that these candidates had links with illegal armed groups. The barred candidates launched a complaint in the Independent Election Complaints Commission (IECC). The IECC ultimately decided to bar 35 candidates over the same allegations. The barred candidates argued that because no court has convicted them of links with illegal armed groups, the IECC did not have the right to remove their names from the ballot. They have now asked the Independent Commission for the Supervision of the Implementation of the Constitution (ICSIC) to review the constitutionality of the IECC decision to remove them - the dismissed candidates claimed that the IECC decision violated their constitutional right to elections. However, as of this writing, the ICSIC has not delivered its opinion. This shows that the issue is much more complicated than one might think.

55 *Constitution of Afghanistan* (2004), art 83.

(mixed member proportional representation or Single Transferable Vote) should be used.<sup>56</sup> Andrew Reynolds notes that this decision was clarified in an appendix to the Constitution.<sup>57</sup> In all forms of proportional representation (PR), political parties play a key role and people vote for political parties rather than independent individual candidates.<sup>58</sup> In open list PR, people can vote for candidates of their choice, but political parties indeed field these candidates. However, in 2004 Afghanistan did not have formal institutionalized political parties that could run for parliamentary elections. As a result, the transitional administration of President Karzai rejected PR and chose, instead, the frequently used SNTV system.<sup>59</sup>

In choosing the SNTV system, the government argued that most people in the country could not read and write, and credible political parties did not exist that could run for elections in a PR system.<sup>60</sup> However, the parliament that was elected via the SNVT system was remarkably fragmented. Candidates opted to run as independent nominees rather than as members of a registered political party.<sup>61</sup> Candidates did so despite the ballot under SNTV allowing a candidate to identify themselves as members of a registered political party. It can be argued that in 2005, when the first parliamentary elections were held, the Afghan public did not have a positive impression about political parties because of their role in the country's devastating civil war in the 1990s; therefore, candidates chose not to identify themselves thusly.<sup>62</sup>

Under the SNTV system, which is still used for parliamentary elections, seats are allocated in each electoral district consistent with the number of votes acquired by each candidate. Each province is considered one single electoral district. Seats are awarded in proportion to the population of the province.<sup>63</sup> This means that not only the candidate who gets the largest number of votes, but also the second or even third, fourth or fifth placed candidate with few votes will probably get elected to the WJ.<sup>64</sup> Furthermore, the preliminary results of the 2018 parliamentary elections revealed that under SNTV, a candidate in one electoral constituency (a province) could win a seat by winning more than twenty thousand votes. In this same constituency, it is possible that a candidate who wins, let's say, ten thousand votes might not get a seat while another candidate in another electoral district might win a seat by winning merely three thousand votes. This matter has recently heated up the debate against the SNTV.

56 Andrew Reynolds and John Carey, "Fixing Afghanistan's Electoral System Argument and Options for Reform," (Kabul, Afghanistan Research and Evaluation Unit, 2012), 106.

57 *Ibid.*

58 See Pippa Norris, "Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems," *International Political Science Review* 18, no. 3 (1997), 297-312. Michael Gallagher and Paul Mitchell eds. *The Politics of Electoral System* (New York, Oxford University Press 2005).

59 Between SNTV and PR, there are several versions of them that were unfortunately not discussed in 2004. For instance, the Single Member District (SMD) is a useful system that helps establish relation between the elected representative and their constituency, and it might also help improve the establishment of political parties. However, the government did not pay attention to this system at all.

60 Reynolds and Carey, "Fixing Afghanistan's Electoral System", 106.

61 Ali Yawar Adili, "Afghanistan Election Conundrum (5): A late demand to change the electoral system," (March 2018), available at: <https://www.afghanistan-analysts.org/afghanistan-election-conundrum-5-a-late-demand-to-change-the-electoral-system/> (accessed on 12 June 2018).

62 Anna Wordsworth, "A Matter of Interests: Gender and the Politics of Presence in Afghanistan's Wolesi Jirga," (Kabul: Afghanistan Research and Evaluation Unit, 2015), vii.

63 The most populated province gets the most seats while the least populated province is allocated at least two seats; Reynolds and Carey. "Fixing Afghanistan's Electoral System", 105, 106.

64 *Ibid.*

Although each province elects a number of members, each voter can vote for one and only one candidate in an SNTV system.<sup>65</sup> Under this system, candidates will be elected by winning the most votes compared to other candidates in a particular electoral district. For instance, if an electoral district is awarded five seats, then the top five candidates with the most votes will win seats. Thus, if collectively a party wins the majority of the votes, it does not win a majority of the seats, as it would under a PR system—the number of seats won depends on whether individual candidates that the party has nominated have performed “adequately”.<sup>66</sup> To do so, candidates are not required to be popular in their electoral district. For example, in a four-seat electoral constituency, it is possible that one candidate will win a seat with 90 percent of the votes while three others could get a seat by winning a very little percent of those votes.<sup>67</sup> Data from the 2005, 2010, and more recently from the 2018 parliamentary election results support this conclusion.<sup>68</sup>

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65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 Complete 2010 parliamentary election data and results of all the 34 provinces, which show how candidates with few percentage of votes have won a seat in the parliament, is available at the National Democratic Institute’s innovative online mapping website, and [www.afghanistanelectiondata.org](http://www.afghanistanelectiondata.org). For instance, if we look at results from Kabul province in this data, one can see how a candidate has won with more than 20,000 votes, while a few are elected by winning much fewer percentage of the votes cast.

## Organization of the Afghan Parliament

### Administrative Boards

The 2004 Constitution of Afghanistan requires both parliamentary houses to elect their administrative board at the beginning of each legislative term. The administrative board of each house is composed of a president elected for the entire legislative term, two deputies—first and second vice presidents—a secretary and an assistant secretary elected for a period of one year.<sup>69</sup> The Constitution leaves it to the regulations pertaining to the internal affairs of each house to determine the responsibilities of the administrative board and the method of its election. According to Article 8 of the Internal Rules of Procedure of the WJ (IRPWJ), the president of the WJ is elected by the secret votes of the majority of the members present in a session. After the president is elected, the rest of the administrative board is then elected by secret votes.<sup>70</sup>

Under the MJ Rules of Internal Procedure (MJRIP), the president of the MJ is elected by the votes of the “majority” of the MJ members. A candidate for the presidency shall have the support of at least 10 members of the MJ; otherwise the individual is not eligible.<sup>71</sup> In cases where no candidate wins the majority of votes in the first round of elections, a second ballot shall take place between two candidates who have received most votes in the first round. In the run-off election, the candidate who “wins the maximum of the vote in the second round shall be declared the winner of the contest”.<sup>72</sup> The MJRIP further articulates that if none of the candidates garners the majority of votes (meaning that the two candidates win equal number of votes) in the second round, new elections are held between new candidates; and the previous candidates do not have the right to compete in the new round. The election process will be repeated at least three times until there is a winner.<sup>73</sup> The rest of the members of the Administrative Board is elected by the votes of the majority of the MJ members present on the day of voting.<sup>74</sup>

The president of the WJ has the duty to administer its sessions, preserve its prestige, i.e., the credibility of the parliament and its position vis-à-vis other institutions, sign all contracts with legal entities, supervise and monitor its budget and receive the reports of its commissions.<sup>75</sup> IRPWJ provides that the rest of the administrative board should help the president in the performance of these delegated duties. The president of the MJ also has the same duties and powers. Article 14 of MJRIP provides that the president of the MJ should preside over its sessions, supervise its budget, sign internal rules of procedures, enforce disciplinary measures, evaluate reports of the administrative board and sign all letters, documents and reports.<sup>76</sup>

69 *Constitution of Afghanistan* (2004), art 87.

70 *Internal Rules of Procedure, Wolesi Jirga*, arts. 9-11 (2007), available at <http://wj.parliament.af/english.aspx>, (Accessed on 15 June 2018).

71 *Mishrano Jirga Internal Rules of Procedure*, Art. 8 (2017), available at <http://mj.parliament.af/english.aspx>, (accessed on 12 July 2018).

72 *Ibid.*

73 *Ibid.*

74 *Ibid.* art. 9.

75 *Internal Rules of Procedure, Wolesi Jirga*, art. 13 (2007), available at: <http://wj.parliament.af/english.aspx>, (Accessed on 15 June 2018).

76 *Mishrano Jirga Internal Rules of Procedure*, art. 14 (2017), available at <http://mj.parliament.af/english.aspx>, (accessed on 12 July 2018).

## Parliamentary Commissions

The Afghan Constitution authorizes each house of the parliament to establish standing commissions to study and investigate matters related to the performance of the government. For example, there is the WJ Commission on National Security and Local Administration that monitors national security institutions. Similarly, the WJ Commission on Legal Affairs takes care of internal legislation and reviews and examines draft laws. Appendix 1 shows the complete list of WJ and MJ commissions.

Each of the WJ commissions consists of 10 to 25 members, while the MJ commissions have 7 to 11 members.<sup>77</sup> Both IRPWJ and MJRIP do not articulate any specific method of electing the members of these parliamentary commissions. Instead, a member of the WJ or the MJ can sign up for a commission and the rest of the Jirga approves the membership. IRPWJ and MJRIP do require, however, that members should sign up for those commissions that are relevant to their experience.<sup>78</sup> A member of the parliament can only become a member of one commission at a time. There is no provision in the Constitution or the internal rules of procedures of the two houses about the duration of a standing commission, but practice shows that these commissions are permanent as their numbers are specified in the internal rules of procedures of the two houses.<sup>79</sup> The members of each standing commission, however, change with each parliamentary election.

Parliamentary commissions, which are an important part of many democracies, usually investigate issues and draft bills, so that the parliament has the necessary information before making a decision. Therefore, the commissions of two houses have the authority to review draft legislation that the parliament considers for approval, propose amendments, prepare and present reports to the presidents of the houses, review international treaties and agreements, investigate and review all other affairs under the jurisdiction of the parliament and question social institutions including national and international non-governmental organizations.<sup>80</sup> Additionally, the commissions of each house have the right to question officials whose appointment requires the approval of the parliament, including government ministers, the Attorney General and the head of the National Directorate of Intelligence.<sup>81</sup> These commissions thus help the parliament to perform its task of monitoring the executive branch and adopt the required legislation.

The lower house of the parliament, the WJ, has an additional prerogative, i.e., the power to set up special temporary commissions to investigate a particular government action.<sup>82</sup> No investigation can take more than six months. The parliament has made rare use of these special fact-finding commissions. For instance, in May 2013, the WJ set up a special commission to review several articles in the Law on the Elimination

77 All of the WJ commissions and who are their members can be found at: <http://wolesi.website/pve/showdoc.aspx?Id=6530>.

78 *Internal Rules of Procedure, Wolesi Jirga*, art 23; Mishrano Jirga Internal Rules of Procedure, Art. 26.

79 Complete information on all of the commissions of the WJ and their members can be found at <http://wolesi.website/pve/showdoc.aspx?Id=4282>. Information on all of the commissions of the MJ can be found at <http://mj.parliament.af/english.aspx>.

80 *Internal Rules of Procedure, Wolesi Jirga*, art. 26 (2007), available, at: <http://wj.parliament.af/english.aspx>, (Accessed on June 2018).

81 *Constitution of Afghanistan* (2004), arts. 93, 64.

82 *Internal Rules of Procedure, Wolesi Jirga*, art. 34-36 (2007), available at: <http://wj.parliament.af/english.aspx>, (Accessed on 15 June 2018).

of Violence against Women that it alleged violated Islamic law.<sup>83</sup> Similarly, in June 2013, the WJ established a special commission to investigate allegations made by Finance Minister Hazrat Omar Zakhilwal against six MPs.<sup>84</sup> Most recently, the WJ set up a commission to investigate claims of corruption against its own Speaker, Abdul Rauf Ibrahim.<sup>85</sup> However, the WJ commissions were problematic and, sometimes, they did not convene a session or did not deliver their reports to the WJ or to the people. For example, the special commission investigating claims of corruption against the Speaker of the WJ never published its findings. Similarly, the special commission that investigated criminal allegations against the MPs by the Finance Minister found them baseless without publicizing its reports, which created a political crisis.<sup>86</sup> In the aftermath of the findings of this commission, the Attorney General called them “illegal” and threatened to ask the Supreme Court to examine the procedure of the parliament’s right to set up special commissions. The main problem seems to be the lack of discipline and coordination in the parliament. Because there are not political parties in the parliament, MPs tend to gather around powerful personalities rather than ideologies and viewpoints and sometimes trade favors for their fellow MPs.

## Parliamentary Groups

Groups are fundamental to parliaments in the modern world. Specifically, in places like Afghanistan that lack functioning political parties, parliamentary groups are expected to fill this gap and help represent a means of shaping political opinion and assisting parliaments act in a more cohesive and coordinated fashion. Parliamentary groups might assist the formation of shared positions that transcend a hodgepodge of individual views to be mobilized against the executive branch. The SNTV system resulted in the formation of a highly fragmented parliament that could not offer a unified front against the executive. In this context, the creation of parliamentary groups in Afghanistan was hoped to increase the efficiency and stability of operation in a highly fragmented and undisciplined parliament.

The rules of procedure of the two houses provide that MPs may establish parliamentary groups in order to coordinate their activities. The MPs are required though to form parliamentary groups according to “shared opinions and affinities”.<sup>87</sup> There is no indication in the rules of procedure about what “shared opinions and affinities” mean. However, the rules provide that no parliamentary group can be formed contrary to the provisions of the constitution, meaning that these groups cannot be created to promote and represent personal, regional, religious, ethnic, linguistic or tribal interests. It does seem therefore that parliamentary groups in Afghanistan are expected to represent a consistent political platform that would otherwise be represented by political parties. They are expected to hold positions concerning the approval or rejection of bills and

83 See Parliament to Set-up Commission to Review Women’s Rights Law, Tolonews (20 May 2013), at <http://prod.tolonews.com/afghanistan/parliament-set-commission-review-women-rights-law>, (Accessed on 15 June 2018).

84 See Tolonews, Attorney General Calls the Findings of the Special Commission Illegal, (9 June 2013), at <http://prod.tolonews.com/afghanistan/attorney-general-calls-special-commissions-decision-illegal>, (Accessed on 15 June 2018).

85 See Jelena Bjelica and Rohullah Soroush, “Lost in Procedure: How a Corruption Case in the Parliament was (not) Dealt with” (Kabul: Afghan Analyst Network, 2018).

86 See Tolonews, Attorney General Calls the Findings of the Special Commission Illegal, (9 June 2013), at <http://prod.tolonews.com/afghanistan/attorney-general-calls-special-commissions-decision-illegal>, (Accessed on 15 June 2018).

87 *Internal Rules of Procedure, Wolesi Jirga*, art. 16 (2007), <http://wj.parliament.af/english.aspx> (accessed on 15 June 2018). The Internal Rules of Procedures of MJ further provides that the MJ should establish “Friendship Groups”. The task of these friendship groups is to maintain and strengthen relations between the Afghan parliament and other parliaments in the world. *Internal Rules of Procedures, Mishrano Jirga Internal Rules of Procedure*, art. 24 (2017), available at <http://mj.parliament.af/english.aspx>, (accessed on 12 July 2018).

expect MPs to align their votes according to shared positions.

At least 23 members of the WJ are needed to form a parliamentary group;<sup>88</sup> to form a group in the MJ, a minimum of 11 senators are required.<sup>89</sup> There is no further provision in the internal regulations of the two houses on parliamentary groups, the regulations on internal affairs of the WJ provides that an “additional regulation” should determine and regulate the organizational structure, procedure, duties and the method of the election of the administrative board of parliamentary groups.<sup>90</sup> However, that additional regulation has not come into being yet.

In practice, therefore, the formation of parliamentary groups has been problematic.<sup>91</sup> Group formation and MPs’ decision to join “newly-formed groups is largely based on who its members are, rather than the platform it holds”.<sup>92</sup> Because political activity in Afghanistan is mostly dictated by “personality-based” relationships, one should not be surprised by MPs’ decision to join parliamentary groups based on relations rather than ideological platform or shared opinion.<sup>93</sup> Therefore, one can sometimes see an MP being a member of more than one parliamentary group. Members are added to the groups based on personal relationship and favors. Moreover, most of these groups do not satisfy the requirements that the Constitution and the internal regulations of the two houses articulate. It appears that most parliamentary groups are formed merely on paper, meaning that MPs register groups, but these groups are not officially formed because they cannot attract the support of the required number of MPs,<sup>94</sup> or they failed to transcend ethnic, regional and religious interests. As such, most of the parliamentary groups that were formed dissolved shortly thereafter, as members were not united behind a unified ideological platform.<sup>95</sup> Consequently, all of these parliamentary groups have not been effective.<sup>96</sup> The following chart provides the names and numbers of the existing groups within the parliament, including groups that were registered but not formed due to the lack of the required number of members.

88 *Internal Rules of Procedure, Wolesi Jirga*, art. 18 (2007), available, at: <http://wj.parliament.af/english.aspx>, (Accessed on 15 June 2018).

89 *Ibid*, art 20.

90 *Ibid*, art 26.

91 Wordsworth, “A Matter of Interests”, vii.

92 *Ibid*. 18.

93 *Ibid*.

94 Anna Larson, *Afghanistan’s New Democratic Parties: A Means to Organise Democratisation?*, (Kabul: Afghanistan Research and Evaluation Unit, Briefing Paper Series, 2009).

95 Andrea Fleschenberg, “Afghanistan’s Parliament in the Making: Gendered Understandings and Practices of Politics in a Transitional Country”, (UNIFEM 2009).

96 Key Expert Interview (IQ), by Zalmay Mallyar in Kabul, Afghanistan (8 July 2018).

Chart I: Number and Names of 16th Term Parliamentary Groups - Groups that were established and those that did not attract the support of the required 23 members

No	Group Name	Members	Head of Group	Deputy Head of the Group
1	National League Group	11 Members (registered but not officially formed)	Ghulam Farooq Nazari	Mohammad Farhad Siddiqi
2	The Unification of the Nation Group	15 Members (registered but not officially formed)	Engineer Saheb Khan	Mulla Sayed Mohammad Akhond
3	Peace Caravan Parliamentary Group	45 Members	Haji Abdul Zahir Qadeer	General Nazifa Zaki
4	Peace Group	20 Members (registered but not officially formed)	Dr Obaidullah Kalemzai	Rahima Jami
5	Pathway/Mission Parliamentary Group (Rasalat)	34 Members	Raeis Abdulbaqi Malekzada	Mohammad Sarwar Osmani
6	Saba Parliamentary Group	28 Members	Mohammad Almas Zahid	Sherwali Wardak
7	National Prosperity Parliamentary Group	18 Members (registered but not officially formed)	Safiullah Muslim	Nasar Ahmad Ghuryani
8	Caucus Parliamentary Group (Enhancing Women's Political Participation)	22 Members (registered but not officially formed)	Fowzia Kofi	Wajhma Safi
9	The Parliamentary Group of the Voice of Justice	23 Members	Shahgul Rezayei	Chaman Gul Etemadi
10	Free Afghanistan Parliamentary Group	29 Members	Humayoon Humayoon	Mohamad Reza Khoshak
11	Independent Parliamentary Group	20 Members (registered but not officially formed)	Leyaqatullah Babakarkhail	Abdul Sabour Khedmat

Source: The Official Website of the Wolesi Jirga<sup>97</sup>

It is argued that parliamentary groups based on ideas and platforms are more likely to improve the performance of a parliament as a coherent institution than groups that are formed based to ethnic or other kinds of identity.<sup>98</sup> Ideas-based parliamentary groups “that transcend ethnic, regional, linguistic, gender, and other social barriers are more likely to be conducive to broad-based lobbying, and also long-lasting campaigns, than

97 For a complete list of the members of these parliamentary groups, see Wolesi Jirga Parliamentary Groups, at <http://wolesi.website/pvd/showdoc.aspx?Id=5565>

98 Wordsworth, “A Matter of Interests”, 17.

those whose membership is based on a specific identity group”.<sup>99</sup> Ever since the first post-Taliban parliament was elected in 2005, only few parliamentary groups in Afghanistan were formed based on ideology. Most were formed based on ethnic and regional interests and were thus not able to improve the functions of the parliament as an institution. For example, a very recent parliamentary group (see chart II below), which has been registered but not yet officially formed because it does not have the required number of members, is created based on ethnic and sectarian identity than based on shared ideas and platform. This might arguably be one reason why this parliamentary group has failed to attract the support of other members of the parliament who come from different ethnic groups.

Chart II: Etimad (Trust) Parliamentary Group Composed of a Single Ethnic Group (the Hazara Ethnic Group)

No:	Full Name		Position	Province
	Name	Surname		
1	Mohammad Noor	Akbari	Chairman	Daikundi
2	Mohammad Arif	Shajahan	Deputy	Ghazni
3	Sayed Nadirsha	Bahr	Secretary	Ghour
4	Sayed Hussain	Alemi Balkhi	Member	Kabul
5	Mohammad Ebrahim	Qasimi	Member	Kabul
6	Fatima	Nazari	Member	Kabul
7	Kobra	Mostafawi	Member	Kabul
8	Mohammad	Akbari	Member	Bamyan
9	Sayed M. Jamal	Fakkori Beheshti	Member	Bamyan
10	Safora	Elkhani	Member	Bamyan
11	Raihana	Azad	Member	Urazgan
12	Mohammad Ali	Akhlaqi	Member	Ghazni
13	Eng. Hamida	Akbari	Member	Maidan Wardak
14	Nematullah	Ghaffari	Member	Helmand
15	Abdul Qayoum	Sajjadi	Member	Ghazni

Source: The Official Website of the Wolesi Jirga<sup>100</sup>

The MJ has only one parliamentary group. The group is called National Group on the Protection of the Law. It was created in March 2015 and currently has 35 members. Engineer Haseebullah Kalimzai, a senator from Maidan Wardak Province, heads the group.<sup>101</sup> It basically reviews and comments on the draft legislation that comes to the MJ for approval.

<sup>99</sup> *Ibid.*

<sup>100</sup> See Wolesi Jirga, Parliamentary Groups, Etimad Parliamentary Group, at <http://wolesi.website/pve/showdoc.aspx?id=2043>

<sup>101</sup> See Mishrano Jirga, Parliamentary Groups, National Parliamentary Group on the Protection of the Law, at <http://www.meshran.website/pvd/document.aspx?Cat=29>

## Duties and Powers of the Parliament under the 2004 Constitution

Afghanistan's 2004 Constitution vests in the parliament more powers as compared to previous constitutions. Like many parliaments around the world, the Afghan parliament has three fundamental duties: (1) to represent the views of the entire nation; (2) to draft and approve laws; and (3) to check, control and supervise the exercise of executive power. More specifically, the parliament (both the WJ and the MJ) has the power to ratify, modify, or abrogate laws and legislative decrees;<sup>102</sup> approve social, cultural and economic development programs; approve the state budget, create, modify or abolish administrative units and ratify international treaties and conventions.<sup>103</sup> In addition, as part of their oversight duties, the Constitution grants both houses of the parliament the power to question any government minister about special issues, and the minister can provide written or oral responses.<sup>104</sup>

Although the 2004 Constitution designates the parliament as the highest lawmaking organ in the country, it also includes provisions that undermine its legislative powers. For instance, Article 97 obliges the parliament to prioritize legislative bills and international treaties that the executive introduces for approval. With respect to financial matters, the Constitution puts even stricter constraints on the parliament's authority. Under Article 98, the WJ cannot delay the approval of the state budget for more than a month. The WJ similarly is mandated not to delay decision on the government's proposal to grant or take a loan for more than 15 days. If the WJ fails to take a decision within the prescribed 15-day period, the government's proposal is considered approved. Together, these provisions seem to jeopardize the independence and legislative prerogatives of the parliament because they put it in the service of the executive branch.<sup>105</sup> The parliament has comparably less leeway than the executive to decide on these important issues. On many occasions, the parliament decides on the budget first when it is introduced in order to make the deadline.

Additionally, Article 76 authorizes the government to formulate and approve regulations that do not contradict the text and the spirit of the country's laws. The adoption of such government regulations does not require the ratification of the parliament. As such, the government can freely enact regulations that it considers necessary.<sup>106</sup> Likewise, Article 79 provides that during parliamentary recess, the government has the power to legislate through presidential decrees to deal with an "emergency situation".<sup>107</sup> The adoption of executive legislative decrees happens quite regularly, specifically on issues over which the executive and the legislature are deeply divided. For example, in June 2016, President Ashraf Ghani enacted Afghanistan's new election law through a presidential decree without the approval of the parliament. In fact,

102 The houses do not have identical legislative powers. Legislative proposals are first submitted to the WJ by the government. The legislative bill then goes to the MJ for approval. If the resolution of one house of the parliament is rejected by the other house, a joint committee is required by law. If the joint committee fails to resolve the matter, the draft comes back to the WJ. The bill will become enforceable legislation if a two-thirds majority of the WJ approves it and the president of the state signs it. *Constitution of Afghanistan* (2004), art 100.

103 *Ibid.* art 90.

104 *Ibid.* art 92.

105 Grote, "Separation of Powers", 909.

106 *Ibid.*

107 Because the Constitution does not clearly define the situations covered by Article 79, 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. *Ibid.* 910.

parliament had rejected two early decrees that were submitted for its approval.<sup>108</sup> When the parliament went on summer recess in June 2016, President Ghani issued another decree (Decree No. 159) that promulgated the Afghanistan's most recent election law.<sup>109</sup>

The 2004 Constitution does require that legislative decrees enacted during parliamentary recess should be submitted for approval after the parliament reconvenes. However, in most cases the government chooses not to do so, fearing that the parliament might reject the decree. This creates serious problems. One problem is that most of the laws enacted through presidential decrees do not in fact meet the requirements of Article 79. In other words, most of these legislative decrees were not adopted to deal with an "emergency situation" as required by Article 79.<sup>110</sup> For instance, the 2018 Penal Code of Afghanistan was adopted through presidential decree without the approval of the parliament. Similarly, the 2013 Law on the Elimination of Violence against Women and the recent Land Management Law were both adopted in normal circumstances. In all of these cases there were no "emergency situation" that requires an urgent promulgation of a law. Instead, the executive considered parliamentary recess an opportunity to promulgate laws that it expected would be rejected by the parliament.

Another and more serious problem that legislative decrees create is that courts do not apply these laws. In this regard, courts argue that such legislative decrees are not "law" (*Qanun*) as defined by the Constitution. The Constitution defines law as a document that is approved by the two houses of the parliament and signed by the president.<sup>111</sup> As such, not submitting legislative decrees for approval to the parliament affects the enforcement of decree laws because they are not approved by the two houses of the parliament are thus not "law".

As this paper discusses later, in practice, these provisions of the 2004 Constitution that vest in the executive branch some legislative power have circumvented the legislative powers of the parliament. These provisions in the Constitution have reduced the parliament to play a passive role in drafting and approving legislation. Therefore, the parliament has not been able to draft laws on its own initiative.

Furthermore, the 2004 Constitution gives the WJ significant political power to check the excesses of executive power and facilitate its role to provide oversight over the duties of the executive branch. In this respect, the constitution grants the WJ the power to question government ministers with respect to their activities; decide on development plans and the state budget and accept or reject presidential appointees.<sup>112</sup> Just as parliaments under many democratic constitutions are empowered to approve high-ranking state officials, they are also authorized to take back that approval when the officials concerned are believed to be guilty of negligence and serious violations.<sup>113</sup> One

108 Ali Yawar Adili, Salima Ahmadi, Lenny Linke, and Kate Clark, "Another Hurdle for Elections in 2016: MPs Reject Presidential Decree on Electoral Commissions" (Afghanistan Analyst Network 2016).

109 "Electoral Reform Decree doesn't Need the Parliament's Approval" *Pajhwok Afghan News* (12 June 2016). <https://www.pajhwok.com/en/2016/06/12/%E2%80%98electoral-reform-decree-doesn%E2%80%99t-need-parliament-approval%E2%80%99> (accessed on 13 July 2018).

110 *Constitution of Afghanistan* (2004), art 79.

111 *Constitution of Afghanistan* (2004), art 94.

112 *Ibid.* art 91.

113 Mohammad Hashim Kamali, *The Relationship Between Executive and Parliament and the Problem of Constitutional Interpretation and Adjudication During the Karzai Years*, (Kabul: Hamida Barmaki Organization for the Rule of Law, Working Paper 2015), 24, available at [http://www.hborl.org.af/wp-content/uploads/2017/09/HBORL-WP-2015-01-Kamali\\_Relations-between-executive-and-parliament-and-constitutional-Interpretation.pdf](http://www.hborl.org.af/wp-content/uploads/2017/09/HBORL-WP-2015-01-Kamali_Relations-between-executive-and-parliament-and-constitutional-Interpretation.pdf).

of the most important powers of the WJ is laid out in Article 92 of the Constitution. It provides that on the proposal of 20 percent of its members, the WJ can summon government ministers and question them about the activities of the related ministry. If the WJ finds the explanations of a minister not satisfactory, then it can issue a vote of no-confidence and remove a minister from office. The Constitution requires that all no-confidence votes must be based on “explicit, direct and convincing reasons” and must be approved by the majority of the members of the WJ.<sup>114</sup>

Article 92 in fact provides the WJ with four interrelated, but different, mechanisms to oversee the government ministers. The first mechanism is *istema*, in which the WJ invites government ministers to deliver a report about the activities of their ministries; this mechanism does not involve investigation by the MPs about the performance of the ministries. The second mechanism is questioning (*istejwab*), where MPs ask questions and demand clarifications from the ministers over the conduct of their ministries. The third mechanism is interpellation (*isteza*) which is commonly associated with a no-confidence motion.<sup>115</sup> The final mechanism is a vote of no-confidence. Although these mechanisms look like a process that starts from delivering reports to the parliament and might end with a no-confidence vote, it has to be noted that the Afghan parliament has sometimes sufficed with only one of these mechanisms. Most recently, for instance, on 24 September 2018, the WJ sufficed with questioning the Minister of Agriculture and Chief of the National Bank of Afghanistan about the activities of their related institutions; the WJ ultimately chose not to go further in the process.

The WJ regularly uses these mechanisms to keep the executive (specially the ministries) under their watch; and sometimes they do not hesitate to remove a government minister. For instance, on 12 November 2016, the parliament questioned all government ministers who had been unable to spend more than 70 percent of their ministry development budget for the financial year of 2015.<sup>116</sup> And when the parliament found the explanations of a number of these ministers (seven of them) unsatisfactory, it opted to remove them from their posts.<sup>117</sup>

114 *Constitution of Afghanistan* (2004), art 92.

115 Interpellation is a formal request of a parliament to a government to respond to the inquiries of the parliament. It often involves a separate procedure than questioning. This method of parliamentary oversight requires the support of a particular number of MPs. Interpellations are commonly connected directly with non-confidence votes. In a questioning session, government ministers are summoned for questions which might not involve a threat of a no-confidence vote.

116 Thomas Rutting, “Parliament Kicks out Ministers Again: A Multi-Dimensional Power Struggle” (Kabul: Afghanistan Analyst Network, 2016).

117 *Ibid.*

Finally, the 2004 Constitution provides that the parliament must approve the determination of the fundamental policies of the state, declaration of war, sending of troops to foreign countries and declaration of state of emergency. In case one house of the parliament rejects the decision of the other house on these issues, a joint committee will be formed to resolve the issue. Neither the Constitution nor the rules of the procedures of the two houses specify the duration of the work of these joint committees. If the joint committee fails to resolve the issue, the decision of the WJ is considered final. This uneven distribution of powers between the two houses reflects the precedence which the directly elected WJ enjoys in terms of democratic legitimacy over the partly appointed, partly indirectly elected MJ.<sup>118</sup>

Chart III: A Brief Comparison of the Powers of the WJ and MJ

Authorities	Wolesi Jirga (WJ)	Mishrano Jirga (MJ)
Approving or Rejecting Presidential Appointments	Yes	No
Removing Government Ministers	Yes	No (The MJ can question government ministers, but it does not have the right to remove them)
Approving State Budget	Yes	No (only provides advice)
Approving Development Programs	Yes	No
Ratifying, Modifying or Abrogating Laws	Yes	Yes
Approving Vetoed Bills by the President of the state or by the MJ	Yes	No
Chairing Joint Sessions of the Parliament	Yes	No
Supervising the Office of the President in Cases of the Death of the President and the Vice-Presidents	No	Yes
Establishing Special Investigatory Commissions	Yes	No
Ratifying International Treaties	Yes	Yes

118 Grote, "Separation of Powers", 910.

## Duties and Powers of the Parliament in Practice: 2005-2018

On 18 September 2005, almost six million Afghans voted to elect the 15th WJ in Afghanistan's history—an election that marked the dawn of Afghanistan's first democratically elected legislature in over four decades.<sup>119</sup> Exactly five years later, on 18 September 2010, Afghans once again went to the polls and elected Afghanistan's 16th parliament overall—the second parliament under the 2004 Constitution. The five-year term of the parliament (specially the WJ) elected in 2010 ended on 22 June 2015 and elections for a new parliament were due in April 2015. However, for various reasons, including lack of security, lack of election logistics, a contested presidential election, a failed election commission and lack of funding, the government failed to hold elections in 2015. The IEC ultimately decide to hold parliamentary elections in October 2018, but as of this writing, the IEC has not announced the final certified results of the elections. The parliament elected in 2010 thus remains in office, thereby surpassing its usual term limit for more than three years.

Immediately after its inauguration on 19 December 2005, the Afghan parliament began to exercise its constitutional right of oversight over the executive branch. Its first important accomplishment as a supervisory body came in March 2006, when it voted to require President Karzai's cabinet to be “approved individually, rather than en bloc”, a move that one could argue might increase the influence and control of the parliament over the executive branch.<sup>120</sup> Likewise, in May 2006, the parliament obliged former President Karzai to replace the members of the Supreme Court who were all appointed by Karzai through presidential decrees without the parliament's involvement.<sup>121</sup> The parliament further pressed that other high-ranking state officials, including the Attorney General and the director of the National Directorate of Security, can only be appointed after they receive a vote of confidence from the parliament. More recently, when the National Unity Government introduced its first cabinet ministers to be approved by the parliament, most of the nominees were rejected, with only a few being approved.<sup>122</sup> Additionally, in 2015-2016, the parliament did not hesitate to reject a number of presidential decrees that attempted to reform the country's electoral system.

The parliament's rejection of many of these nominees and legislative decrees demonstrated that it has emerged as an increasingly powerful institution with a firm goal of limiting executive power and playing a key role in making, amending and repealing laws. Most observers in fact celebrated these moves and hoped that the parliament would continue to serve as an effective check over executive actions. However, practice shows that over time the parliament has in fact struggled to keep the intensity of its supervision over the executive branch. As time passed and its relationship with the executive deteriorated, the parliament began to give up exercising those powers that improved its institutional viability and increased its leverage over the executive branch. MPs instead began to further their individual interests;<sup>123</sup> for instance, MPs adopted a parliamentary immunity law and spent most of its time in

119 Andrew Wilder, “A House Divided? Analyzing the 2005 Afghan Elections” (Kabul: Afghanistan Research and Evaluation Unit, 2005), 1.

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

121 *Ibid.*

122 Thomas Ruttig and AAN Team, “Afghanistan Has Now a Constitutional Cabinet: Eleven Minister Candidates Received Votes of Confidence,” (December 2017) available at: <https://www.afghanistan-analysts.org/afghanistan-has-now-a-constitutional-cabinet-eleven-minister-candidates-received-votes-of-confidence/> (accessed on 14 September 2018).

123 Weinbaum, “Afghanistan: Nonparty Parliamentary Democracy,” *Journal of Developing Areas* 7, no. 1 (1972).

debating the increase and extension of their pay and other privileges.<sup>124</sup> Moreover, the executive branch also began to undermine the parliament by disregarding its decisions. For example, in several cases where the parliament removed a minister from office, the executive chose to keep him/her as acting ministers. The most recent example is Salahuddin Rabbani, Minister of Foreign Affairs, whom the parliament voted out in November 2016, but remains in office as an acting minister. The parliament therefore apparently began to perform poorly, and its legislative and supervising functions were both questioned and criticized among Afghan and foreign policymakers and observers.

## The Parliament's Legislative Power in Practice

The 2004 Constitution authorizes the parliament to make necessary legislation. Legislative proposal can be initiated by the government, the Supreme Court (in judicial matters only) or through the demand of 10 MPs and the approval of one-fifth of all members.<sup>125</sup> Since 2005, when the first parliament under the 2004 Constitution was elected, the Afghan parliament has passed many laws.<sup>126</sup> However, only a handful of these have come from within the parliament, with the executive branch having proposed almost all of them.<sup>127</sup> For example, since 2005, the parliament has only managed to draft and adopt five laws on its own initiative. These laws include the 2007 Law on National Reconciliation and General Amnesty,<sup>128</sup> the 2014 Law on the Privileges and Immunities of the MPs, the 2016 Law on the Prevention of Harassment against Women and Children, the 2014 Law on Diplomatic and Consular Staff of Afghanistan and the 2017 Law on the Publication and Promulgation of Legislative Documents.

Most of the key experts interviewed for this research opined that this small number of laws (named above) suggests that the parliament's performance in this respect has been less than satisfactory. A closer look at these laws reveals that the parliament suffers from lack of expertise and legal knowledge when it comes to exercising its right to make legislation. These laws are ambiguously formulated and contain only a few articles. Furthermore, there are differences in the Pashto and Dari versions of some of these laws.

Experts pointed to the following reasons for this lack of capacity to produce legal texts from within the parliament. First, the parliament is considerably fragmented; there are no political parties or effective parliamentary groups that can play a constructive role in proposing and drafting legislation. Second, personal and partisan animosities; these animosities made it hard for many MPs to work together to draft a legislation. Third, many of the MPs lack technical higher education (appendix 2 shows the level of the education of the MPs). Fourth, many MPs are consistently absent. Fifth, there is very little legal assistance provided for legislative affairs. Although such legal assistance is provided by international NGOs under certain projects, it is only temporary. The combination of these obstacles has relegated the parliament to an institution whose only role in legislation is the approval of laws proposed by the executive branch.

124 Tolonews, "Lower House Passes Law Giving New Privileges to PMs" (12 July 2014), available at <https://www.tolonews.com/afghanistan/lower-house-passes-law-giving-new-privileges-mps>. (Accessed on 14 September 2018).

125 *Constitution of Afghanistan* (2004), art 95.

126 For a complete list of these laws up to 2016, see Ali Agha Mazidi and Nawroz Raja, *Constitutional Violations in 13 Year*, (Kabul: Afghanistan Freedom House, 2016).

127 Hamidi and Jayakody, "Separation of Powers", 15.

128 President Karzai did not sign an initial draft of the Law on National Reconciliation and General Amnesty. Later, the parliament passed the Law with two-thirds majority, and it became enforceable legislation without the signature of the president under Article 94 of the Constitution.

Moreover, the ambiguous legal framework surrounding the legislative powers of the parliament has negatively impacted its performance. Despite the fact that the Constitution grants considerable legislative power to the executive branch, it also gives the president the power to veto legislation that the parliament adopts on its own initiative or amends a legislative piece that is introduced by the executive. The parliament does have a right to overrule the president's veto by two-thirds majority, but in practice, the exercise of that right has never been unproblematic. In cases when the parliament overrules the president's veto, the president refers the resolutions to the Supreme Court for a review, as stipulated by Article 121 of the constitution.<sup>129</sup> Practice shows that the Supreme Court has sided with the executive branch in almost all of such scenarios.<sup>130</sup> As the following examples indicate, the version of the law published in the official gazette is the one in which the Supreme Court has ruled parliamentary amendments unconstitutional—one that favors provisions preferred by the executive. The following cases illustrate how the president uses judicial review to undermine the parliament's legislative powers.

In September 2009, the Afghan parliament adopted Afghanistan's long-delayed Mass Media Law (MML). In the draft that the government sent to the WJ for approval, Article 13 provided that the president should appoint the head of the state-run media channel, Radio Television of Afghanistan (RTA). The parliament amended Article 13, by adding a key provision that required the head of RTA to obtain a vote of confidence from the parliament.<sup>131</sup> By requiring the head of the RTA to obtain a vote of confidence, the parliament apparently tried to increase its leverage over the executive branch. President Karzai, however, vetoed the MML because of this specific provision in Article 13. Karzai proposed that the president should appoint the head of the RTA without parliamentary approval, as the constitution does not mention the head of RTA in the list of state officials whose appointment requires parliamentary approval.<sup>132</sup> The parliament overrode the President's veto by a two-thirds majority. Unsatisfied with the MML, President Karzai challenged its constitutionality.<sup>133</sup> The Supreme Court sided with the President and declared Article 13 of the MML unconstitutional.<sup>134</sup> The revised version of the MML was then published in the official gazette. President Karzai then appointed the head of the RTA without the approval of the parliament.

Similarly, in August 2014, the Afghan parliament passed the law on diplomatic and consular staff of Afghanistan (LDCSA). LDCSA included two controversial provisions; first, the parliament had included a provision in Article 5(1) that stated that all consular and diplomatic staff of the Ministry of Foreign Affairs must be exclusively Afghan nationals who should hold no other nationalities. Second, LDCSA required that, with the adoption of this law, all consular and diplomatic personnel of the Ministry of Foreign

129 *Constitution of Afghanistan* (2004). art 121

130 Ghizaal Haress, "Judicial Review in Afghanistan: A Flawed Practice," (Kabul: Afghanistan Research and Evaluation Unit, 2017).

131 See Qanun-i-Rasana-ha-ye Hamagani [Mass Medial Law], art 13, (*Official Gazette* no. 986) 2009.

132 See Ghizaal Haress, "Adjudicating Election Complaints: Afghanistan and the Perils of Unconstitutionality A Case Study of the Special Election Tribunal 2010" (Kabul: Afghanistan Research and Evaluation Unit, 2014).

133 Mass Medial Law, 2009 (SY 1390), art 13.

134 The Court argued that the Constitution clearly requires parliamentary approval for ministers, the Attorney General, the justices of the Court, the head of the Central Bank, the National Security Director and the members of the Independent Commission for the Supervision of the Implementation of the Constitution. Other presidential appointments to high-ranking governmental positions, such as the head of the RTA, do not require the approval of the parliament. The Court claimed that authorizing the parliament to approve the appointment of the head of the RTA would technically constitute an amendment to the Constitution. According to the Court, amending the Constitution is only the authority of the CLJ, not the prerogative of the parliament. Therefore, the Court removed Article 13 from the body of the MML and, in a footnote; the Court stated that Article 13 was determined unconstitutional.

Affairs of Afghanistan who possess dual or multiple nationalities should automatically be dismissed.<sup>135</sup> The Ministry of Foreign Affairs challenged the constitutionality of the LDSCA. In this case too, the Supreme Court sided with the government and declared articles 5(1) and 8 of the LDSCA unconstitutional.<sup>136</sup>

In short, the legislative power of the parliament in practice has effectively been curtailed over the past decade and a half. Research for this paper revealed that most MPs are not satisfied with the parliament's legislative achievements over the past 13 years.<sup>137</sup> Most feel that they have not done enough in this respect to meet the expectations of the people. They complained of their fellow MPs' lack of personal and the parliament's institutional capacity to propose and draft legislation and the executive's interference in legislative matters. In other words, they argued that MPs do not have legal knowledge and experience that can assist them in this regard. Furthermore, most of the key experts interviewed for this research pointed to the ambiguous framework surrounding the legislative power of the parliament as the key obstacle for the parliament to make laws effectively.

### The Parliament's Supervisory Powers in Practice

By contrast to its rarely used legislative powers, the parliament has widely used its oversight powers over the executive branch. However, its performance in practice has been mixed. The drafters of the 2004 Constitution vested in the parliament these supervisory powers to safeguard the institutional viability of the parliament as an independent and coequal branch of the government. Nevertheless, a major theme that emerged from the data collected in this research shows that many MPs did not concern themselves with improving the parliament's overall capacity in controlling the executive branch.<sup>138</sup> The parliament mostly resorted to the oversight mechanisms at its disposal, including the no-confidence vote, to retaliate against the executive branch instead of using this right constructively.

135 Qanun-i-Karkunan-i Diplomatic wa-Konsoli [Law of Diplomatic and Consular Staff], arts 5(1) & 8, Official Gazette no. 1105 (2014).

136 The Supreme Court argued that the Constitution requires a single Afghan nationality only for two categories of state officials - the president of the state and the vice-presidents. Besides these two state officials, there is no single Afghan nationality requirement for other state officials in the 2004 Constitution. The Court further stated that the Constitution does not require a single Afghan nationality even for government ministers. Article 72 of the Constitution states that dual or multiple nationalities should not be a barrier to appoint a minister, but the Article authorizes the parliament to either accept or reject as a minister a candidate with dual or multiple nationalities. This provision, according to the Court, meant that the president of the state could introduce as a minister an individual with multiple nationalities. The Court thus held that the framers of the Constitution required a single Afghan nationality only for the president and the vice-presidents. Any extension of the single nationality requirement to other state officials would be considered an amendment to the Constitution, which is not the power of the parliament. As such, the Court ruled that Articles 5(1) and 8 of the LDSCA were unconstitutional.

137 This view was shared by both the observers of the Afghan parliament and by the MPs interviewed for this research. This view was in fact one of the major themes that emerged from the empirical data the author collected for this research.

138 An MP interviewed for this research stated that the issue of the vote of no-confidence has become a tool in hands of the MPs to use it to pressurize government ministers to accept their "selfish" individual demands. The MP provided an example of how negatively the impeachment and the vote of no-confidence was used. That incident involved the former minister of transport. The minister had sent a formal letter to the parliament to ask to return the Ministry of Transport's vehicles that the MPs relatives used. The next day, most of the MPs were collecting signatures to impeach the Transport Minister.

The manner and frequency in which the parliament used its right to remove government ministers by granting no-confidence vote made the exercise of this oversight mechanism problematic from the very first time it was practiced.<sup>139</sup> For example, in May 2007, when the parliament removed Foreign Minister Spanta, President Karzai challenged the parliament's decision and refused to appoint a replacement for Spanta. More recently, the parliament impeached 17 ministers of the National Unity Government who had not been able to spend more than 70 percent of their development budget. Seven were voted out by the parliament.<sup>140</sup> This time President Ghani challenged the parliament's decision before the Supreme Court and kept the removed ministers in office for more than a year. Every parliamentary vote of no confidence apparently created a constitutional crisis in the country.

These oversight mechanisms including *istema*, *istejwab* and *istehza* can be problematic if exercised in inappropriate and unproductive manner (e.g., for personal interest or for retaliatory purposes).<sup>141</sup> Unfortunately, in Afghanistan most no-confidence votes have been retaliatory and not for improving the parliament's oversight power but to further the causes of the MPs. Thus, after almost each vote of no-confidence, the parliament and the executive entangle themselves in a constitutional dispute. The matter is that the executive mostly refers the constitutionality of the parliament's no-confidence votes to the Supreme Court. When the executive refers to the Supreme Court to determine the legality of these no-confidence votes, the parliament reacts by threatening the Court justices of impeachment and disregarding its decisions.<sup>142</sup> The recent dismissal of the seven ministers provides a useful example in this respect. When the parliament voted these ministers out of office, President Ghani referred to the Supreme Court to determine whether these dismissals were based on "convincing reasons". However, the parliament reacted strongly, arguing that the Supreme Court did not have the power to resolve this dispute and that it would not accept the Court's decision. At the end, therefore, the Supreme Court decided not to rule on this question at all, fearing that the parliament might retaliate.<sup>143</sup>

Moreover, the parliament has not fully and effectively exercised some of its oversight powers. For example, several MPs interviewed for this research stated that the parliament has not successfully used its right to establish special commissions to investigate the actions of the government. It is true that such commissions have been established, yet they have not taken adequate action to counter executive branch overreach. This is due to the fact that the parliament does not consistently follow the activities of such commissions and "sometimes forgets that it has set up a special commission".<sup>144</sup> For instance, in August 2011, the parliament established a special commission to investigate why the government has failed to prevent land appropriation by both state and non-

139 Mohammad Hashim Kamali, "Afghanistan's Constitution Ten Years On: What Are the Issues?," (Kabul: Afghanistan Research and Evaluation Unit, 2014), 14.

140 Thomas Rutting, "Parliament Kicks out Ministers Again: A Multi-Dimensional Power Struggle" (Kabul: Afghanistan Analyst Network, 2016).

141 Kawun Kakar, Thomas Kraemer and Hamayoun Raoofi, "Evolution of the Executive Branch in Afghanistan: A Look Back and Recommendations on the Way Forward," (Kabul: Afghanistan Research and Evaluation Unit, 2017), 34.

142 Shamshad Pasarlay, "When Courts Decide not to Decide: Understanding the Afghan Supreme Court's Struggle to Decide the Fate of the Dismissed Ministers," *International Journal of Constitutional Law*, blog post, (22 March 2017), available at: <http://www.iconnectblog.com/2017/03/when-courts-decide-not-to-decide-understanding-the-afghan-supreme-courts-struggle-to-decide-the-fate-of-the-dismissed-ministers/> (accessed on 13 September 2018).

143 On certain occasions, the parliament has used its oversight mechanisms to a negative effect. For example, in late 2017, the parliament approved 11 ministers out of 12 introduced by the executive, but it rejected the only female candidate - an action that attracted criticism from civil society groups.

144 Key Expert Interview (IQ), by Zalmay Mallyar in Kabul, Afghanistan (8 July 2018).

state actors.<sup>145</sup> Although this Special Commission did convene meetings and identified the usurped land and the number of usurpers,<sup>146</sup> the status of this special commission remained unclear.<sup>147</sup> According to one expert, this special commission did not even convene a single meeting after establishment and did not publicize its findings.

Another important function granted to the parliament is the power it has over the state budget. Under the Constitution, the government has the authority to prepare the budget and regulate financial affairs.<sup>148</sup> Matters related to the approval of the state budget by the parliament are first introduced to the MJ and passed along to the WJ with the MJ's advisory opinion.<sup>149</sup> It is the WJ that has the final say on the state budget—whether to approve it or reject it.<sup>150</sup> Although approval of the state budget is a key mechanism to control the executive branch, in practice the effectiveness of this mechanism has been mixed. MPs are accused of striking self-interested deals with the president and individual ministers as a price for their affirmative votes on the budget.<sup>151</sup> Having said that, it has to be noted, though, that the parliament has sometimes forced the executive to comply with its decision in response to an affirmative vote on state budget. For instance, in late 2016, the WJ forced the executive to introduce new ministers to replace caretaker ministers who had obtained a vote of no-confidence, a move that did result in the appointment of three new ministers.<sup>152</sup>

Experts pointed to several factors that might have impacted the parliament's performance in monitoring the executive branch. First, most MPs complained about the ambiguous constitutional framework that supposedly defines the parliament's oversight powers. For example, the Constitution does not clarify which state officials can be granted a vote of no confidence, nor for what kind of conduct. Second, most observers and MPs alike "complained of [the MPs'] lack of personal and institutional capacity to monitor government offices".<sup>153</sup> The required legal and technical knowledge are therefore missing. Finally, some MPs accused others of consistently supporting the government and blocking parliamentary initiative to impeach government officials.<sup>154</sup>

145 Hamidi and Jayakody, "Separation of Powers", 3.

146 For details on the activities of this Special Commission, see Women, Peace and Security Research Institute, "An Assessment Report Functions and Transparency of the Lower House and its Occurrence with the Laws of Afghanistan, 2010-2013," (2014) 15, available at [http://afghandata.org:8080/jspsui/bitstream/azu/17868/1/azu\\_acku\\_pamphlet\\_hq1735\\_6\\_a874\\_2014\\_w.pdf](http://afghandata.org:8080/jspsui/bitstream/azu/17868/1/azu_acku_pamphlet_hq1735_6_a874_2014_w.pdf), (accessed on 17 October 2018).

147 *Ibid.*

148 *Constitution of Afghanistan* (2004), art. 97.

149 *Ibid.* art 98.

150 *Ibid.* art 91.

151 Key Expert Interview (SRM), by Zalmay Mallyar in Kabul, Afghanistan (9 July 2018); Key Expert Interview (ZO), by Zalmay Mallyar in Kabul, Afghanistan (9 July 2018); Key Expert Interview (GRQ), by Zalmay Mallyar in Kabul, Afghanistan (10 July 2018); Key Expert Interview (HM), by Zalmay Mallyar in Kabul, Afghanistan (9 July 2018); Key Expert Interview (IQ), by Zalmay Mallyar in Kabul, Afghanistan (8 July 2018).

152 Key Expert Interview (QZH), by Zalmay Mallyar in Kabul, Afghanistan (7 July 2018); Key Expert Interview (NA), by Zalmay Mallyar in Kabul, Afghanistan (10 July 2018).

153 Marvin G. Weinbaum, "Towards a More Effective Parliament?" In *Snapshots of an Intervention: The Unlearned Lessons of Afghanistan's Decade of Assistance*, (Kabul: Afghanistan Analyst Network, 2012).

154 There are in fact three blocs of MPs within the parliament. The first bloc includes MPs who side with the government on a regular basis. The second bloc includes MPs who consistently oppose the president and the government. The third and larger bloc includes MPs whose support and loyalties are regularly shifting. Weinbaum, "Towards a More Effective Parliament?"; see also Anna Larson, "The Wolesi Jirga in Flux, 2010 Elections and Instability I" (Kabul: Afghanistan Research and Evaluation Unit, 2010).

## The Representation Duty of the Parliament

The findings of this research suggest that the Afghan parliament has underperformed in representing the people. Once candidates for parliament are elected, they do not establish local offices to keep in touch with their local constituency. Instead, the people must go through too much trouble to get in touch with their MP, making them disappointed in the performance of the parliament. Some MPs do not appear in the sessions of the parliament to discuss the problems of their constituency which has kept them out of touch with the people who voted to elect them.<sup>155</sup> Voters complained about the performance of the parliament, stating that most MPs follow their “own personal businesses”, and they rarely discuss significant issues such as wellbeing of the people and matters related to security.<sup>156</sup>

Again, as explained earlier, the problem seems to be the SNTV system. This system failed to establish relations between MPs and their constituencies. It is here that single member districts (SMDs) or proportional representation (PR) might have been more useful, albeit with satisfying the requirements of a PR and SMD system (i.e. institutionalizing political parties for PR and dividing large districts into several smaller ones for SMDs). Although these alternatives might not fix all of the pathologies of Afghanistan’s electoral system, they might help establish the relations between the MP and his/her constituency better than the current SNTV because electoral districts are smaller and people know who they vote for and who their representative is.

The 2004 Constitution does require MPs to travel to their districts twice a year (once in the summer and once in the winter for 45 days). During these times, when the parliament is in recess, MPs are required to hear the peoples’ problems and discuss them when they return to the parliament to ensure that the peoples’ views are taken into consideration. However, in practice, very few MPs have bothered traveling to their districts and talking to the people who elected them. Most use these opportunities “to travel abroad on vacations while some use the period of parliamentary recess to conduct personal businesses”.<sup>157</sup> There is no body that can hold MPs accountable for not traveling to their constituency. Although this might not be a serious violation of the Constitution, it does impact the MPs credibility and their performance.

155 Salima Ahmady, “2015 Performance of the Wolesi Jirga: Low Attendance, Nominal Oversight,” (Kabul: Afghanistan Analyst Network, 2016).

156 Nafay Choudhury and Mohammad Irfani, “Electoral Reform and the Experience of Parliamentary Elections in Afghanistan: Comprehensive Report,” Political Systems Reform Studies III, 69 (Kabul, Afghan Institute for Strategic Studies, 2018).

157 Key Expert Interview (IQ) by Zalmay Mallyar, in Kabul, Afghanistan (8 July 2018).

## Challenges for the Afghan Parliament

Some of the most important challenges facing the Afghan parliament, according to national and foreign experts, include internal fragmentation that has resulted from an ill-suited electoral system; the ambiguous constitutional framework surrounding the duties and powers of the parliament; the failure of the government to hold parliamentary elections on time; the unaccountability of the MPs to the public; the attempts of the executive to circumvent the powers of the parliament and ignore its decisions and the lack of personal and institutional capacity within the parliament. These challenges have undermined the independence of the parliament, damaged its credibility and negatively impacted its performance over the past decade.<sup>158</sup> Unless these problems are resolved, the prospect for an effective parliament in Afghanistan seems a distant hope.

### An ill-Suited Electoral System and a Highly Fragmented Parliament

One of the biggest challenges facing the Afghan parliament is internal fragmentation and lack of shared position and platforms. Ever since the first post-Taliban parliament was inaugurated in 2005, it has never acted as a cohesive institution; instead, there are roughly 249 different heads and 249 different voices in the parliament.<sup>159</sup> Results from the past three parliamentary elections indicate that candidates from varied religious, ethnic and political backgrounds were elected to the WJ.<sup>160</sup> While this is not a bad thing, the problem is that individuals coming from such diverse backgrounds were unable to unite and form alliances that transcend their individual, religious or regional interests. The WJ is thus sometimes described as “an atomized, fragmented institution and one in which numerous parties with fluid and often indistinguishable membership and platforms operate”.<sup>161</sup> By some estimates, there are 22 to 33 different political parties represented in the parliament none of which has a sizable representation that could rally behind a unified ideology or platform.<sup>162</sup>

The SNTV electoral system failed to create any meaningful form of representation and produced a fragmented and undisciplined parliament that was not able to form “functional political alliances that can respond in a organized fashion to hold the executive accountable”.<sup>163</sup> The system instead impeded the establishment of an organized parliament because it did not permit candidates to show any affiliation with political parties on the ballot during parliamentary elections.<sup>164</sup> As a result, the SNTV heightened fragmentation within the parliament and helped elect a parliament that was characterized by “unstable, unaccountable factions and personality politics,” never being able to unite behind a single ideology or a unified policy.<sup>165</sup>

158 Key Expert Interview (MHK), by Shamshad Pasarlay and Zalmay Mallyar via Skype (13 August 2018); Key Expert Interview, Marvin Weinbaum, by Shamshad Pasarlay via Skype (3 August 2018).

159 Key Expert Interview (AHN), by Zalmay Mallyar in Kabul, Afghanistan (12 July 2018); Key Expert Interview (LRS), by Zalmay Mallyar in Kabul, Afghanistan (7 July 2018); Key Expert Interview (MAR), by Zalmay Mallyar in Kabul, Afghanistan (8 July 2018).

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

161 *Ibid.*

162 *Ibid.*

163 *Ibid.*

164 See Reynolds and Carey, “Fixing Afghanistan’s Electoral System”, 8.

165 *Ibid.*

Agreeing unanimously that the key challenge for the Afghan parliament is fragmentation and personality-driven politics, almost all of the key experts interviewed for this research stated that the parliament needs to respond in a coordinated fashion and act cohesively, specifically while exercising its oversight right over the actions of the government. In this regard, many policymakers believe that the SNTV system has to be completely abandoned or reformed at least to cure some, if not all, of the challenges that have negatively affected the performance of the parliament over the past 13 years.

Three main proposals for reform emerged from the interviews. First, some observers proposed that Afghanistan should use some form of PR system (open-list PR most likely) for parliamentary elections.<sup>166</sup> Proponents of open-list PR argued that it would encourage the formation and institutionalization of political parties in Afghanistan which will run for election instead of independent individuals. The SNTV system has shown itself to be ill-suited to Afghanistan, and PR will ensure a better representation.<sup>167</sup> It will also lead to the election of a coherent, coordinated and disciplined parliament. In 2005, Barnett Rubin noted that, unlike the SNTV, “where each candidate competes against all the others, [PR system] creates incentives for cooperation among candidates and ethnic groups across a province”.<sup>168</sup> National and international experts acknowledge that Afghanistan will encounter considerable obstacles and difficulty in introducing a PR system (no matter open- or closed-list), but they warn that the establishment of an independent and viable parliament will not be possible without it.

Several experts, however, opined that Afghanistan is not currently in a situation to introduce a PR system because the country still lacks national political parties. They feared that PR will incentivize the people to vote based on ethnicity and religion rather than an overarching national policy. One observer believed that “open-list PR is not practical at all; it is impossible to have thousands of lists filled with the names of political parties and candidates and have people choose among them”.<sup>169</sup> While agreeing with the first group that the current system must be changed, they propose that a form of a mixed electoral system should be used to elect the members of the WJ. This system will combine the SNTV with closed-list PR; in some constituencies, candidates will be elected through the SNTV, while in others, voters will cast votes to a list of candidates fielded by political parties.<sup>170</sup> The key advantages of this mixed system are: (1) it will make space for political parties to emerge because list-based PR might encourage the formation of cross-ethnic and cross-religious alliances; (2) it will still let most candidates with strong local support to run as independents and be elected through the SNTV, thus reducing the sensitivity that currently exists in reforming the electoral system; and (3) losing candidates might possibly contribute to the election of their allies in the national lists.<sup>171</sup>

166 Proportional electoral system finds support among many political parties in Afghanistan. On 24 February 2018, leaders of around 21 influential political (mostly former mujahiddin) parties convened a conference in Kabul. They called for changing the current SNTV system and adopting a proportional representation system. See Choudhury and Irfani, “Electoral Reform,” 23.

167 Almost all the observers interviewed for this research shared this view. This view is also shared by some international observers. See Barnett Rubin, “The Wrong Voting System,” *The New York Times*, 16 March 2005, <https://www.nytimes.com/2005/03/16/opinion/afghanistan-the-wrong-voting-system.html>; [accessed on 4 July 2018]; see also Siddiqui, *Promoting Political Parties*.

168 *Ibid.* Rubin, however, has recently acknowledged that although PR might be a better solution for the Afghan electoral system, it does not currently look to be a practical solution for Afghanistan’s electoral pathologies.

169 Key Expert Interview (MAR), by Zalmay Mallyar in Kabul, Afghanistan (8 July 2018).

170 This is indeed one of the systems that Andrew Reynolds and John Carey propose as a replacement for the SNTV. See Reynolds and Carey, “Fixing Afghanistan’s Electoral System”, 21.

171 *Ibid.*

Finally, many proposed that a first-past-the-post (FPTP), single member district system (SMD) will be most feasible in Afghanistan, believing that PR is not practical under current situations (although it looks attractive), and that the mixed system will be a disaster because many Afghans, including party representatives and political elites, do not know how it functions. Under SMD, a larger area is divided into several geographically defined electoral constituencies, each represented by a single elected official. A candidate who gets the highest number of votes will be the winner of that smaller district. This system helps voters get a strong representation; it also increases the likelihood of accountability of the MP. Implementing the SMD will not be easy in Afghanistan because it requires the daunting task of dividing the current large electoral districts (provinces) into smaller ones, but SMD can be implemented while remaining within the SNTV system. This might make the SMD a more realistic choice, although it might certainly not cure all of Afghanistan's electoral problems.

The Afghan government has already attempted to change the much-criticized electoral system. In the new 2016 election law, the government considered redrawing electoral districts. Article 35 of the new election law instructs the IEC to “determine the Wolesi Jirga and provincial council electoral constituencies and to divide them into smaller constituencies.”<sup>172</sup> The new election law, however, does not clarify whether the smaller constituencies should be single-member or multi-member and what type of electoral system should be used to elect candidates. Despite this provision in the new election law, the October 2018 parliamentary elections took place in the same fashion as the 2005 and 2010 election, using the SNTV and large multi-member constituencies. Like the previous parliamentary elections, the 2018 elections were not free from trouble.

The SNTV indeed guaranteed the formation of unrepresentative WJ of local, tribal and religious leaders who have no incentive at all to cooperate with one another or with government unless their personal or ethnic interests are involved.<sup>173</sup> Therefore, it is time for Afghanistan to engage in a serious effort to reform its electoral system and institutions and to think about how best to do that to improve the perceived legitimacy, independence and performance of its parliament.

172 Ali Yawar Adili and Martine van Bijlert, “Afghanistan’s Incomplete New Electoral Law: Changes and Controversies,” (Kabul: Afghanistan Analyst Network, 2017).

173 Rubin, “The Wrong Voting System”. For instance, in voting on the country’s much needed higher education law, many MPs put their ethnic and linguistic agendas before any other consideration, thereby delaying the approval of the law for years. Similarly, the parliament was divided into two blocks (Pashtun vs. non-Pashtun) when it came to approving the law on National Electronic Identification Cards. In these cases, MPs ethnic interests triumphed all other national interests, and no MP was willing to cooperate with each other to form a minimum consensus to pass the much needed laws.

## The Ambiguous Legal Framework Surrounding the Duties and Powers of the Parliament

Another key challenge facing the parliament is its unclear constitutional mandate. There are ambiguities with respect to the parliament's power to monitor the state budget, the accountability of the MPs to the public and, more disturbingly, with respect to the parliament's oversight powers and the procedure that should be used when it exercises this right.

### Oversight

The 2004 Constitution of Afghanistan is ambiguous on one of the most important supervisory powers of the parliament, the vote of no-confidence. Article 92 of the Constitution provides in part that the no-confidence votes against a government minister must be “based on convincing reasons”.<sup>174</sup> But it does not clarify what “convincing reasons” means. Likewise, it does not clarify what happens after a no-confidence vote has been issued: whether the minister should remain in office until a new minister is appointed; whether the minister should resign immediately or whether the minister should be terminated indefinitely.<sup>175</sup>

After each parliamentary vote of no-confidence, the executive has consistently attempted to exploit these constitutional ambiguities in a manner that undermines the parliament by claiming they are not based on convincing reasons.<sup>176</sup> For example, in late 2007, when the parliament voted Foreign Minister Spanta out of office, the executive argued that the parliament's no-confidence vote was not based on valid reasons and opted to keep Spanta in office. Likewise, in the case of the validity of no-confidence votes against seven ministers in 2016, the executive argued on the same grounds in an attempt to disregard the parliament's decision.

Most of the interviewees noted that these ambiguities should be resolved sooner. They argued that these ambiguities could be clarified through constitutional amendment or through constitutional interpretation.<sup>177</sup> However, both options seem considerably hard at this time. With respect to amending the Constitution, most experts opined that it is not possible at this time because the government has not yet held parliamentary and district council elections to convene a constitutional LJ. Although the option to resolve these constitutional ambiguities through constitutional interpretation looks more feasible at this point, experts made it clear that the issue of constitutional interpretation must be resolved first. Currently, there are two institutions, the Supreme Court and the Independent Commission for the Supervision the Implementation of the Constitution (ICSIC), competing with one another for the right to interpret the Constitution.<sup>178</sup> Once the problem over interpretation is resolved, then the ambiguous

174 *Constitution of Afghanistan* (2004) art 92.

175 Mohammad Hashim Kamali, “Afghanistan's Constitution Ten Years On: What Are the Issues?” (Kabul: Afghanistan Research and Evaluation Unit, 2014), 9.

176 Hamidi and Jayakody, “Separation of Powers”, 1.

177 Key Expert Interview (KK) by Zalmay Mallyar, in Kabul, Afghanistan (8 July 2018); Key Expert Interview (GQ) by Zalmay Mallyar, in Kabul, Afghanistan (10 July 2018); Key Expert Interview (MAR) by Zalmay Mallyar, in Kabul, Afghanistan (10 July 2018); Key Expert Interview (NF) by Zalmay Mallyar, in Kabul, Afghanistan (8 July 2018); Key Expert Interview (JE) by Zalmay Mallyar, in Kabul, Afghanistan (13 July 2018); Key Expert Interview (AR) by Zalmay Mallyar, in Kabul, Afghanistan (11 July 2018).

178 AREU has previously conducted extensive research on the issue of constitutional interpretation in Afghanistan; there is no need to discuss this issue in greater details here. See Haress, “Judicial Review in Afghanistan”; Kamali, “Afghanistan's Constitution Ten Years On”; see also Shamshad Pasarlay, “Constitutional Interpretation”: Dempsey and Their, “Resolving the Crisis”.

provisions of the Constitution vis-à-vis the parliament should be resolved.<sup>179</sup>

### Term Extensions

Another key problem is the debate over the term of the sitting parliament which ended on 22 June 2015. The government and the IEC only managed to hold parliamentary election in October 2018. Because the final results of the elections are not yet announced, the parliament continued to remain in office beyond its constitutional term of five years.

This raised a controversial question over the legality of the parliament's extended term. The question was particularly complicated because the Constitution is remarkably ambiguous in this respect. Article 83 provides that the term of the parliament (particularly the WJ) shall end "after the declaration of the results of parliamentary election, on the 1st of Saratan<sup>180</sup> of the fifth year and the new parliament shall commence work".<sup>181</sup> The elections for members of the WJ shall be held 30-60 days prior to the expiration of the term of the sitting WJ.<sup>182</sup> A cursory reading of this Article suggests that two requirements have to be met in order to end the term of the sitting parliament and replace it by a new parliament: (1) the end of the five-year term, and (2) the declaration of the results of new parliamentary elections.

In practice, however, the issue of the extension of the term of the parliament was considerably divided and pushed Afghanistan into yet another constitutional crisis. President Ghani asked Supreme Court's opinion, and his office issued a decree that extended the parliament's term until new elections are held.<sup>183</sup> However, MPs rejected President Ghani's decree, arguing that administrative decrees concern the executive branch only and cannot extend to the legislative branch.<sup>184</sup> The parliament maintained that President Ghani's decree that attempted to extend the parliament's term was thus not within the office's constitutional powers.

The issue was seriously debated within the parliament, too. Most of the MPs maintained that the parliament could stay in office legally until new elections are held, as per Article 83. Some, however, claimed that the term of the parliament ended on 1st of Saratan of the fifth year (after five years). A few members of the parliament resigned stating that their presence in the WJ beyond the 1st of Saratan of the fifth year (roughly 22 June 2015) is not sanctioned by the Constitution. The remaining MPs chose to remain in office.

Putting the question of the legitimacy of the parliament beyond its five-year term aside, experts unanimously agree that the parliament remaining in office beyond its constitutional term has negatively affected its performance. Most MPs do not work

179 All of the interviewees including national and international stated that Afghanistan must resolve its problems over constitutional interpretation. The current ambiguous constitutional framework regarding who has the right to interpret the Constitution has been the key source of all constitutional crises in Afghanistan.

180 Saratan is a month in Persian calendar that coincides with late June and most of July.

181 *Constitution of Afghanistan* (2004), art 83.

182 *Ibid.*

183 "Afghan Leader Extends Parliament's Term, Promises New Elections," Reuters, 19 June 2015, <https://www.reuters.com/article/us-afghanistan-parliament/afghan-leader-extends-parliaments-term-promises-election-date-idUSKBN00Z20220150619>; (accessed on 11 July 2018).

184 All most of the key experts interviewed for this research shared the view.

with the same degree of enthusiasm as they used to do.<sup>185</sup> According to policymakers and practitioners interviewed in this research, the government also does not take the parliament seriously anymore.<sup>186</sup> They pointed to some of President Ghani's unilateral decisions in this respect, specifically the decree that passed the new election law of Afghanistan in June 2016, the decision to keep in office some of the ministers who were voted out by the parliament and, his most recent move in December 2018, to appoint Amrullah Saleh and Assadullah Khalid as interior and defense (caretaker) ministers respectively without parliamentary approval.

### **Lack of MP Accountability to their Constituencies**

Lack of a binding system to keep MPs accountable also indirectly impeded the parliament's performance over the past two terms. Because there is not accountability mechanism, MPs tended not to take their role seriously.<sup>187</sup> Because there is no system to ensure MPs' accountability, ordinary Afghans rarely know how their representatives vote on legal and political matters. Currently, MPs do not feel responsible to anyone, including to their local constituencies. As a result, MPs consistently promote their own business interests by constantly shifting allegiances.<sup>188</sup> In the absence of a functioning system that can impose voters' supervision on MPs, there are many chances for corruption as unqualified people can easily occupy senior executive positions while parliament will not be able to supervise them. Lack of such a system is not only leading to corruption in approving the appointment or rejection of presidential nominees, but also in passing or abrogating laws and legislative decrees.

Accountability of MPs is a key indicator of a healthy and functioning democratic system. It can ensure representation and force the MPs to provide reasons for the way they cast their votes, thereby preventing corruption and vote selling. MPs' accountability further helps build trust in the legislator,<sup>189</sup> and it provides a testing mechanism that the public can use to evaluate their performance.

To improve the accountability of MPs in Afghanistan, two major proposals were made. First, some of the interviewees believed that political parties should be encouraged. Most experts, however, opined that because Afghanistan does not have cross-ethnic political parties, this option does not look feasible at this moment. They proposed that instead of adopting a party system, it is more feasible to divide larger electoral constituencies to several smaller single member ones. In smaller electoral constituencies, voters become closer to the MPs and can maintain a direct link with them. Because MPs are easily accessible, the people can contact them any time they want and question them over the performance of their duties in the parliament.<sup>190</sup> There is an argument in favor of smaller electoral districts: MPs know their voters and, due to the fear of being removed from office, they mostly tend to perform effectively. It is furthermore argued that the SMD system might allow a wider range of political

185 Key Expert Interview (AR) by Zalmay Mallyar, in Kabul, Afghanistan (11 July 2018); Key Expert Interview (NF) by Zalmay Mallyar, in Kabul, Afghanistan (8 July 2018); Key Expert Interview (SW) by Zalmay Mallyar, in Kabul, Afghanistan (12 July 2018).

186 Key Expert Interview (IQ) by Zalmay Mallyar, in Kabul, Afghanistan (8 July 2018); Key Expert Interview (KK) by Zalmay Mallyar, in Kabul, Afghanistan (8 July 2018).

187 Key Expert Interview (IQ) by Zalmay Mallyar, in Kabul, Afghanistan (8 July 2018).

188 Larson, "The Wolesi Jirga in Flux", 8-9.

189 Key Expert Interview (IQ) by Zalmay Mallyar, in Kabul, Afghanistan (8 July 2018); Key Expert Interview (AR) by Zalmay Mallyar, in Kabul, Afghanistan (11 July 2018).

190 Key Expert Interview (HM) by Zalmay Mallyar, in Kabul, Afghanistan (10 July 2018); Key Expert Interview (IQ) by Zalmay Mallyar, in Kabul, Afghanistan (11 July 2018).

parties to enter the parliament.<sup>191</sup> The SMD system should remain functional until a culture of political parties emerges. Then, Afghanistan can move towards a more proportional representation electoral system.

## The Hostile Executive-Parliament Relationship

Ever since the first post-Taliban parliament was inaugurated in 2005, relations between the executive and the parliament have been comparably hostile and reactionary.<sup>192</sup> The executive (both under President Karzai and President Ghani) regularly attempted to undermine the parliament. The head of the executive branch has disregarded the parliament's decision on many occasions whether it was adopting a legislation or removing a government minister.<sup>193</sup> The parliament mainly uses the threat of interpellation and no-confidence vote against government ministers to make life difficult for the president. This unfriendly relation between the two branches of the government has deteriorated over time, sometimes testing the effectiveness of the constitutional model adopted for the post-Taliban Afghan democracy.<sup>194</sup>

There are several instances of confrontation between the executive and the parliament over the adoption of laws or the appointment/removal of government ministers. For instance, the Afghan parliament passed the population registration act (Census Law) in 2013 that also regulated the distribution of electronic ID cards. The Census Law was expected to enter into force in 2014. However, President Ghani issued a decree that required the inclusion of the term "Afghan" as the common nationality for all ethnic groups in the country. The parliament rejected President Ghani's decree. President Ghani ultimately ordered the presidential cabinet's Committee of Law to amend the Census Law to add nationality and ethnicity in the electronic ID cards, a move that infuriated the parliament. Ultimately, in mid-2018, President Ghani's government began to issue electronic ID cards in accordance with the amendment version of the law, not the version that the parliament had approved, meaning that the term Afghan will be included as the common nationality of all different communities.

One of the most controversial recent encounters between the parliament and the executive was the WJ's decision to impeach the entire cabinet ministers on 12 November 2016 over the ministers' developmental budget spending. Low spending of developmental budget has mostly been a major problem every single year, but this time the parliament took it seriously for some reason. In the process, the parliament voted seven key ministers out of office. These ministers had been unable to spend more than 70 percent of their ministry's development budget.<sup>195</sup> In appointing these ministers, President Ghani had gone through a great deal of discussion and political compromise with Abdullah Abdullah, Chief Executive Officer of the present National Unity Government. The executive (especially President Ghani) strongly objected to the parliament's decision to remove these ministers. President Ghani instructed the sacked ministers to stay in office, and asked the Supreme Court to "reverse the [parliament's] decision."<sup>196</sup> The Supreme Court did not deliver an opinion, and it took

191 For a detailed discussion of this argued in context of the post-communist Europe, see Sarah Birch, *Electoral Systems and Political Transformation in Post-Communist Europe*, (Palgrave Macmillan, 2003).

192 Gran Hewad, Thomas Rutting and Claudio Franco, "Tit for Tat - and Worse: The Long History of Enmity between Parliament and Government," (Kabul: Afghanistan Analyst Networks, 2013).

193 Larson, "The Wolesi Jirga in Flux", 6-7.

194 Hewad, Rutting and Franco, "Tit for Tat".

195 Thomas Rutting, "Parliament Kicks out Ministers Again: A Multi-Dimensional Power Struggle" (Kabul: Afghanistan Analyst Network, 2016).

196 *Ibid.*

the president more than a year and a half to find suitable candidates to replace these sacked ministers.

The antagonistic relationship between the parliament and the executive appears to be driven “by both the personalities involved as well as by the issues raised by a [centralizing] agenda, two botched elections and contradictory laws”.<sup>197</sup> Under these problematic situations, the WJ seems to have no means but to retaliate against the executive by targeting individual ministers.<sup>198</sup> This move apparently gives the fragmented WJ an incentive, and probably the only incentive, to come together and transcend individual stances in order to fulfill its role of being an effective check-and-balance to the executive.

The government’s recent struggle to reform the electoral system shows how hard it is to implement reforms in these conditions.<sup>199</sup> The unfavorable relationship between the executive and the parliament has been one of the key reasons why the parliament has performed less in the post-Taliban era. Besides fixing its electoral system, Afghanistan thus needs to take steps to build a culture of constructive relations between the executive and the legislature. This kind of relationships between the two branches might not develop overnight, but, by taking the right steps, it might improve.

Most observers and practitioners argue that political parties might provide the missing piece in the executive-legislative relationship by building a bridge between the two branches of the government. The lack of political parties in the parliament has facilitated executive dominance over almost all other branches of the government. Party-based parliament might lead to a constructive dialogue and debate over national policy and might force the executive to gather support from the political parties to implement its policies. Because political parties might be able to present a united front, the executive will gain more to keep a friendly relationship with the parliament rather than antagonizing it by disregarding its decisions.

197 Hewad, Rutting and Franco, “Tit for Tat”.

198 *Ibid.*

199 The parliament rejected two decrees that President Ghani issued to reform the electoral system. President Ghani then decided to issue a third decree to promulgate the 2016 election law that reformed Afghanistan’s electoral system and institutions. He chose not to submit his third decree to the parliament for approval.

## Conclusion

The 2004 Constitution of Afghanistan granted the parliament unprecedented legislative and oversight powers for the first time in the country's history. Previous Afghan constitutions, except the 1964 Constitution, either did not establish a parliament or established a symbolic one with no oversight power at all. As such, no Afghan parliament in practice has been successful in performing its tasks of representation, legislation and supervision effectively. The drafters of the 2004 Constitution, however, believed that the creation of a strong parliament is necessary to counter the powers of the powerful president. The main debates at the 2004 constitution-making bodies thus centered on how to design a parliament that can successfully perform oversight functions over the executive branch and adopt the required legislation.

This research explored the parliament's performance over the past decade and half and evaluated its legislative and political achievements. The findings of this research suggest that the parliament has performed poorly, and, unless some changes are made, there is little prospect for a viable parliament in Afghanistan. A member of the CDC, who had rigorously advocated for more powers for the parliament during the drafting of the 2004 Constitution, opined that, after seeing the experience and achievements of the parliament over the past two and a half terms, "I now regret voting for the creation of a powerful parliament during the drafting of the 2004 Constitution". He appeared unsatisfied with the achievements of the parliament over the past 13 years, arguing that MPs resort to oversight mechanisms for personal gains.

Although the parliament has only adopted five laws on its own initiative since inauguration in 2005, most experts held that the parliament's oversight powers, specifically the right to exercise the no-confidence vote, in practice have been remarkably destabilizing. They use it as a personal, retaliatory tool to force ministers to accept their demands. Practice shows that the parliamentary vote of no-confidence has very rarely been used constructively, and it is no surprise that the exercise of no-confidence vote has mostly had destabilizing effects.

One of the key conclusions that can be drawn from this research is that the 2004 Constitution of Afghanistan is very ambiguous. Specifically, ambiguities about the mandate of the parliament require urgent attention. This paper concludes that they can be clarified mainly through constitutional amendments and interpretation. Because amending the Constitution is difficult, some minor ambiguities related to the duties of the parliament can be resolved through constitutional interpretation. It must be noted, however, that for any interpretation to be effective, the current crisis over whether the Supreme Court or the ICSIC should have the power to interpret the Constitution needs to be resolved. If these changes are made and the electoral system is shifted from the current SNTV to a more proportional representation system or at least to FPTP smaller constituency for the short term, Afghanistan might be able to establish a viable and a much more effective parliament.

## Recommendations

Based on the views of the experts and practitioners interviewed for this research, the lessons learned from Afghanistan's constitutional history and other empirical evidence, the recommendations of this research paper concern how the parliament should carry out its duties effectively.

### With respect to the parliament as an independent and coequal branch of the government

One of the most ominous findings of this research suggests that the parliament has lost its position and prestige in the country. This is because the parliament has done very little to perform its constitutional tasks effectively. To rebuild the public's trust in the parliament and help it perform more efficiently, this paper recommends that the following steps should be taken:

#### Strengthen Afghanistan's electoral institutions

Afghanistan's flawed system for electing parliaments and resolving electoral disputes has always led to political crises. Electoral disputes are usually resolved through judicial or political mechanisms without the involvement of the country's electoral institutions, the IEC or IECC.<sup>200</sup> The IEC and the IECC have both been sidelined. Afghanistan will not be able to hold successful democratic elections with weak electoral institutions. A transparent system for electing the members of the IEC, enhancing its integrity, respecting its independence and clearer rules that define the duties and organization of the IEC and the IECC might help strengthen these two institutions. In addition, there should be coordination between the IEC and the IECC. The two bodies should jointly strive to improve their independence rather than fighting with each other. The IEC and the IECC should be the only bodies to decide all matters related to elections.

#### Change the SNTV system

All experts interviewed for this research unanimously rejected the SNTV system, although they differed on which system should replace it. As this research showed, the parliament has not yet used some of its oversight powers. Much of the parliament's inability to perform its constitutionally mandated role is the result of the SNTV system, which has repeatedly produced fragmented parliaments. In the short term, Afghanistan can adopt a FPTP single member district system as it looks feasible and better than the SNTV, but in the long term, the country needs to embrace some form of PR to improve cohesion and coordination within the parliament.

### With respect to the legislative duties of the parliament

The findings of this research suggest that the parliament has performed less in the areas of legislation. In order to strengthen the parliament's legislative functions, the following steps should be taken:

<sup>200</sup> For instance, the crisis that followed the 2010 parliamentary election was resolved through judicial means. In fact, President Karzai appointed a special court that would supposedly resolve the crisis. Similarly, Afghanistan's most recent political turmoil that followed the 2014 presidential election was resolved through a special power-sharing agreement between the two front-runners, Ashraf Ghani and Abdullah Abdullah. In resolving these disputes, Afghanistan's electoral institutions were pushed to the corner and played no role.

### **Increase the legislative capacity of the parliament**

The parliament needs to make greater efforts to improve its legislative record, particularly in terms of its ability to draft and review legislation. The parliament can do this by establishing an institute for legal affairs that will assist MPs. Another option in this respect can be appointing highly qualified legal advisors for each parliamentary commission. Most of the laws that the government sends to the parliament for approval are first debated in the related commission. Legal expertise in these commissions will definitely help.

### **Make higher education mandatory for parliamentary candidates**

Lack of higher education has been the main challenge according to observers that has obstructed the parliament's performance over the past years. Although some observers believed that making higher education a requirement for candidates might limit the peoples' choices to elect representatives and might impact the people's right to be elected, MPs with higher education degrees might play an effective role in improving the legislative capacity of the parliament. For instance, MPs with higher technical education degrees, such as Ramazan Bashardoost, Abdul Rab Rasool Sayyaf, Shukria Barakzai, Baktash Siyawash and a few others, were very active in reviewing draft laws.

One could argue that educating the people to elect the appropriate candidate might be a better option in this respect because the right to be elected cannot be limited by doing so. It must be noted, though, that the first option is more feasible than the second option under the current situation. It is simply not possible to educate millions of people to elect the right person for the parliament, but it does seem possible to make higher education mandatory for the candidates. Some observers believed that MPs should have at least a bachelor's degree. This requirement can be removed once higher education spreads around the country.

### **Amend the Constitution to limit the executive's legislative powers**

As this research showed, the 2004 Constitution designates the parliament as the only legislative body. However, the Constitution includes provisions that considerably undermine the parliament's legislative functions (e.g., legislations through presidential decrees, government's power to make regulations without parliamentary involvement). In the long term, the paper suggests that Afghanistan should adopt a constitutional amendment that limits the legislative power of the executive. Unless the executive's power to legislate is limited, the parliament's legislative powers will remain curtailed.

### **The Supreme Court should not have the final word on the constitutionality of legislation**

Another disturbing finding of this research concerned the executive's power to use the Supreme Court to strike down laws that the parliament passed or amended. The president has always sent laws to the Court, which regularly declared those provisions of these laws unconstitutional that the president did not like. In this respect, the paper recommends that the Supreme Court shall not have the final legal authority to strike down legislation, at least on the laws that the parliament passes with a two-thirds majority. The final say on the constitutionality of such laws should be left to the democratically elected parliament. In other words, the Court should have the right to review the constitutionality of legislation, but it should consult with the parliament before publicizing it in the official gazette. It is not recommended that his should

be a permanent solution. It can be this way for some time and when the executive-legislature relationships improve, the Court should then be given the right to have the final legal authority on the constitutionality of legislation. Experiences of countries where the legislature has the final legal authority on the constitutionality of laws might be helpful in this regard.

### **Adopt a clear executive-legislative dispute resolution mechanism**

One of the missing elements in the Afghan constitutional system is the lack of a clear mechanism to resolve disputes that emerge between the executive and the legislature. The Supreme Court did try a couple of times, but its power to do so was severely challenged, and it does not attempt to do so anymore. Therefore, Afghanistan needs an institution that could resolve political disputes between the legislature and the executive. There is a growing consensus among Afghan political elites that the Constitution should be amended to create a separate constitutional court. The creation of such a court will require further amendments to the Constitution, but many observers believed that it would be an effective mechanism to resolve disputes between the two political branches. If this court is created, it should also have the right to review the constitutionality of laws. It might thus fix some of the problems that currently exists between the Supreme Court and the parliament.

### **With respect to the oversight duties of the parliament**

The results of the parliament oversight duties have been mixed. Although it actively exercised its oversight duties, most of the observers criticized the way it used its oversight duties. Most believed that the parliament did not follow a clear mechanism while exercising its oversight powers and for that reason the exercise of this right has been less successful. To improve the performance of the parliament in this respect, the paper's recommendations include the following:

#### **Adopt a parliamentary oversight law**

The parliament has abundant oversight powers under the 2004 Constitution, but it has not made effective use of them. Hence, a law should be adopted that will clearly define when and how the parliament will use oversight mechanisms (summoning, impeachment and no-confidence vote). This law will have to define state officials that can be voted out by the parliament and further clarify the consequences of no-confidence votes.

#### **Limit the use of no-confidence vote**

As the findings of this research suggest, the use of the no-confidence votes has turned into a habit among individual MPs furthering their own interests, rather than a mechanism of checking executive power and improving the parliament's functioning. It has been used too often, and it is mostly not based on "convincing reasons" that the Constitution requires. Currently, the no-confidence vote is used for matters as important as national security and matters as unimportant as the use of government vehicles by the MPs. One MP stated that MPs tried to impeach the Minister of Transport and remove him from office because he had asked them not to use government vehicles for personal purposes. Therefore, the issues for which the parliament can resort to impeachment and no-confidence vote should be clarified and limited to those particular instances.

**Require MPs to cast their no-confidence votes openly**

Afghanistan's history suggests that too many no-confidence votes can result in considerable instability and slowness in performance as government ministers constantly come and go. To avoid this situation, the paper recommends that MPs should be required to vote openly in removing government ministers. Currently, the confidence and no-confidence votes are cast secretly. One observer stated that sometimes it happens that the "good" minister goes and the "bad" minister stays. Most observers believe that the secrecy of confidence and no-confidence votes has paved the way for bribes and systematic corruption within the parliament. Open votes of no-confidence will help avoid bribe taking and might thus assist the "good" ministers to remain in office.

**Encourage the parliament to use its right to form parliamentary groups and use all of its powers**

The Afghan parliament is considerably fragmented because election laws did not give political parties room to run for parliamentary elections. To fill this gap, however, the IRPWJ authorizes the formation of parliamentary groups. In practice, MPs have failed to form successful parliamentary groups because of the lack of a productive mechanism for group formation. The IRPWJ is ambiguous in terms of group formation and sustenance, and it should be amended to include clear and productive mechanisms for effective parliamentary groups.

Similarly, the parliament needs to make greater use of all of its oversight powers. Although it has exercised some oversight powers with great frequency, it has not used all of them. For example, the WJ has rarely used its right to form special commissions to investigate actions of the government. To exercise this right more effectively, the parliament should adopt the required mechanisms and follow the work that the commission performs and report to the general sessions of the parliament.

**The executive branch should respect the decisions of the parliament**

It is true that the parliament has been guilty of underperformance. However, one should not disregard the role of the executive branch. The executive branch regularly interferes in parliamentary matters, including in parliamentary elections. A constructive executive-legislature relationship cannot be institutionalized unless the executive respects the decisions of the parliament and works for the improvement of democratic legitimacy rather than obstructing its independence and authority.

## Appendix 1: Commissions of the Wolesi Jirga and the Mishrano Jirga

### Wolesi Jirga Commissions

No	Commissions	Chairmen	Assistant	Secretary
1	Commission on International Affairs	Zimarak Padkhwabi	Mohammad Dawoud Kalkani	Farida Hamidi
2	Commission on Internal Affairs	Engineer Iqbal Safi	Abdolhai Akhundzada	Shakila Hashemi
3	Commission on Defense	Nisar Ahmad Ghoryani	Ali Akbar Qasemi	Engineer Nafisa Azimi
4	Commission on Finance, Budget	Muhammad Azim Mohseni	Zakia Sangin	Roqya Nayel
5	Commission on Compliance	Obaidullah Barakzai	Abdul Jabbar	Haji Amir Jan
6	Commission on Legislative Affairs	Farhad Azimi	Abdul Sattar Khawasi	Ahmad Behzad
7	Commission on Women's Affairs	Fawzia Koofi	Masouda Karokhi	Aziza Jalees
8	Commission on Judicial, Justice	Seyyed Mohammad Hassan Sharifi	Mohammad Sarwar Osmani Farahi	Masouma Khawari
9	Commission on National Economy	Mir Rahman Rahmani	Monawar Shah Bahadori	Rangina Kargar
10	Commission on Transport, Telecommunications	Qais Hassan	Mohammad Farhad Sediqi	Musa Khan Nasrat
11	Commission on Education and Higher Education	Kamal Nasir Ussouli	Khalilullah Shahibzada	Layluma Hakimi
12	Commission on Counter-Narcotics	Muhammad NahimLali	Naqibullah Fayeq	Chaman Shah Etemadi
13	Commission on Nomads	Shair Ali	Habib ul-Rahman Afghan	Hamida Ahmadzai
14	Commission on Immunities, Rights and privileges	Ahmad Ulla Mowahed		
15	Commission on Natural Resources and Environment	Safiullah Muslim	Reyhana Azad	Abdul Rahman Shaidani
16	Commission on Central Investigation	Mohammad Hossein Faramosh	Dr Zahir Sa'adat	Asifa Shadab
17	Commission on Health	Mujib Rahman	Mohammad Saleh Saljouqi	

## Meshrano Jirga Commissions

No	Commissions	Chairmen	Deputy	Secretary
1	Commission of religious, cultural, education, higher education and scientific research affairs	Abdul Latif Nahzatyar	Lyluma Ahmadi	Mir Bahadur Wasifi
2	Commission of International affairs	Eng. Ahmad Jaweed Rawoof	Mohammad Usman Rahmani	Fawzia Sadat
3	Commission of national economy, financial and badge (development village, agriculture and livestock, NGOs, banks and inspection of finance affairs)	Mohammad Azim Qoyash	Saliha Mehrzad	M. Nadir Safari
4	Commission of legislative affairs, judicial affairs (legal control, human rights, administrative reforms and campaign against corruption)	Mawlawi Ghulam Muhaiuddin Munsif	Alhaj Mohammad Hassan Hotak	Aziza Musleh
5	Commission of disables and public welfare affairs (martyr's family, natural resources and environment, health, work and workers, physical education and Red Crescent)	Nisar Ahmad Haris	Tayba Zahidi	Sara Sarkhabi
6	Commission of transportation and telecommunications (cities development, housing, transport, aviation, social benefit, energy and water, municipality of Kabul)	Lutfullah Baba	Mod Hassan Rahim Yaar	Gulaly Akbari
7	Commission of hearing complaint	Mohammad Hanif Hanafi	Gul Ahmad Azami	Muhammad Qais Wakili
8	Commission of provincial council, districts and immunity and privileges member of session	Qari Mir Hatim Tarakhil	Haji Rahmatullah Achakzai	Ustad Tayib Ata
9	Commission of tribal, borders, refugees and displaced	Dr Mohammadajan Mangal	Roshan Ara Alekozai	Farida Kochi
10	Commission of defensive affairs and internal security (local organs, campaign against drugs and intoxicants)	Muhammad Hashim Alekozay	Rana Tareen	Fatima Akbari
11	Commission of women affairs and civil society	Siddiqa Balkhi	Suhaila Sharifi	Nabila Mostafazada
12	Commission for the disabled, martyr's descendants and refugees	Bibi Haji Nafisa Sultani	Abdul Baqi Baryal	Chaman Shah Etemadi

## Appendix 2: Educational Composition of the Wolesi Jirga

Source: Women, Peace and Security Research Institute, “An Assessment Report Functions and Transparency of the Lower House and its Occurrence with the Laws of Afghanistan, 2010-2013,” (2013), at [http://afghandata.org:8080/jspui/bitstream/azu/17868/1/azu\\_acku\\_pamphlet\\_hq1735\\_6\\_a874\\_2014\\_w.pdf](http://afghandata.org:8080/jspui/bitstream/azu/17868/1/azu_acku_pamphlet_hq1735_6_a874_2014_w.pdf) [accessed on 5 January 2018].

Education	Number	Percentage
Private Education/Madrassa Education	3	1.2%
Elementary/Under Grade 12	3	1.2 %
High School Graduates/ Grade 12 Certificate	98	40%
Graduate of Grade 14/ High School, Plus Two Years Professional Training	18	7.2%
Bachelorette degree	106	42%
Masters’ Degree	19	7.6%
Doctorate	2	0.8%

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