Separation of Powers under the Afghan Constitution: A Case Study

Farid Hamidi and Aruni Jayakody

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Case Study

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Cover photo: Members of Parliament voting during a Parliamentary session. Cover photo by Gulbudin Elham.

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March 2015

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Glossary

Loya Jirga	Grand Council, Constitutional Assembly
Meshrano Jirga	Council of Elders, Upper House of Parliament
Wolesi Jirga	People's Council, Lower House of Parliament

Acronyms

AIHRC	Afghanistan Independent Human Rights Commission
ICOIC	Independent Commission for Overseeing the Implementation of the Constitution
IEC	Independent Election Commission
LJ	Loya Jirga
MJ	Meshrano Jirga
NUG	National Unity Government
WJ	Wolesi Jirga
SNTV	Single Non-Transferable Vote

Executive Summary

The separation of power under the Afghan Constitution suffers from flaws, both on paper and in practice. Power is firmly tilted in favor of the executive, at the expense of the judiciary and the legislature. The no-confidence vote against the then Foreign Minister, Dr Rangin Spanta, brought to the fore ambiguities in the Constitution as well as inherent weaknesses in the way each branch of government operates. The ensuing political crisis severely tested the existing constitutional architecture, and demonstrated that in high-stakes moments none of the branches of government are willing to accept the constitutional powers and duties of the others. This Case Study examines the way power has been separated under the Afghan Constitution, and using the events relating to Dr Spanta's no-confidence vote, analyses how they have functioned in practice.

This first section examines the powers and duties assigned to the three branches of government under the 2004 Constitution, and analyses both strengths and weaknesses in the way power has been separated on paper. The second section focuses on the no-confidence vote against Dr Spanta and unpacks the political factors that drove the sequence of events, as well as legal and constitutional implications of the events. The research for this paper was conducted in the form of literature review of relevant academic sources, news media articles and legal documents. Several interviews were also conducted with relevant individuals who closely observed the events relating to the no-confidence vote, and data gathered from these interviews were used as background information for the Case Study.

Under the current Constitution, the President has significant powers to enact laws and has control over how appointments are made to all levels of the judiciary. This has undermined both the separation and balance of power under the Constitution. Further, the Single Non-Transferable Vote (SNTV) electoral system has produced a fragmented parliament that is unable to form functioning political alliances that can respond in a coordinated fashion to hold the executive accountable. Similarly, the judiciary has struggled to establish itself as an independent branch both because of a weak constitutional architecture as well as a historical lack of institutional capacity within the judiciary.

The events following the no-confidence vote against Dr Spanta triggered a prolonged political and constitutional crisis that tested how power has been separated under the Constitution. Throughout the crisis the executive exploited ambiguities and gaps in the Constitution, and sought to act in an extra-constitutional manner. The Parliament divided; yet, motivated by a desire to retaliate against the President, targeted individual ministers. The judiciary, beholden to the executive, continued to issue decisions that appeased the government.

It has been suggested that these constitutional battles are merely the "growing pains" of a new democracy. That the prolonged battles between the executive and the legislature, and in particular the practice of repeatedly issuing no-confidence votes, are in fact evidence that inter-branch checks are indeed working. However, even if these constitutional battles are merely the signs of a nascent, yet functional democracy, they have come at a heavy price. At a time when it is needed the most, these constitutional battles have eroded public confidence in government institutions.

Within the context of the National Unity Government (NUG), these questions relating to the separation of powers take a special significance. At present, in the event of a dispute between the CEO and the President, there is no political or legal consensus over who has authority to interpret the Constitution. Issues such as the legal effect of a no-confidence vote as well as who has the power to interpret its validity can have significant political ramifications, and ultimately undermine the agreement underpinning the NUG.

In order to strengthen the separation of powers under the Constitution, greater efforts must be made by each branch of government to exercise its powers and duties in a constitutionally mandated manner:

- Limit executive overreach: The executive should strictly adhere to the limitations placed on the exercise of its constitutional powers. For example, use of legislative decrees should be limited to genuine cases of "immediate need," and all such decrees should be tabled before Parliament within the time frame stipulated by the Constitution. The executive should actively seek to facilitate independence within the judiciary, and ensure the integrity in the process of appointing judges to the Supreme Court.

- Strengthen the judiciary: The executive should take immediate steps to nominate judges to the vacant seats of the Supreme Court and address other issues such as implementing the constitutionally mandated staggered terms, improve remuneration of judges and facilitate greater autonomy to the court in developing its budget. Similarly the judiciary should take steps to improve the capacity and competence of judges at all levels, and foster a culture of judicial independence.

- Improve performance of Parliament: The Parliament should make greater use of its oversight powers, for example under Article 89 of the Constitution, by investigating government actions. Similarly, it needs to make greater efforts to improve its legislative record, particularly in terms of its ability to draft and review legislation.

1. Introduction

Under the Afghan Constitution, power is separated among the executive, the National Assembly and the judiciary. There are numerous challenges in the way powers have been divided on paper as well as the way they have been implemented in practice. Power is firmly tilted in favor of the executive, often at the expense of the judiciary and the Parliament. The President has the power to enact laws, as well as significant control over appointments to all levels of the judiciary. This Case Study examines the powers and duties of each branch of government, and how the checks and balances have functioned in practice.

The Parliament has important powers to provide oversight over actions of the executive, for example through its powers to review and vote on legislative decrees; monitor fiscal spending by government; establish special commissions to investigate actions of government; and summon and question government ministers before Parliament. Some of these powers, such as scrutiny over the budget process, have been exercised (albeit in a chaotic manner) while others, such as the power to establish special commissions to investigate actions of government, have not yet been used.[1] Much of the legislature's inability to perform its constitutionally mandated role is the result of the SNTV system, which has repeatedly produced fragmented parliaments. In the absence of established political parties, the Afghan legislature has struggled to establish coherent, functioning political alliances that can act in a coordinated fashion to respond to executive action.

The judiciary suffers from institutional design flaws that fundamentally impede its capacity to function as an independent branch of government. As noted above, the President has significant control over appointments to all levels of the judiciary. The Constitution also limits the capacity of the judiciary to conduct judicial review, which seriously undermines its ability to act as a check or balance against other branches. In particular, the Constitution only provides that the government or the courts can request a judicial review from the Supreme Court. Thus, the current Constitution does not provide standing to anyone politically opposed to the President (i.e., the National Assembly members, members of the opposition or political parties) to seek judicial review before the Supreme Court.

These inherent weaknesses and ambiguities in the way power has been separated among the three branches of government were brought to the fore in the aftermath of the no-confidence vote against former Foreign Minister, Dr Spanta. In May 2007, Refugees and Repatriation Minister Akbar Akbar and Minister Spanta were summoned before Parliament and questioned over the mass deportation of Afghan refugees and workers from Iran. Both failed to survive a no-confidence vote against them. In response, the President accepted the no-confidence vote against Minister Akbar, but referred the vote against Spanta to the Supreme Court, questioning the procedure used by the Parliament to dismiss a minister via a no-confidence vote.

The following events sparked a prolonged political and constitutional crisis among all three branches of government. A marked feature of the dispute was that instead of merely disputing the politics or the legality of the issue at hand, each branch sought to challenge the constitutional powers and duties of the other branches. The Supreme Court, as expected, delivered an opinion holding that the vote to oust Dr Spanta was unconstitutional. The Wolesi Jirga (WJ) questioned the President's authority to refer the matter to the Supreme Court, and sought to challenge the authority of the Supreme Court to interpret the Constitution by enacting legislation that created the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC), with parallel powers of constitutional interpretation. At first instance the President rejected the law proposed by the Parliament, and the Parliament responded by passing the ICOIC law by a two-thirds majority. The President responded by referring the law to the Supreme Court, which was

1 In August 2011 the Parliament did establish a special commission to investigate land appropriation practices. However, the status of this commission and whether it was established under Article 89 is unclear. See also 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, http://www.riwps-afghanistan.org/site_files/13783111101.pdf (accessed January 2015).

held to be unconstitutional. Despite this ruling, the ICOIC has since been established, and Afghanistan at present continues to have two bodies with the power of constitutional interpretation.

Since the ousting of Spanta, a fragmented Parliament has come together repeatedly on the issue of no-confidence votes against government ministers. Numerous ministers and senior government officials, including the Attorney General and Supreme Court justices, have been summoned before Parliament and dismissed for a range of reasons. The executive's response has been varied. At times the no-confidence votes have been accepted, while in other instances, the President, although seemingly accepting the decision, has retained the minister as "an acting minister." In one instance, while accepting the no-confidence vote against a minister, a short period later appointed the same minister to another closely related portfolio.

2. Methodology

The main form of research for this paper was undertaken through a desk review. The desk review consisted of books, reports, journal articles, online sources and informal minutes of meetings and newspaper articles that covered the constitutional text and its implementation.

Interviews were conducted with a small number of experts to discuss questions relevant to theoretical concepts of separation of power and the relevance of those questions in the current Afghan context. Additional interviews were also conducted with experts who closely observed the events relating to the no-confidence vote and the ensuing political and constitutional crisis between Parliament and the executive. The data gathered from the interviews were used as background information in the writing of the paper.

3. Separation of Powers

In Afghanistan's constitutional history, the concept of separation of powers was first seen in the 1931 Constitution. However, a meaningful separation of powers was only provided for in the 1964 Constitution.[2] The basic premise underlying the separation of powers is that where the same entity is responsible for enacting, executing and enforcing laws, it may lead to tyranny. The French philosopher Montesquieu, in his original articulation of the concept, provided as follows:

> *"When the legislative and executive power are united in the same person, or in the same body of magistrates, there can then be no liberty; because the apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."*[3]

In practice the concept provides for a framework where the legislature is responsible for enacting laws, the executive is responsible for their enforcement, and the judiciary is responsible for their application and interpretation. According to theory, separating power among different branches has numerous advantages. First, it can prevent governments from acting purely out of self-interest or majoritarian interests (as they will be checked by other branches), and second, the organs of government will be "mutually accountable" to one another, as one or more branches can act to check or balance the actions of another branch that acts in excess of their constitutionally mandated role.[4]

There is no one correct or standard way to separate powers in a constitution. Powers can be separated at the horizontal level (among actors at the national level) and at the vertical level (between national and provincial actors). This paper will focus on horizontal separation of powers in Afghanistan. In different contexts, there can be strict or not so strict separation of powers. Generally in presidential systems, power is separated more strictly than in parliamentary systems. This is because in parliamentary systems, the Prime Minister and the Cabinet are part of the legislature and the Prime Minister as the head of government exercises many powers traditionally deemed to fall within the executive. In the Afghan context, power is less strictly divided as the Constitution provides for a strong executive with wide-ranging powers that at times impinge on areas traditionally deemed to fall within the legislature and the judiciary.

3.1 Separation of powers under the Afghan Constitution

Under the Afghan Constitution the powers of the three branches of government are divided between the executive, the Parliament and the judiciary. Separation of powers, in order to be effective, must be evident on paper as well as in practice. The following section will first outline the powers and duties of each branch, and discuss how these powers have been exercised in practice. Under the Afghan Constitution there are numerous challenges in the way the powers have been divided on paper. In particular, power is firmly tilted in favor of the executive, often at the expense of the judiciary and the legislature. Despite the powers that have been granted formally to the judiciary to, for example, conduct judicial review of legislative decrees, thus far there has been little capacity to exercise them effectively and serve as a check against the excesses of the executive.

3.2 The executive

The executive consists of the President, two vice presidents and the Cabinet. The President is elected directly by the people and must receive more than 50 percent of the votes cast.[5] During the drafting process there was a concern that what Afghanistan needs above all is stability and strong

2 Rainer Grote, "Separation of Powers in the New Afghan Constitution," *ZaoRV* 64 (2004): 897, 913, 899. The 1931 Constitution established a bicameral Parliament, however a "meaningful separation of power," which included an independent judiciary and a parliament with full law-making powers was established under the 1964 Constitution.

3 Montesquieu, Baron de [Charles Louis de Secondat], *The Spirit of Laws*, vol. 1, T*he Complete Works of M. de Montesquieu* (1748), 6:199, http://oll.libertyfund.org/titles/837 (accessed 1 November 2014).

4 Richard Bellamy, "The Political Form of a Constitution: The Separation of Powers, Rights and Representative Democracy," in *The Rule of Law and Separation of Powers*, ed. Richard Bellamy, 253-274 (London: Asghate, 2005*)*, 253.

5 *Constitution of Afghanistan*, Articles 60, 61, 2004 (SY 1382). All English citations of the 2004 constitution have been taken from the Ministry of Justice website: http://moj.gov.af/en/page/1684.

state institutions. This argument was driven by the historical experience of Afghans who have gone through almost two decades of chaos, lawlessness and provincial and regional fiefdoms ruled by warlords. Thus, the 2004 Constitution reflects a clear intention to create a strong executive with extensive responsibility for the functioning of government.[6] The President functions as both head of state and head of government. The President has wide powers to conduct foreign policy, set the domestic agenda, and pass regulations to facilitate the implementation of national policies. The legislature and the judiciary have limited mechanisms at their disposal to hold the President accountable. With the vote of two-thirds of its members, the WJ can initiate proceedings to impeach the President where he is accused of treason or criminal activity.[7] The accusation is then considered by a Loya Jirga (LJ), and upon the vote of two-thirds of the latter, the President is tried before a Special Court. The Special Court is comprised of political figures and three justices of the Supreme Court.

3.3 The role of the vice presidents

Both vice presidents (VPs) are elected on the "same ticket" as the President.[8] The two VPs have been given limited roles under the Constitution. The first VP is identified as the direct successor of the President.[9] The second VP is given no express constitutional role at all. Given the fragile security environment, it was envisaged that having two vice presidents was necessary to ensure continuity of government.[10] Thus, it is presumed that in the absence of the first VP, the second VP will succeed him.

Having two VPs has also allowed for ethnic minorities to be represented at the highest levels of government. In 2004, President Karzai chose Ahmad Zia Massoud, a member of Jamiat-e-Islami faction and brother of Ahmad Shah Massoud, who led the fight against the Taliban in the north as first VP and Karim Khalili, a leader of Hazbi-e-Wahdat party as second VP in an effort to appeal to Tajik and Hazaara voters. In the 2009 elections, President Karzai replaced Zia Massoud with Marshal Mohmmad Fahim Qasem, a powerful commander of Shura-e-Nizar and a former aide to late Ahmad Shah Massoud.

In practice each of the VPs are assigned to chair and oversee different sectors of government. The first VP often acts as chairman of the Economic Development Committee of the Council of Ministers, while the second VP is tasked to lead the Legislative Committee and the Committee for Preparation of Disaster Prevention and other ad hoc committees established by the executive.

The VPs in both terms have exercised different degrees of authority within the executive branch and have largely remained out of the sight of Parliament. The VP's influence in ministerial and other executive branch appointments has been significant, yet there has been no mechanism to hold them accountable before Parliament.

3.4 Duties and powers of the President

The President is given the power to act as both the head of state and head of government. During the drafting process the Constitutional Review Commission submitted a draft which provided for a semi-presidential system with both a prime minister and a president. Under this proposal the people directly elected the President, and the Prime Minister was to be chosen by the WJ. In this proposal, similar to the 1964 Constitution, the President would have had the power to appoint the Supreme Court justices and one-third of the Meshrano Jirga (MJ). The Prime Minister would have been responsible for "enforcing laws, protecting Afghanistan's sovereignty, pursuing national interests, managing financial issues, and reporting to the National Assembly."[11] However, this

6 Rainer Grote, "Separation of Powers in the New Afghan Constitution," *ZaoRV* 64 (2004): 897-915, 905.
7 *Constitution of Afghanistan*, Article 69.
8 *Constitution of Afghanistan*, Article 60; Grote, "Separation of Powers in the new Afghan Constitution," 905.
9 *Constitution of Afghanistan*, Article 67.
10 Grote, "Separation of Powers in the New Afghan Constitution," 905.
11 Rose Ehler, Elizabeth Espinosa, Jane Farrington, Gabe Leeden and Daniel Lewis, *An Introduction to the Constitutional Law of Afghanistan* (Stanford: Afghanistan Legal Education Project, 2013), 105; International Crisis Group, "Afghanistan: The Constitutional Loya Jirga," 12 December 2003, http://www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/B029%20Afghanistan%20The%20Constitutional%20Loya%20Jirga.pdf.

proposal and the broader idea of a prime minister was rejected as it was reasoned that creating two executives with "competing bases of power" (one with popular support versus the other with parliamentary support) would create further instability in a country that was already fragmented, and experiencing armed conflict.[12]

During the drafting stage it was thought that Afghanistan's first priority should be to establish strong state institutions. Given the struggle for control between the centre and the periphery, and in particular given the presence of local power holders in the form of armed groups and warlords, centralisation of power was deemed essential. Thus, devolution of power to provincial actors was ruled out, as it was feared that such a structure might further enable "extra-legal power holders."[13]

Chapter three of the Constitution provides that the President has the power to execute authority in "the executive, legislative and judicial fields."[14] In this sense the 2004 Constitution is a marked departure from the 1964 Constitution as it combines the powers of both the King and the Prime Minister in the President.[15] Scholars have noted that by granting the President power to exercise authority in all three areas of government, Article 60 reinforces the "monarchial origins of the president."[16] In fact, many of the powers listed in Article 64 of the 2004 Constitution find their origins in Article 9 of the 1964 Constitution, which provides for the "rights and duties of the king."[17]

New members of the Afghan cabinet being sworn in during a ceremony by President Karzai.

12 For a discussion of the politics that motivated a shift from a semi-presidential system to a presidential system see Barnett Rubin, "Crafting a Constitution for Afghanistan," *Journal of Democracy* 15, no. 3 (2004): 5-19, 12-13. Rubin notes that when it came down to a vote for a presidential versus parliamentary system, the Pashtun delegates supported a presidential system. For the latter, it was clear that one of their own (President Karzai) would emerge as the first President. The United States also backed a presidential system, as it would produce a system with a "clearly identifiable Afghan partner." However, other ethnic groups preferred a parliamentary system arguing that it would facilitate a coalition government that would be more representative and inclusive and less prone to executive overreach. In response, it was countered that in conflict affected countries with multi-ethnic constituencies, parliaments can become polarised along ethnic lines.

13 Rubin, "Crafting a Constitution for Afghanistan," 12-13.

14 *Constitution of Afghanistan*, Article 60.

15 Ehler et al, *Constitutional Law of Afghanistan*, 46; Grote, "Separation of Powers in the New Afghan Constitution," 904.

16 Grote, "Separation of Powers in the New Afghan Constitution," 904 -5.

17 Ehler et al, *Constitutional Law of Afghanistan*, 107.

The powers granted to the President have been further divided into three groups: to instances where the President has the power to act independently, to act with the approval of Parliament or to instances where he can delegate authority.[18] The President can exercise the following powers in the executive sphere independently: supervise the implementation of the constitution;[19] act as the commander of the armed forces;[20] take necessary action to defend the territorial integrity and independence of the nation;[21] convene a Loya Jirga;[22] and call for a referendum.[23] The President also has a range of powers related to foreign affairs that he can exercise independently: appoint representatives of Afghanistan to foreign states and organisations;[24] accept credentials of foreign representatives to Afghanistan;[25] and conclude international treaties.[26]

In exercising some of the powers granted to him, the President must act with the approval of the National Assembly. For example, in the following instances, the President must act with the approval with the legislature: declaring war or peace; sending Afghan troops abroad; and proclaiming or terminating a state of emergency.[27] There are some ambiguities in the way some of these shared powers have been articulated. For example, even though the President needs the approval of Parliament to declare war, he does not need Parliament's approval to defend Afghanistan's territorial integrity and preserve its independence.[28]

However, as the President also acts as the head of government, in practice he has significant influence over the legislative sphere. The ministers are appointed by the President with the approval of Parliament[29] and work under the "chairmanship" of the President.[30] The number of ministers, as well as their duties, is to be regulated by law.[31] The government is assigned the following duties: execute the provisions of the constitution and other laws, as well as the final decisions of the courts; preserve the independence and defend the territorial integrity of the country; maintain public law and order; eliminate all kinds of administrative corruption; prepare the budget; prepare and implement social, cultural and economic development programs.[32] The government is given authority to devise and approve regulations, which shall not be contrary to the body or spirit of any law.[33]

Additionally, when Parliament is in recess and in cases of "immediate need," the government can issue legislative decrees.[34] The decrees are to be presented to the National Assembly within 30 days of its reconvening, and can become void if the National Assembly rejects the decree. This negative check against the use of legislative decrees has proved ineffective. It would have been a more robust check on executive power had the Constitution required subsequent approval of decrees by Parliament. In practice, decrees rarely end up being considered by the legislature. Over the past decade the government has used the "immediate need" pretext in many circumstances for its own convenience and political ends. For example, the President rushed through the Electoral Decree of 2010, limiting the authority of the electoral bodies, and inserting ambiguous provisions concerning the right of candidates to challenge the disqualification of their

18 Stephen Dycus, Arthur Berney, William C. Banks, Peter Raven-Hansen, *National Security Law* (Wolters Kleur, 2007).
19 *Constitution of Afghanistan*, Article 64 (1)
20 *Constitution of Afghanistan*, Article 64 (3), (6).
21 *Constitution of Afghanistan*, Article 64 (5).
22 *Constitution of Afghanistan*, Article 64 (9).
23 *Constitution of Afghanistan*, Article 65.
24 *Constitution of Afghanistan*, Article 64 (14).
25 *Constitution of Afghanistan*, Article 64 (15)
26 *Constitution of Afghanistan*, Article 64 (16).
27 *Constitution of Afghanistan*, Article 64 (3), (4), (6).
28 *Constitution of Afghanistan*, Article 64 (5).
29 *Constitution of Afghanistan*, Article 64 (11).
30 *Constitution of Afghanistan*, Article 71.
31 *Constitution of Afghanistan*, Article 71; *Law on the Structure of Government* (2012).
32 *Constitution of Afghanistan*, Article 75.
33 *Constitution of Afghanistan*, Article 76.
34 *Constitution of Afghanistan*, Article 79. An exception is that legislative decrees passed under Article 79 cannot relate to the budget and financial affairs. Legislative decrees are to be presented to the National Assembly within 30 days after Parliament reconvenes, and if they are rejected by Parliament they become void.

candidacy.[35] The WJ reacted strongly, and rejected the decree. The President countered, arguing that the Constitution prohibited Parliament from amending the electoral law one year out from parliamentary elections.[36] In response, the WJ conceded that the text of the Constitution may indeed prevent them from amending the electoral law, but insisted that the WJ was not prevented from rejecting the decree.[37] Ultimately, President Karzai was able to use his influence over the MJ to ensure that the Electoral Decree never became an item on the latter's legislative calendar. Thus, having only been rejected by one house, the Electoral Decree continued to be in force.

In the judicial sphere, the President has the power to appoint the justices of the Supreme Court with the approval of the WJ.[38] Acting independently, the President can appoint and dismiss lower court judges,[39] endorse legislative decrees,[40] approve sentences of capital punishment and reduce penalties.[41] Where a government minister is accused of "crimes against humanity, national treason or other crimes," they also do not come before the judiciary; instead they are to be brought before a "special court."[42]

The legislature has some capacity to check executive power. The ministers are responsible to both the President and Parliament, and are required to report to the latter at the end of the fiscal year about its activities.[43] The WJ has the power to approve or reject the President's choices for government ministers.[44] Once ministers are appointed, they can become the subject of a no-confidence vote by the WJ.[45] In practice, as will be discussed below, the legislature has frequently used its power to issue a no-confidence vote against ministers. However, even after no-confidence votes were successfully cast, many ministers have continued to serve in government as an acting minister or have been reappointed to another ministry.

Under Article 69, the President is accountable both to the nation and WJ. However, the WJ can only take action against the President where he has been accused of crimes against humanity, treason or any other crime. WJ can convene a Loya Jirga to consider an accusation with two-thirds approval of its members. If the Loya Jirga approves of the accusation then the President is dismissed, and the matter is referred to a special court.[46] The special court is not strictly a judicial body, as it is comprised of both political and judicial figures.[47]

To date there have been no serious efforts to impeach the President. In 2012, Hafiz Mansor, a member of the opposition, did press for impeachment of the president on grounds of violating the constitution as an act of treason. Nader Nadery, a civil society actor and former Human Rights Commissioner, argues that "views and accusations presented in Parliament calling for the President's impeachment, was always thin in evidence, lacked substance, and could hardly justify a move as significant as an impeachment."[48] He believes that these expressions in Parliament were emotionally driven statements that lacked evidence-based arguments, proper documentation of which acts of the President has violated the constitution and why a motion of impeachment should be considered. The fact that Parliamentarians always acted as individuals, rather than as groups, further undermined efforts to impeach the President. The proposed motions, before being presented to the plenary, never went through proper preparation, lobbying, or even had

35 See International Crisis Group, "Update Briefing: Afghanistan's Election Stalemate" (Kabul: Asia Report No. 117, 2011), http://www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/B117%20Afghanistans%20Elections%20Stalemate.pdf, (accessed 7 November 2014).
36 *Constitution of Afghanistan*, Article 109.
37 Carol Wang, "Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability," *Harvard International Law Journal* 55, no. 1 (2014): 211-249, 229
38 *Constitution of Afghanistan*, Article 64 (12).
39 *Constitution of Afghanistan*, Article 132.
40 *Constitution of Afghanistan*, Article 64 (16).
41 *Constitution of Afghanistan*, Article 129.
42 *Constitution of Afghanistan*, Article 78.
43 *Constitution of Afghanistan*, Article 77 (2).
44 *Constitution of Afghanistan*, Article 92.
45 *Constitution of Afghanistan*, Article 69.
46 Ibid.
47 The Special Court for hearing a crime against a president is comprised of three members of the WJ and three members of the Supreme Court. *Constitution of Afghanistan*, Article 69.
48 Nader Nadery, pers. comm., 2 October 2014.

an underlying legal strategy. Therefore, each time an MP presented the idea of impeachment, it remained mere rhetoric and was never considered a serious threat.

An additional reason that the President did not consider the rhetoric of impeachment by MPs as a threat is the constitutional condition upon which an impeachment or president's trail could be operationalised — i.e., a Loya Jirga had to be convened. The LJ is composed of all members of the legislature (WJ and MJ), heads of provincial councils and heads of district councils.[49] While the national assembly and provincial councils were functional in the past 10 years; to date, the Afghan government and the Independent Election Commission (IEC), have not conducted elections for district councils and therefore an essential part of what will enable an LJ to be convened has been missing.

However, despite the inability to convene one as prescribed under the Constitution, the President has convened a number of "consultative" LJs to gain political backing for major policy initiatives, undermining the role of Parliament. The Constitution provides that an LJ is the "highest manifestation of the will of the people of Afghanistan," and can convene to decide issues related to independence, national sovereignty, territorial integrity as well as the supreme national interest, amend provisions of the constitution, and impeach the President.[50] The President has relied on LJs on three significant occasions: the first in 2010 to initiate a peace process with the Taliban, and the second and third in 2012 and 2013 to sign a Strategic Partnership Agreement and a Bilateral Security Agreement with the United States. These "consultative" LJs convened by President Karzai did not conform to the constitutional requirements. Often the members of the LJ were handpicked, and the proceedings were tightly controlled, with little debate about the issue at hand. Parliament has criticised these LJs as illegal and unconstitutional. Commentators have also dismissed them as "nothing more than a piece of political theatre" that ultimately sought to undermine the existing constitutional architecture.[51]

Parliament

The Parliament in Afghanistan consists of a Senate (Meshrano Jirga) and a House of People (Wolesi Jirga). Members of the WJ are to be elected through "free, general, secret and direct balloting."[52] The members of the MJ are both elected and appointed. Each Provincial Council is to elect a representative for a four-year term, and each province is to elect one representative from among its 24 district councils for a three-year term.[53] Given that district councils are yet to be formed, it was determined by the Supreme Court that each Provincial Council would send two members each to the MJ. The remaining one-third of the membership are to be appointed by the President from among the impaired and handicapped as well as two members from nomads.[54] Fifty percent of the President's appointments must be women. The President's appointees serve for a longer term, and therefore enjoy a measure of seniority in the house.[55]

The way Parliament has been designed provides for an inherent check in the design of the constitution. The President is elected by the whole country and as a result, is directly accountable to the entire country, or through the people's elected representatives in WJ. Members of the WJ are accountable to their electorates within the provinces. Thus, each member of the WJ may be answerable to specific, regional interests. Similarly given that two-thirds of the MJ are appointed by local elected bodies (provincial and district councils[56]), they are answerable to specific local constituencies. In

49 *Constitution of Afghanistan*, Article 110.
50 *Constitution of Afghanistan*, Article 111.
51 Benjamin Buchholz, "The Nation's Voice? Afghanistan's Loya Jirgas in the Historical Context" (Kabul: Afghanistan Analysts Network, 2013), https://www.afghanistan-analysts.org/the-nations-voice-afghanistans-loya-jirgas-in-the-historical-context/ (accessed 1 November 2014); Kate Clark, "Traditional Loya Jirga 4: Lackluster Political Theatre (amended)" (Kabul: Afghanistan Analysts Network, 2011), https://www.afghanistan-analysts.org/traditional-loya-jirga-4-lacklustrepolitical-theatre-amended/ (accessed 1 November 2014).
52 *Constitution of Afghanistan*, Article 83.
53 *Constitution of Afghanistan*, Article 84 (1), (2).
54 *Constitution of Afghanistan*, Article 84 (3).
55 *Constitution of Afghanistan*, Article 84.
56 *Constitution of Afghanistan*, Article 84.

theory, the fact that the President and the National Assembly are accountable to different sections of the country is intended to facilitate a broad set of interests being represented within state institutions and ultimately facilitate better governance and law making.

Eligibility criteria to become a member of the National Assembly include being a citizen of Afghanistan, being free of a conviction of a crime against humanity, deprivation of a civil right, or any other crime, and be of a minimum age of 25 and 35 for the WJ and MJ respectively.[57] The credentials of the members of the National Assembly are to be reviewed by the Independent Election Commission.[58] In practice, during 2010 parliamentary elections, the IEC's process of vetting candidates with allegations of human rights abuses against their name was highly criticised, and many candidates with questionable records were allowed to remain on the ballot.[59]

The National Assembly has the following duties: ratification, modification or abrogation of laws or legislative decrees; approval of social, cultural and economic development programs; approval of the state budget; creation, modification and abrogation of administrative units; and ratification of international treaties.[60]

The WJ has been vested with additional powers to enable it to check the excesses of the executive branch, and facilitate its role in overseeing the executive as a whole, as well as individual ministers. The WJ has the power to establish special commissions on the proposal of one-third of its members, to review as well as to investigate the actions of the government.[61] In particular, the WJ has the following special powers: to question ministers regarding their activities; decide on development programs as well as the state budget; and approve or reject appointments under the constitution.[62] The power to question government ministers is laid out in Article 92: on the proposal of twenty percent of WJ members, it can call government ministers and question them. Where the explanations are not satisfactory the WJ can issue a vote of no confidence. Such a vote must be based on explicit, direct and convincing reasons and must be approved by the majority

Mohammad Younus Qanoni, Speaker of Parliament between 2005-2010.

57 *Constitution of Afghanistan*, Article 85.
58 *Constitution of Afghanistan*, Article 86.
59 Ghizaal Haress, "Adjudicating Election Complaints: Afghanistan and the Perils of Unconstitutionalism A Case Study of the Special Election Tribunal 2010" (Kabul: Afghanistan Research and Evaluation Unit, 2014), 9,18. See also Fatima Ayub, Antonella Deledda and Patricia Gossman, "Vetting Lessons for the 2009-10 Elections in Afghanistan" (New York: International Centre for Transitional Justice, 2009).
60 *Constitution of Afghanistan*, Article 90.
61 *Constitution of Afghanistan*, Article 89.
62 *Constitution of Afghanistan*, Article 91.

of members of WJ.[63] Additionally, any commission of both houses of Parliament can question any Minister about special issues, and the Minister can provide written or oral responses.[64]

Despite these provisions, the executive remains a strong hold over the legislative process and the legislative agenda. At the request of the government, the National Assembly must give priority to bills introduced by the government; the government also has the authority to pass regulations without approval from the National Assembly, provided they do not conflict existing laws. Where the government decides to hold an "emergency session of the legislature," it can pass legislative decrees on its own accord and bypass the legislature.[65] Such legislative decrees are in force as soon as they receive presidential endorsement. However, such legislative decrees are required to be tabled before Parliament within thirty days of its reconvening. In practice, such decrees are not regularly tabled before Parliament. Additionally, in specific areas such as proposals for laws relating to the regulation of the judiciary by the Supreme Court, or proposals for drafting the budget and financial affairs can only be made by the government.

One of the important functions given to the legislature to check executive power is the powers it has over the budget. However, the effectiveness of these checks and balances in practice have been mixed. Under the constitution the government has the authority to prepare the budget and regulate financial affairs.[66] Any laws related to these two subject areas can only be initiated by the government.[67] The government's power to make legislation during a recess of the WJ does not extend to matters related to the budget and financial affairs; thus, the budget must go through the usual legislative process.[68] The legislature has a clearly stated role to either to approve or reject the budget.[69] This is particularly important given that the executive has significant power; for example, relating to declaring war, and defending the territorial integrity of the state. The budget is introduced to the MJ, and is passed along to the WJ with the MJ's advisory comments.[70] It is important to note that the MJ doesn't have much of a role in the process; it has to send the government's proposed budget to the WJ. The WJ has the final decision whether to approve the budget.[71]

If for any reason the budget is not approved before the beginning of the new fiscal year, the budget of the previous year is applied. The WJ cannot delay the approval of the budget for more than one month. Thus, under the 2004 Constitution, the legislature has limited capacity to use the approval of the budget as a means of applying pressure on the government to adopt a wider policy or program. The WJ cannot, for example, as in the United States or Australia, bring the functioning of the whole of government to a halt by refusing to approve the budget.

There are several additional mechanisms that seek to hold the executive accountable to the legislature. During the last quarter of every financial year the government must present the budget for the coming year, along with a brief account of the current year's budget.[72] A precise account of the previous year's budget, the so called "qatia report" must be presented within the following six months.[73] Further, at the end of every fiscal year the government must report to the legislature on the "tasks it has achieved as well as important programs for the new fiscal year."[74] Combined, these provisions provide a clear oversight role for Parliament to scrutinise the government's spending, programs and planned activities for the future. Over the last few years, Parliament has sought to scrutinise the fiscal policies of the government with some zeal. For example, the 2012-2013 budget was only approved on the third attempt. The first two times the government submitted a budget, the WJ rejected them with the argument that there was not

63 *Constitution of Afghanistan*, Article 92.
64 *Constitution of Afghanistan*, Article 93.
65 *Constitution of Afghanistan*, Articles 76, 79, and 97.
66 *Constitution of Afghanistan*, Article 75 (1), 95.
67 Ibid.
68 *Constitution of Afghanistan*, Article 79.
69 *Constitution of Afghanistan*, Article 90.
70 *Constitution of Afghanistan*, Article 98.
71 *Constitution of Afghanistan*, Article 91.
72 *Constitution of Afghanistan*, Article 98, 75 (6).
73 Ibid.
74 *Constitution of Afghanistan*, Article 75 (6).

enough allocation of funds for less developed provinces, and expressed concern over the dearth of funds allocated for job creation and infrastructure projects.[75] The members of Parliament also strongly objected to the US$70 million Kabul Bank bailout at the taxpayers' expense.[76] Additionally, upon receiving the qatia report from the government, the WJ summoned eleven ministers for questioning as to why they had failed to spend most of their development budgets.[77] For example, the Ministry of Defense and Ministry of Information and Culture had only spent nine and 12 percent respectively; the WJ considered a spending rate of below 70 percent as unacceptable.[78] The processes of Parliament's questioning and negotiations with the government were described as being "mismanaged" and "chaotic," with wide-ranging accusations of corruption and bribery; and in the final compromise not all of WJ's demands were met.[79] Much of this lack of coordination within the WJ is attributed to the absence of political parties and lack of coherent political alliances with Parliament.

Additionally, gaps and lack of clarity in the related legal framework has also limited the legislature's important function in playing an oversight role in the budget process. First, it is unclear under the Constitution whether changes to budget lines after they have been passed by the WJ and approved by the President need to be enacted via legislative decree or via Parliament. During 2011 and 2012, changes to specific budget lines and the budget ceiling without going through the legislative process raised much protest in the legislature, and the then Finance Minister was almost brought to a no-confidence vote before the WJ.[80] The Constitution does not specifically address this gap. However, it has been argued that under Article 97 the budget should be treated the same way as any other law; and under Article 79 the budget cannot be changed via legislative decree.[81]

The executive has been able to encroach on the law-making powers of the Parliament by relying on the judiciary. Under Article 121 of the Constitution, the Supreme Court can review the constitutionality of laws and legislative decrees at the request of the government. Over the past decade the President has relied on Article 121 to undermine the role of Parliament by sending the Parliament's bills to the Supreme Court for judicial review. The judiciary, in almost all of the cases referred to it by the executive, issued opinions that accorded with the executive's views. This practice has allowed the government to implement the laws it desires, without the approval or disapproval of the Parliament.

On at least three occasions, government has sent laws approved by Parliament to the Supreme Court to be reviewed. On one occasion, Parliament passed the law of diplomats of Afghanistan. Upon receiving the draft law from the government, Parliament amended the bill, adding provisions requiring that Afghan diplomats cannot have dual passports or foreign wives. The President objected to these amendments, and sent the amended version of the bill to the Supreme Court for review. The Supreme Court upheld the view of government and struck down the provisions made by Parliament. It is important to note that where Parliament makes an amendment to a bill proposed by the government, the President can exercise his veto and resend the bill to Parliament with explanatory reasons, thus still allowing a law to go through the legislative process. If the legislature can't come to a compromise, and passes the law in its original form, the executive can then send the law to the Supreme Court.

Factors such as lack of institutional memory, capacity of individual MPs, and the electoral systems have also impacted the ability of Parliament to function as a separate and co-equal branch of government. In particular, lack of personal and institutional capacity has prevented Parliament

75 Obaid Ali, "Budget Through, Impeachments Pending: Wolesi Jirga Went into Winter Recess" (Kabul: Afghanistan Analysts Network, 2013), https://www.afghanistan-analysts.org/budget-through-impeachments-pending-wolesi-jirga-went-intowinter-recess/ (accessed 1 November 2014).
76 Ibid.
77 Ibid.
78 Afghan Voices, "The Implications of Donor Conditionalities on the Afghan Budget Process," http://www.afghanvoice.org.uk/avfm1/mypanel/pdfeng/Donor-condionalities-paper-20130705-204625.pdf (accessed 1 November 2014).
79 Obaid, "Budget Through, Impeachments Pending."
80 Ghizaal Haress (Assistant Professor of Constitutional Law, American University of Afghanistan), pers. comm., 11 August 2014.
81 Ibid.

from playing a more robust role in initiating new legislation.[82] Throughout its two-term history, with the exception of the law on general amnesty, Parliament has only approved laws that previously existed or laws introduced by the government. Additionally, to date, the legislature has failed to use one of the most powerful oversight mechanisms at its disposal, the power under Article 89 to establish as special commission to investigate government actions.[83]

MPs are elected on the basis of the SNTV system, which discourages the formation of political parties or alliances within Parliament.[84] In the absence of political ideology, MPs tend to rally along ethnic lines or patronage networks. Given that even government ministers are a collection of strong personalities and individuals that are representative of various ethnic groups, "pro-government" often in fact means "pro the President or another powerful Minister." Even where steps were taken to establish opposition groups, they have soon frayed and fallen apart due to competing interests among individual MPs and disagreements over leadership. Opposition groups in Parliament have been described as being "transient," as MPs tend to only stay in opposition as long as there is a personal gain involved; where the government can offer a more lucrative incentive, MPs have been more than willing to shift allegiances.[85]

Once elected, there are in fact strong incentives for MPs to cooperate and ally themselves with the President and government ministers. Having access and good relationships with government can facilitate a range of benefits to individual MPs, their families and their communities. The range of benefits can include security for an MP's district (especially close to an election), campaign finances or support for their private business. In particular, leading up to elections, analysts have observed that highly fluid alliances can be observed between MPs and the executive, as the former scramble to secure funds for their re-election campaigns.[86] Some candidates draw funds from their own communities, adding an additional layer of electoral accountability. Others rely on their own private businesses, patronage networks, and government contracts as sources of funding, all of which can be leveraged with strong relationships with the executive.[87] For government ministers, there are strong and obvious incentives to cultivate close relationships with MPs. There have even been reported practices where government ministers regularly employ the relatives of MPs in order to secure votes of confidence.[88]

Other practices such as lack of documentation of how MPs vote during plenary session only facilitate these shifting allegiances. Currently, only "yay" and "nay" votes are counted and they are not recorded against the names of individual MPs, which could be later verified. As a result, there is no public accountability for how MPs cast their votes in Parliament. Efforts at reform have been pushed back largely because of lack political will, but also because of concerns over expenses and safety of individual MPs.[89]

While in theory the Afghan Constitution provides separation of power between the two branches, in practice the legislature's capacity to effectively function as a check on the exercise of executive power has been limited. There are many factors resulting in ineffectiveness of the Parliament. But the central driver for Parliament to remain fragmented and driven by individual interests is the SNTV system that discourages individuals to run on a party platform. As a result, no one party has managed to gain a minimum number of MPs required to form a parliamentary group, or form a functioning, coherent political alliance that could act to check the excesses of the executive.

82 See Marvin G. Weinbaum, "Towards a More Effective Parliament?" In *Snapshots of an Intervention: The Unlearned Lessons of Afghanistan's Decade of Assistance,"* edited by Martine Van Biljert and Sari Kouvo (Kabul: Afghanistan Analyst Network, 2012); Anna Larson, "The Wolesi Jirga in Flux, 2010 Elections and Instability I" (Kabul: Afghanistan Research and Evaluation Unit, 2010).

83 Ehler et al, *Constitutional Law of Afghanistan*, 90; *Constitution of Afghanistan*, Article 89.

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

85 Anna Larson, "The Wolesi Jirga in Flux, 2010 Elections and Instability I" (Kabul, Afghanistan Research and Evaluation Unit, 2010), 21.

86 Anna Larson, "The Wolesi Jirga in Flux, 2010 Elections and Instability I" (Kabul, Afghanistan Research and Evaluation Unit, 2010), 21.

87 Noah Coburn, "Political Economy of the Wolesi Jirga: Sources of Finance and their Impact on Representation in Afghanistan's Parliament" (Kabul: Afghanistan Research and Evaluation Unit, 2011), 7-8.

88 Larson, "The Wolesi Jirga in Flux," 8.

89 Larson, "The Wolesi Jirga in Flux," 9.

3.5 Judiciary

The Constitution provides that the judiciary shall be an independent organ of the state.[90] The judiciary is composed of the Supreme Court and high courts as well as primary courts whose organisation and authority are to be regulated by law.[91] The Supreme Court is deemed "the highest judicial organ, heading judicial power" of the State.[92] However, a number of the provisions in the Constitution do little to ensure the independence of the judiciary. The limited safeguards that have been included rarely function in practice as intended in the Constitution. The President retains significant control over the way the judiciary is constituted and functions in practice. Despite the existence of a rigorous appointment mechanism to the Supreme Court, in practice the appointees have not met the requirements spelled out in the Constitution, nor have they respected their term limits. The President retains significant control over the appointment and dismissal of lower court judges, which in effect gives the President significant influence over how the entire judiciary is constituted. Additionally, the jurisdictions granted to the courts are limited in a number of important ways. For example, the Courts do not have the jurisdiction to try members of the executive.[93] Even though the decisions of the courts are final, there are important exceptions giving the President power to reduce or quash penal sentences and capital punishments.[94] Most problematic are the provisions that limit the judiciary's power to conduct judicial review, which undermines its capacity to act as a check on the other two branches.

Afghan judicial authorities during a court session.

Appointments to the Supreme Court are made by the President, with the approval of the WJ.[95] Justices of the Supreme Court must be at minimum forty years of age; be a citizen of Afghanistan; have higher education and adequate experience in legal studies or Islamic jurisprudence as well as adequate experience in the judicial system of Afghanistan; have a good character and reputation; shall not have been convicted by a court for a crime, deprivation of civil rights or crimes against humanity; and shall not be a member of a political party during his term of duty.[96] The initial rounds of appointments to the Supreme Court were to be made in the following manner: three members for a period of four years; three members for seven years; and three members for ten years. All subsequent appointments are to be for ten years.[97] Neither initial nor subsequent appointments to the Court can be renewed.[98] The President is to appoint one of the members as the Chief Justice.

90 *Constitution of Afghanistan*, Article 116.
91 Ibid.
92 Ibid.
93 *Constitution of Afghanistan*, Article 69, 78.
94 *Constitution of Afghanistan*, 64 (18).
95 *Constitution of Afghanistan*, Article 117.
96 *Constitution of Afghanistan*, Article 118.
97 *Constitution of Afghanistan*, Article 117.
98 Ibid.

In practice, appointments have not been made in the manner mandated in the Constitution. The Parliament's ability to provide oversight of the President's nominations to the Supreme Court has been limited. The first rounds of appointments were made in December 2001, when the first WJ was yet to be formed.[99] President Karzai appointed Fazl Hadi Shinwari, an Islamist and the former head of a madrasa, to the Supreme Court.[100] In 2006 President Karzai nominated Shinwari as Chief Justice. However, the WJ rejected Shinwari to a vote of 117 to 77 owing to concerns about his lack of secular professional legal education and the potential for strong influence of his conservative religious views on his judicial decisions.[101] The President then nominated Abdul Salam Azimi, his former legal advisor, as the new Chief Justice, and was approved by the Parliament. Justice Azimi was relatively unknown at the time and was perceived to be a moderate.[102] When Justice Azimi's term ended, the President, in violation of the Constitution, extended his term and appointed him as, "Acting Chief Justice," a position not provided for in the Constitution. In doing so, the President did not seek the approval of the WJ and bypassed it altogether, choosing instead to appoint the Chief Justice via a presidential decree.[103]

The justices of the Supreme Court cannot be dismissed before the end of their term except as provided for in the constitution. Under Article 127, a Justice of the Supreme Court can only be dismissed where one-third of the members of WJ demand the trial of a justice for "committing a crime or a crime related to the performance their job," and two-thirds of the WJ approve this demand.[104] Once approved, the Justice is dismissed from their position and the matter is referred to a special court.[105] As will be discussed below, the WJ did attempt to dismiss six of the Supreme Court justices in the aftermath of the 2010 parliamentary elections. However, the process adopted by the WJ did not follow the requirements under Article 127, and in particular, did not identify that any of the justices committed a "crime or crime related to job performance." Thus, even though two-thirds of the WJ did vote against the six justices, it amounted to nothing more than a public show of disapproval against the justices.

Internal matters of the judiciary are to be regulated by law.[106] The chapter on judiciary provides that the Supreme Court shall establish the Office of the General Administration of the Judiciary, which shall regulate judicial as well as administrative matters, and recommend reforms for the administration of courts.[107] By placing administrative matters of the judiciary in the hands of the Supreme Court, the Constitution, in theory, was seeking to insulate the judiciary from interference and influence from other branches.

However, these provisions have done little to guarantee the financial independence of the Court. The budget of the judiciary is to be prepared by the Supreme Court, "in consultation with the Government," and is to be presented to the National Assembly as part of the national budget.[108] Supreme Court justices are provided a "generous pension at the end of their term of service provided they do not hold state and political offices."[109] The executive on numerous occasions has

99 In 2001, under the Bonn Agreement and the temporary enforcement of the 1964 Constitution the President had wide-ranging powers to make appointments to state institutions.

100 At the time of Justice Shinwari's appointment to the Court, the 2004 Constitution was not yet in force. There was a concern that the appointment violated the requirement under the 1964 Constitution, Article 105, which provided that Supreme Court judges be less than 60 years old; at the time Shinwari was 80 years old. See International Crisis Group, "Reforming Afghanistan's Broken Judiciary," 7.

101 In fact during his time on the bench, the Court a made number of controversial decisions; for example, in 2003 he was part of a ruling that banned cable television.

102 See International Crisis Group, "Reforming Afghanistan's Broken Judiciary," 9. At the beginning of his term he took on corrupt judges and sought to get rid of conservative judges at the lower court levels. However, since then, on numerous occasions he has sided with the Karzai regime and has on occasion made controversial rulings, including meting out severe punishment to a student journalist for distributing materials about women's rights under Islamic law, holding that it amounted to blasphemy.

103 International Crisis Group, "Afghanistan: The Long, Hard Road to the 2014 Transition," 14.

104 *Constitution of Afghanistan*, Article 127.

105 Ibid.

106 *Constitution of Afghanistan*, Article 123.

107 *Constitution of Afghanistan*, Article 132; see also *Law on the Organisation and Jurisdiction of the Courts*, Article 29 (2) 4.

108 *Constitution of Afghanistan*, Article 125.

109 *Constitution of Afghanistan*, Article 126.

used budgetary measures to apply pressure on the judiciary.[110] Despite the "generous pension" guaranteed in the constitution, during the term of their office, judges are poorly remunerated and their remuneration does not include their shelter and security.[111]

Lower court judges are appointed at the proposal of the Supreme Court and approval of the President.[112] The President also has the power to retire and to accept the resignation and dismissal of lower court judges.[113] As a result, the President retains significant influence over who sits on the lower courts. Given that even at the Supreme Court level the appointment process in practice is not very rigorous, the President in practice retains significant control over the entire judiciary. This has a negative impact on its overall independence, and in particular the extent to which Parliament is willing to accept the judicial review function of the courts.

The Courts have jurisdiction over all "cases filed by real or incorporeal persons, including the state, as plaintiffs or defendants, before the court in accordance with the provisions of the law."[114] Under Article 121, the Supreme Court's jurisdiction is defined as follows: "at the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law."[115] Given that the President controls the government, and makes all appointments to lower courts, the President has significant control over who can request a judicial review.[116] The lack of standing afforded to anyone politically opposed to the President, i.e., the WJ, members of the opposition or political parties, has significantly weakened the capacity of the judiciary to function as a check on executive power.[117]

One of the earlier drafts of the 2004 Constitution contained specific provisions relating to a Constitutional Court, which was given the express power to interpret the constitution.[118] Draft Article 146 provided that the Constitutional High Court shall have the following authorities: "1) examining the conforming of laws, legislative decrees and international agreements and covenants with the constitution. 2) Interpretation of the constitution, laws and legislative decrees."[119] However, at the last minute this provision was omitted, at the initiation of President Karzai's team.[120] Those that opposed the idea argued that historically, the Supreme Court has been dominated by justices that were trained in Ulama and Islamic jurisprudence, rather than constitutional law. In time, a Constitutional Court comprised of Islamic scholars could evolve to resemble the Council of Guardians in Iran.[121]

The final draft of the 2004 Constitution gave the Supreme Court most powers of the proposed Constitutional Court, except for the specific language giving it the power to interpret the Constitution.[122] Current Article 121, reads as follows: "At the request of the Government, or the courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the constitution and in accordance with the law."[123] However, Article 121 doesn't include the second clause of draft 146 which granted the proposed constitutional high court explicit power to interpret the Constitution and other laws. Thus, it continues to be debated whether this omission was deliberate or whether the

110 Lorenzo Delesgues, Yama Torabi, "Reconstruction National Integrity System Survey" (Kabul: Integrity Watch Afghanistan, 2007), 55.
111 Haress, "Adjudicating Election Complaints," 13.
112 *Constitution of Afghanistan*, Article 132; Article 64 (13).
113 Ibid.
114 *Constitution of Afghanistan*, Article 120.
115 *Constitution of Afghanistan*, Article 121.
116 Grote, "Separation of Powers in the New Afghan Constitution," 911.
117 Grote, "Separation of Powers in the New Afghan Constitution," 911; International Crisis Group, "Reforming Afghanistan's Broken Judiciary," 16.
118 Ehler et al, *Constitutional Law of Afghanistan*, 169.
119 John Dempsey and J. Alexander Thier, "Resolving the Crisis," 1.
120 Hashim Kamali, "Afghanistan's Constitution Ten Years On: What are the Issues?" (Kabul: Afghanistan Research and Evaluation Unit, 2014); Rubin, "Crafting a Constitution for Afghanistan," 15.
121 See Kamali, "Afghanistan's Constitution Ten Years On"; Rubin, "Crafting a Constitution for Afghanistan," 15; Dempsey and Thier, "Resolving the Crisis," 1.
122 Ehler et al, *Constitutional Law of Afghanistan*, 169.
123 *Constitution of Afghanistan*, Article 121.

power of constitutional interpretation is implicit within Article 121. As will be seen below, Article 121 has become one of the most contentious provisions of the 2004 constitution. In particular, three interpretive questions continue to be debated about the provision: first, does the Supreme Court have the power to the interpret the Constitution?; second, can the Supreme Court review executive action?; and third, can any other branch or entity also acquire jurisdiction to interpret or review the Constitution?[124]

Article 122 provides that "no law shall under any circumstances exclude any area from the jurisdiction of the judicial organ as defined in this chapter and submit it to another authority."[125] However, the article provides that there could be a number of exceptions, including in cases where special courts or military courts need to be established. As discussed above, trials against the President, members of the Cabinet and justices of the Supreme Court are to be tried by "special courts."[126] The Constitution does not set out the details as to how such courts should function, and only provides that they should be regulated according to law.[127]

Additionally, given that Article 121 provides that judicial review should be conducted, "in accordance with the law," an argument can be made that the legislature has the power to modify the jurisdiction granted to the judiciary to conduct judicial review.[128] However, the extent to which they can amend the jurisdiction granted to the courts is unclear. A plain reading would suggest that Parliament at the very least has to be limited by Article 122, which prohibits excluding any area from the jurisdiction of the judiciary by submitting it to another authority.[129] As discussed below with the establishment of the ICOIC, the WJ enacted a law that granted the ICOIC explicit power to interpret the Constitution — a function initially understood to fall within the purview of the courts.

Decisions of the courts are final and shall be enforced; however, the President has the authority to "reduce and pardon penalties," and provide final approval for cases involving capital punishments.[130] To date, in the absence of any statutory guidelines, the President exercises these powers solely at his discretion. At times President Karzai's use of his power to pardon perpetrates was criticised as not only undermining the finality of court decisions, but also contrary to basic fundamental rights and the rule of law. In a much-publicised case he pardoned a rape victim allegedly so she could marry her perpetrator.[131] In another case the perpetrators allegedly with connections to the President were pardoned after being found guilty of gang raping their victim.[132]

Additionally there is some doubt as to whether judicial review conducted by the Supreme Court under Article 121 is advisory or binding. The constitution itself is silent on the issue, and no law has been enacted to clarify it. Dr Hashim Kamali, a member and sometimes Chair of the Constitutional Review Commission, notes that court itself appears to view its decisions as advisory. However, Kamali argues that relying on 162, which provides that "upon entry into force of the constitution all laws contrary to it are invalid," it maybe possible to argue that the court's rulings are binding.[133]

124 Ehler et al, *Constitutional Law of Afghanistan*,169.
125 *Constitution of Afghanistan*, Article 122.
126 *Constitution of Afghanistan*, Article 78, 69, 127.
127 Musa Mahmodi (Executive Director, Afghanistan Independent Human Rights Commission), pers. comm., 2 April 2014.
128 Ghizaal Haress (Assistant Professor of Constitutional Law, American University of Afghanistan), pers. comm., 6 November 2014.
129 *Constitution of Afghanistan*, Article 122.
130 *Constitution of Afghanistan*, Article 129, 64 (18).
131 Deb Riechmann, "Hamid Karzai, Afghanistan President, Pardons Imprisoned Rape Victim," The *World Post*, 12 January 2011, http://www.huffingtonpost.com/2011/12/01/hamid-karzai-afghanistan_n_1123656.html (accessed 10 January 2015).
132 Kate Clark, "Afghan President Pardons Men Convicted of Bayonet Gang Rape," The *Independent*, 24 August 2008, http://www.independent.co.uk/news/world/asia/afghan-president-pardons-men-convicted-of-bayonet-gang-rape-907663.html (accessed 10 January 2015).
133 Kamali, "Afghanistan's Constitution Ten Years On," 18.

The authority of the judiciary is further limited by provisions in the Constitution that limit the authority of the Supreme Court over criminal charges brought against lower court judges. Where a judge from a lower court is accused of a crime, the Supreme Court can consider the case; however, if the case is valid, the Supreme Court doesn't have the power to dismiss the judge. The Supreme Court must present a proposal to the President, and it is the latter who must decide whether to dismiss and punish the judge.[134] As noted above, the Supreme Court doesn't have jurisdiction to hear trials against the President or cabinet ministers, as they are to be tried by special courts.[135]

Practical considerations such as lack of resources and capacity among judges have also impacted on the judiciary's ability to function as an independent branch of government. More than 60 percent of the Afghan judiciary has no training in modern, secular law schools; instead most have received their legal education from traditional and Islamic schools.[136] In particular, the appointment of Justice Shinwari to the Supreme Court led to a number of conservative judges being appointed to lower courts, who had little to no legal training, including Islamic legal training.[137] A survey conducted by Integrity Watch found that the first round of appointments to the judiciary were determined by "patronage networks" and guided by a need to project "ethnic inclusiveness."[138]

Additionally, a range of historical and political factors and, in particular, the institutional culture and traditions of the Afghan judiciary has affected its ability to function as an independent organ.[139] In 1978 following a coup by the pro-Soviet Socialist Party, Afghanistan enacted a provisional constitution in 1980. "This constitution eliminated the independence of the judiciary both de jure and de facto. Justices of the Supreme Court were appointed by the Presidium of the Revolutionary Council and the Court was required to report to the Revolutionary Council about its performance."[140] Nader Nadery, a former Human Rights Commissioner who has examined war crimes and crimes against humanity committed by the communist regime argues, "the practice of the regime for the next 10 years was to rely on the judiciary to defend the ideology and interest of the government against the citizens. The goal was to protect the revolution and the socialist ideals it created. Over the long term it institutionalised an organisational culture in the judiciary that took away any sense of its own independence. The judges acted to protect the interests of the ruling communist party and acted as a tool of the regime to suppress its political opposition."[141]

In 1992, when mujahidin toppled the government of President Najibullah, politicisation of the judiciary further undermined its independence. All factions who had part of the Islamic State of Afghanistan appointed their members to the judiciary, most of whom who had no legal education or even professional work experience. These newly appointed judges did little to change the organisational culture of leniency towards the ruling government; instead they further exacerbated the situation. The Taliban's rule further damaged the institutional infrastructure of the judiciary, and introduced a strict Sharia law-based justice system with mostly arbitrary decision making processes issued by non-professional, self-appointed judges who had very little to no legal education. Nadery observes, "the judiciary formed in 2002 is built upon the ashes of a destroyed judicial system that carries with it still an organisational culture that is not familiar with the concept of an independent judiciary."

134 *Constitution of Afghanistan*, Article 134.
135 *Constitution of Afghanistan*, Articles 69, 78.
136 Delesgues and Torabi, "Reconstruction National Integrity System Survey," 54; International Crisis Group, "Reforming Afghanistan's Broken Judiciary," 8.
137 International Crisis Group, "Reforming Afghanistan's Broken Judiciary," 8; ICG report claims that Justice Shinwari, during his first year in office, appointed 137 judges to lower courts.
138 Delesgues and Torabi, "Reconstruction National Integrity System Survey," 54. The survey found that heads of primary and provincial courts were more based on "their personal, tribal, ethnic or political affiliations rather than educational qualifications or merit."
139 J. Alexander Thier, "Reestablishing the Judicial System in Afghanistan" (Stanford: Centre on Democracy, Development and the Rule of Law, 2004), 10-11.
140 Matteo Tondini, *Statebuilding and Justice Reform: Post-Conflict Reconstruction in Afghanistan*, (New York: Routledge, 2010).
141 Nader Nadery (civil rights actor, former Commissioner of the Afghanistan Independent Human Rights Commission, and current director of AREU), pers. comm., 20 August 2014.

Thus a range of factors, including the lack of rigor in the appointment process; lack of institutional capacity and ambiguities in the Constitution as well as gaps in the law, have made the Supreme Court lack independence, and at times beholden to the executive. In a number of high-stakes moments, the judiciary has sided with the government and the President. For example, in the lead-up to the 2009 presidential election, the IEC announced that the second round of the election should be held four months later than the timeline provided for in the Constitution. Unsurprisingly, a controversy erupted where the President was accused of attempting to prolong his term contrary to the Constitution. In an effort to appease the uproar, the President referred the matter to the Supreme Court, where the Court issued a ruling in favor of the President. In another example, in the aftermath of the 2009 parliamentary elections, where the votes were heavily disputed, the President created a Special Elections Tribunal. The Supreme Court once again affirmed the constitutional validity of the Tribunal, despite strenuous objections from all other stakeholders. As will be seen below, even in the case of the no-confidence vote against Dr Spanta, the President relied on the Supreme Court to issue a ruling in his favor, and strengthen his political position, in his larger battle against the WJ.[142] Unsurprisingly, in the aftermath of the 2014 presidential elections, none of the stakeholders identified the courts as a venue to resolve any of the contested aspects of the election.

142 Kamali, "Afghanistan's Constitution Ten Years On," 10.

4. Case Study: The Vote of No Confidence Against Minister Spanta

Table 1: Timeline of events

21 April 2007	Iran commences mass deportation of Afghan refugees and illegal workers
10 May 2007	WJ attempts a vote of censure against Foreign Minister Dr Spanta and Mr Akbar Akbar, Minister for Refugees and Repatriation
12 May 2007	A second no-confidence vote is attempted against Minister Spanta
3 June 2007	Supreme Court hands down its decision, determining that the no-confidence vote against Minister Spanta was unconstitutional
31 August 2008	Parliament passes legislation giving the ICOIC power to interpret the Constitution
15 April 2009	Supreme Court hands down decision holding that the jurisdiction given to the ICOIC is unconstitutional

4.1 Background to the no-confidence vote

The former Foreign Minister, Dr Spanta, was a long-serving friend and ally of President Karzai. He was perceived as a secular, democratising influence on the Karzai administration. Domestically he had a number of political opponents. Dr Spanta was the President's representative on the Afghanistan Independent Human Rights Commission's (AIHRC) transitional justice initiatives and had publicly committed to helping the implementation of Afghanistan's national action plan on peace, reconciliation and justice. In 2007, the Afghan Parliament mainly consisted of influential jihadi groups, former members of the Northern Alliance, and former members of the communist regime. These groups had come together and formed a powerful alliance known as the "National Front," in opposition to the Karzai regime. Within this coalition were powerful individuals who opposed Spanta's public support for transitional justice initiatives, and in particular his opposition to a blanket amnesty for those who had perpetrated gross human rights abuses.[143]

Second, Dr Spanta had pursued a foreign policy that sought to limit the role of neighboring countries in internal affairs and in particular the internal political dynamics of Afghanistan,[144] e.g., the National Front, was widely speculated to be financially supported by neighboring nations.[145] At the time it was speculated that these groups actively sought to undermine Spanta's efforts to pursue a more independent foreign policy. Minister Spanta had been at the centre of several foreign policy issues that brought him in direct conflict with Iranian interests. In particular, he had been a key figure in navigating a transboundary water dispute with Iran and the signing of an Afghan-US security partnership.[146]

143 Musa Mahmodi (Executive Director of AIHRC), interview by Farid Hamidi, 20 April 2014; Kirk Semple, "A Political Standoff Tests Afghan Leaders," The *New York Times,* 25 September 2007, http://www.nytimes.com/2007/09/25/world/asia/25iht-afghan.4.7633584.html?pagewanted=all&_r=0 (accessed 1 November 2014).

144 At the time there was widespread concern over increasing Iranian influence Afghanistan. On the security side there was concern that Iran was supplying weapons to armed groups within Afghanistan. There was additional concern about growing Iranian support and investment in domestic political opponents, and media groups. See Wikileaks, "Cable from the US Embassy in Kabul: Stepped up Iranian Influence Reaches Foreign Ministry," http://www.wikileaks.org/plusd/cables/07KABUL1724_a.html 23 May 2007 (accessed 22 August 2014).

145 Ibid.

146 Wikileaks, "Stepped up Iranian Influence"; Dr Rangin Spanta, interview by Aruni Jayakody, 20 October 2014.

Matters came to a head in April 2007, when Iran started a mass deportation of Afghan refugees and illegal workers.[147] Within weeks, more than 50,000 Afghans had been forcibly returned to Afghanistan.[148] Many of those who were deported were rounded up from their work places or whilst commuting and forced on to buses. Among those deported were Afghans who had been living in Iran for over 25 years, and had failed to register themselves under a new requirement. Afghan returnees were relocated to Nimruz province, and many were forced to live in tents.[149] Unsurprisingly the events caused a domestic uproar, with Parliament demanding explanations from the government as to why it had been unable to protect the Afghan returnees.

On 9 May, using its powers under Article 92, Parliament summoned Mr Mohammed Akbar Akbar, Minister for Refugees and Repatriation, and Foreign Minister Spanta and questioned both over their role in the mass deportation. By some accounts, neither minister fared well during the questioning. At the time some observers noted that more delicate handling of the questions, especially by Minister Spanta, may have led to a different outcome.[150] However, Dr Spanta defended his answers before Parliament, and in particular noted that he brought with him relevant documentation to support his answers.[151] The following day both ministers became the subject of no-confidence votes. Minister Akbar lost by 11 votes.[152] The vote against Minister Spanta was inconclusive. When the votes were counted, the no-confidence vote had in fact failed by one vote. However, two "mismarked ballots" were also found, giving rise to confusion.[153] Parliament decided to re-convene two days later and cast another no-confidence vote. On 12 May, Minister Spanta only secured 73 votes, with 141 votes cast against him.[154]

The motivations for voting against Dr Spanta are numerous and range from the political to the personal. On the political level, it was speculated that forces within Iran engineered the no-confidence vote, and in particular that Iranian agents paid various MPs substantial amounts of cash to cast their votes against the foreign minister.[155] Spanta himself believed that Iranian forces that opposed his broader foreign policy stances were involved in efforts to oust him. Commentators also point to MPs who opposed his support for transitional justice initiatives.[156] On the personal front, many MPs reportedly stated that their votes were influenced by Spanta's "condescending attitude"; unwillingness to relinquish his German citizenship; and his lackluster efforts to keep Parliament informed.[157]

The President accepted the decision against Minister Akbar, but rejected the move against Dr Spanta. This is in part owing to a constitutional ambiguity, as the Constitution does not expressly state the consequence of a no-confidence vote.[158] In accepting the decision against Akbar, the

147 Carlotta Gall, "Afghan Legislators vote out Foreign Minister," *New York Times*,13 May 2007, http://www.nytimes.com/2007/05/13/world/asia/13kabul.html?fta=y&_r=0 (accessed 22 August 2014).
148 Ibid.
149 Ibid.
150 One account suggests that Minister Spanta became "testy" and his answers became a "catalyst" for the no-confidence vote. During the latter stages of the questioning, he is reported to have said the following: "I need MPs to understand the [Ministry of Foreign Affairs (MFA)] was just established after the war, and it cannot do everything that society expects of it. We [the MFA] are under a lot of pressure as Iran's neighbor. Expelling Afghans from Iran is not about the refugees involved. It is a political game, and we do not have any authority to push the GOI [Government of Iran] into letting the Afghans remain in Iran. Expelling Afghans from Iran is not what it appears on the surface. There are other reasons behind the GOI's decision." Later during questioning, when Minister Spanta was accused of being a traitor, the latter had reportedly responded with, "If you are not happy with me, then do not vote for me, and pick a Foreign Minister who will satisfy all of you. History will prove if I am a traitor." See Wikileaks, "Cable from the US Embassy in Kabul: Afghan Parliament Flexes its Muscles: FM Spanta Loses No-Confidence Vote, Supreme Court to Review Decision," 14 May 2007, http://www.wikileaks.org/plusd/cables/07KABUL1605_a.html (accessed 22 August 2014).
151 Dr Rangin Spanta, interviewed by Aruni Jayakody, 20 October 2014.
152 Wikileaks, "Afghan Parliament Flexes its Muscles."
153 Kamali, "Afghanistan's Constitution Ten Years On," 10; Mohammad Qasim Hashimzai, "The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan," in *Constitutionalism in Islamic Countries between Upheaval and Continuity*, ed. Rainer Grote, Tillman Roder, 665 – 681, 679 (New York: Oxford University Press, 2012).
154 Carlotta Gall, "Afghan Legislators Vote out Foreign Minister."
155 Wikileaks, "Stepped up Iranian Influence."
156 Musa Mahmodi (Executive Director of AIHRC), interview by Farid Hamidi, April 2014.
157 Other speculation included that Pashtun MPs may have been motivated by ethnic considerations, and voted against Spanta, as he is ethnically Tajik. See Wikileaks, "Stepped up Iranian Influence Reaches Foreign Ministry,"
158 Kamali, "Afghanistan's Constitution Ten Years On."

President was signaling in principle that he accepted Parliament's power to dismiss ministers via a no-confidence vote. However, by rejecting the decision against Spanta, the President was also indicating that he questions Parliament's discretion over the process. The President's decision to accept one and reject the other may also have been a politically calibrated move that marked his protest but avoided direct confrontation with his main political opponents, including the parliamentary Speaker, Qanooni. Spanta himself admits that after the second vote, he submitted his resignation as he conceded to the President that it would be challenging to carry out his work without the confidence of Parliament.[159]

However, the President declined to accept Minister Spanta's resignation. In his official statement, the President noted that Akbar was "honest," "patriotic" and worked hard on the deportation issue.[160] Nonetheless, given his work was "directly linked" to the issue, he accepted the Parliament's decision. He may have also viewed it as an opportune moment to get rid of Minister Akbar, who was widely perceived to be ineffective in his role.[161] On the other hand, Spanta was close to the President and was an influential member of his team. Later that summer, the President had ahead of him two major regional and international events where Minister Spanta was expected to play a critical role. First, Afghanistan was set to convene a regional peace Loya Jirga and second, the President had an impending trip to the United States to meet the US President at Camp David.

The political fallout from the no-confidence vote threatened to destabilise the whole of Parliament. Once the Supreme Court issued its opinion, members of the National Front threatened to resign from Parliament en-masse. The result, had it occurred, would have left Parliament without quorum. At the time, observers noted that this ensuing political crisis was merely a sign of the "growing pains" of a new democracy. However, the political battle inevitably transformed into a constitutional crisis that brought into question the basic structure of separation of powers under the Afghan constitution.

4.2 Decision of the Supreme Court on the no-confidence vote

In his referral of the no-confidence vote against Minister Spanta, the President posed the following three questions to the Supreme Court: first, was Minister Spanta's failure to take action against the mass deportation of Afghan refugees a convincing reason under Article 92 (3) of the Constitution?; second, was the second round of voting against Minister Spanta "legitimate and lawful"?; and third, should the votes of those members who were not present during the first day be counted under article 92(3)?[162]

4.2.1 Clear and convincing reasons

In its decision the Supreme Court affirmed the power of Parliament to make inquiries from a minister, and where answers are not satisfactory to cast a vote of no-confidence. However, in doing so Parliament must make inquiries "related to a specific and related task of a minister."[163] The Supreme Court further held that a vote of no confidence must be based on "justifiable reasons and explicitly and clearly stated." The Court stressed that reasons should underline the responsibility and the fault of the Minister on a commission or omission of a responsibility. The reasons for a no-confidence vote cannot be based on the performance, omission, or commission relating to people or institutions that the minister could not have control over.

The Supreme Court requested documents from the Ministry of Foreign Affairs relating to its communications with Iran on the issue of Afghan deportees. The court examined 49 letters and found that the Ministry of Foreign Affairs exerted diplomatic efforts, including directly appealing to Iran to allow Afghans residing in Iran to remain there until the situation in Afghanistan improves. Applying its reasoning, the Court held that Iran's decision to deport Afghans was beyond the control of Minister Spanta. In particular, the Court held that "preventing or barring

159 Semple, "A Political Standoff"; Dr Rangin Spanta, interview by Aruni Jayakody, 20 October 2014.
160 Wikileaks, "Afghan Parliament Flexes its Muscles."
161 Wikileaks, "Stepped up Iranian Influence."
162 Spanta Opinion, The Supreme Court of the Islamic Republic of Afghanistan (May 13, 2007).
163 Spanta Opinion.

the government of Iran from making decisions is not a specific responsibility of the Minister for Foreign Affairs." The Court accepted that Minister Spanta had been continuously in contact with the government of Iran, but that the final decision was made solely by the government of Iran, and has no bearing on Spanta's ministerial portfolio as Foreign Minister. Applying this reasoning the Court held that the Minister cannot become the subject of a no-confidence vote. The Minister had not committed any fault or omission, and therefore the justification used for casting a no-confidence vote was "outside the provision of law."[164]

4.2.2 Legality of the vote on 10 May

In terms of the first no-confidence vote against Minister Spanta, the Court found that there was a proper quorum for the first vote on 10 May. The Court held that according to international and Islamic principles, as well as National Assembly procedures when both yay and nay votes are equal, the result is nullified. Thus, the vote on the 10 May is nullified as the votes that were cast were split even between yay votes and nay votes.[165] The fact that the WJ proceeded to a second vote in itself indicates that the National Assembly considered the first vote void.

4.2.3 Legality of the vote on 12 May

On the question of the second vote the Court held that the presence and participation of new members during the second vote made it illegal. Article 65 of the internal procedures of the WJ provides that once the result of a vote is announced, renewed discussion shall not be permitted. The additional members who were present during the second day, were not aware of the content of question and answer session and whether the "reasoning and opinions on the issue were convincing and justified."

Additionally the Court held that according to established legal principles a "revision of penal judgments may only occur in favor of the offender, not against him." Therefore, the vote on 12 May reinstating the no-confidence vote was not in compliance with established legal principles.

A number of questions arise in relation to the Supreme Court's decision. First, should the President have referred the matter to the Supreme Court? Was he duty-bound to accept the decision of Parliament? As noted above, by accepting the decision against Akbar, the President did in principle concede that Parliament has the power to dismiss ministers. It has been suggested that as head of state and head of government, the President has an overriding duty to preserve the Constitution and the institutions it creates. Thus, by questioning the Parliament's decision the President was acting contrary to his implicit constitutional duty to preserve the legitimacy of the organs of the state.[166]

Second, a question arises as to whether the Supreme Court had the jurisdiction to hear the case. Aside from the question of its power to interpret the Constitution, which is discussed below, Article 121 of the Constitution limits the jurisdiction of the Court to the review of "laws, legislative decrees, international treaties as well as international covenants" for their compliance with the Constitution.[167] It seems on a plain reading of Article 121, "actions of the legislature," and in particular, a "vote of no confidence" cannot be reviewed by the Supreme Court. The Supreme Court did not have the opportunity to hear submissions from Parliament prior to making a ruling. This further highlights an inherent flaw in the design of the Constitution. Under Article 121 the Supreme Court can only hear matters at the request of government or the courts; thus, Parliament has no recourse to refer a matter to the Supreme Court.

164 Spanta Opinion.
165 Interestingly, the court does not address the issue of the "miscast" ballots on the first day.
166 Dr Kamali notes that "[the President] is constitutionally responsible for maintaining good relations among the organs of the State." He further notes that under Islamic constitutional theory leadership requires three basic features: knowledge, just character and wisdom (*ilm, 'adalah, hikmah*). See Kamali, "Afghanistan's Constitution Ten Years On," 13
167 *Constitution of Afghanistan*, Article 121.

Third and relatedly, questions have been raised whether an inherently political decision such as that of issuing a no-confidence vote should come under judicial scrutiny.[168] Numerous other jurisdictions have developed a "political questions doctrine," which preclude the judiciary from reviewing political decisions made by other branches of government.[169] In the United States, the application of this doctrine has precluded the judiciary from reviewing both the process of impeachment and the substance of impeachable offenses.[170] An impeachment proceeding and a vote of no confidence are two substantially different processes; however, both are similar mechanisms that give one branch of government a measure of oversight over another. Whether such a doctrine is appropriate for Afghanistan is questionable, given the highly politicised functioning of the current judiciary. In particular, given the partiality demonstrated by the judiciary to side with the executive, especially in politically high-stakes moments, adopting a "political question doctrine" may prove all too convenient.

168 Ehler et al, *Constitutional Law of Afghanistan*, 88. Dr Kamali discusses the view of a number of civil society commentators as well as ministerial advisor Ashraf Rasooli expressing a similar view: see Kamali, "Afghanistan's Constitution Ten Years On," 10-11.

169 See *Marbury v. Madison*, 5 U.S. 137 (1803); *Baker v. Carr* 369 U.S. 186.

170 Jesse H. Choper, "The Political Question Doctrine: Suggested Criteria," *Duke Law Journal* 54 (2005): 1457-1523, 1519. See also *Nixon v. United States* 113 S. Ct. 732, where a federal district judge who had been removed from office by impeachment sought judicial review of his impeachment proceedings. In particular, he challenged the Senate's use of a special committee to gather evidence relating to his impeachment instead of holding a full hearing before the entire Senate. The US Supreme Court held that the question was non-justiciable for a number of reasons including that it would "disturb the system of checks and balances where impeachment was the only legislative check on the judiciary"; and it would be contrary to the intention of the framers who gave the power of impeachment to a different branch of government. See also Michael J. Gerhardt, "Re-discovering Nonjusticiability: Judicial Review of Impeachments after Nixon," *Duke Law Journal* 44, no. 2 (1994): 231-276, 235-6.

5. The Independent Commission for Overseeing the Implementation of the Constitution

As expected the WJ rejected the Supreme Court's decision on Spanta, claiming that the latter's jurisdiction is limited to reviewing "laws, decrees and treaties." They took matters a step further by enacting a law providing for the establishment of the ICOIC, and giving it explicit jurisdiction to interpret the Constitution. The Parliament had little discussion on the public record about their proposed version of the ICOIC. In particular, there was little to no discussion about what impact this would have on the existing constitutional order, and what impact it would have on two competing authorities with the power to interpret the Constitution. Rather, at the time it was a spontaneous and collective retaliation against the executive and the judiciary.[171]

Article 157 of the Constitution provides for the establishment of an ICOIC in accordance with the provisions of the law.[172] At the time of Minister Spanta's impeachment the ICOIC had not yet been established. Neither Parliament nor the President had any plans to establish the ICOIC until late in 2007. The law of the ICOIC had been drafted by the Ministry of Justice and approved by the Cabinet. The Cabinet had then sent the law through the Ministry of Parliamentary Affairs to Parliament. WJ had approved the bill on 4 April 2007, with some amendments. The amended bill was sent to the President; however, he refrained from approving the law. The President had objections to Article 8 of the bill, which gave express powers to the ICOIC to interpret the Constitution at the request of the President, National Assembly, Supreme Court and the executive.

The President argued that Article 8 of the bill contradicted with Articles 121, 122 and 157 of the Constitution. These matters were highlighted in a letter written by the Minister of Parliamentary Affairs to the Speaker of Parliament. The letter concluded that the Constitution only grants the ICOIC the power to supervise the implementation of the Constitution and not the power to interpret the Constitution or any other laws.[173] In the midst of the political battle between the President and the Parliament over the impeachment of Minister Spanta, on 18 August 2008 the WJ seized the opportunity, and passed the bill with two-thirds majority, in accordance with Article 94 of the Constitution.

In response, in March 2009, the President sent the ICOIC law to the Supreme Court, asking that the Court review its constitutionality. As expected, the Supreme Court held that the law is unconstitutional. In its reasoning, the Supreme Court held that Article 157, which provides a mandate for "overseeing," does not also include the power of interpretation.[174] In particular, Article 8(1) of the law, which grants the power of interpretation, is in contradiction with Article 121 of the Constitution. The Supreme Court reasoned that as Article 121 provides that only the Supreme Court has the power to interpret the Constitution, it continued that interpretation of the Constitution would require power of issuing binding verdicts or adjudication and that power is only vested by the Constitution to Supreme Court.[175]

The Supreme Court further held that the appointment and dismissal mechanism in the law was contrary to the Constitution. Under Article 7 of the law of the ICOIC, by a proposal of five members of the ICOIC and approval of the WJ, the ICOIC could dismiss its members. The Supreme Court held that the ICOIC is not a "commercial firm" to dismiss its own members. Rather, it is an executive body, and under Article 64 of the Constitution the power to dismiss ministers and other government officials is exclusively vested in the President.

The Supreme Court further held that several additional provisions of the ICOIC were also unconstitutional. Under Article 5(1) of the law only an Afghan citizen could be a member of the ICOIC. The Supreme Court held that Afghan citizenship is a matter related to rights and

171 Nader Nadery, pers. comm., 10 January 2015.
172 *Constitution of Afghanistan*, Article 157.
173 Senior Government Official, pers. comm., 10 April 2014; see also Dempsey and Thier, "Resolving the Crisis," 5.
174 Judicial Verdict no. 5, 25 of Hamal 1388.
175 Ibid.

duties of citizens, which can be regulated by the constitution and not regular laws. Additionally, under Article 11 of the law, "no member of commission shall be arrested, detained or prosecuted without consent of the President; the case of evident crime is exempted." In the Supreme Court's view this concession could be only granted to the president, MPs and judges and in accordance with the constitution, not by regular laws to ordinary officials.

In issuing its decision, the Supreme Court published the law removing all the provisions it deemed unconstitutional. Thus, commentators argue that the Supreme Court violated the constitution by modifying the law that had been passed by Parliament.[176] Matters were made worse when the Ministry of Justice published the law, omitting the offending provisions, and providing explanations in the footnotes.[177]

Despite the passing of the law by Parliament, and the Supreme Court opinion, the status of the law remained unclear. The Parliament refused to accept the decision of the Supreme Court, claiming that the latter faced a conflict of interest in making its decisions. It was not until June 2010 the government took steps to establish the ICOIC.[178] The government nominated six candidates to sit on the ICOIC, and Parliament approved of five.[179] Since its establishment, despite the Supreme Court ruling that it does not have the power to interpret the constitution, the ICOIC had proceeded to issue opinions on key constitutional questions. The status of these opinions is unclear.[180] In addition to claiming the power to interpret the constitution, the ICOIC also claims the power to "supervise the observance and application of the constitution by government and non-government actors including the judiciary."[181] This provision has further raised confusion over whether the ICOIC can potentially function as an appellate body, to which even the Supreme Court decisions can be appealed.[182]

176 Ghizaal Haress, (Assistant Professor of Constitutional Law, American University of Afghanistan), pers. comm., 22 June 2014.
177 Ibid.
178 By May 2010 the WJ was holding "silent sessions" where no substantial matters were being discussed during its sessions. The WJ was marking its protest over a number of issues, including the President's handling of the Electoral Law, and his statements against the international community. In particular, the WJ had issued a number of ultimata to the government, including that it establish the ICOIC within ten days. It was in response to this standoff that the government finally nominated six candidates to be appointed to the ICOIC. See Martine Van Biljert, "Continuing Tug of War between the Parliament and Karzai"(Kabul: Afghanistan Analysts Network, 2010), http://www.afghanistan-analysts.org/continuing-tug-of-war-between-the-parliament-and-karzai/ (accessed 1 November 2014).
179 One candidate withdrew. The other five candidates were Gul Raham Qazi, Sayyed Omar Munib, Muhammad Amin Ahmadi, Abdul Qadir Adalatkhwah, Mahbuba Huquqmal (only female candidate); all five are well known personalities within the Afghan legal community and possessed previous academic and or government professional experience. See Sari Kouvo, "Six Years Late, the Constitutional Commission is Formed; but Will it Take on President and Parliament?" (Kabul: Afghanistan Analysts Network, 2010), https://www.afghanistan-analysts.org/six-years-late-the-constitutional-commission-is-formed-but-will-it-take-on-president-and-parliament/ (accessed 1 November 2014).
180 See Dempsey and Thier, "Resolving the Crisis," 5-6.
181 Tom Ginsburg, "Kabul Update: Constitutional Confusion Continues," Iconnectblog.com, 25 September 2011, http://www.iconnectblog.com/2011/09/kabul-update-constitutional-confusion-continues (accessed 1 November 2014).
182 Ibid.

6. The Power to Interpret the Constitution

The existence of the ICOIC has raised a fundamental question over who has the power to interpret the Constitution. Is it the Supreme Court, the ICOIC or both? It is important to note that prior to the enactment of the law on the ICOIC, the Supreme Court did in practice interpret the Constitution, and its power to do so was uncontested. In fact, up until 2007, when the ICOIC law was enacted, the Supreme Court had provided several important opinions interpreting the constitution. First, in 2005, when a question arose on how to constitute the MJ in the absence of district council elections, the Supreme Court determined that each Provincial Council should send two members each.[183] Second, when a question arose over what constitutes a 'majority' of Parliament for the purpose of approving government ministers, the Supreme Court decided that it means a majority of the members present.

Opinion as to the correct interpretation of Article 121 falls into three categories. All agree that the Supreme Court has the power to review and interpret legislative decrees, laws and international covenants for their compliance with the Constitution. The first category argues that the Supreme Court does indeed have the power to interpret the Constitution. His Excellency the Second Vice President Sarwar Danish, also a member of the Constitution Review Commission, argues that, "it is incorrect from legal and [policy] point of view to place the power of interpretation of [the] constitution to one organ and the review and compliance of ordinary laws to constitution another. And it is not the practice of any country in the world." Additionally, he claims the Constitution drafting committee, which he was also a member of, understood that the power to interpret the Constitution falls within the Supreme Court's jurisdiction.[184]

In contrast Mr Ashraf Rasooli, another member of the Constitution Review Commission and former deputy Minister of Justice and legal advisor to the President, argues that the Supreme Court does not have the power to interpret the Constitution. He argues that "some believe that the Supreme Court has also the power to interpret the constitution. However, the provision of the constitution [Article 121] is specific and clear that it provides for review of compliance of laws, legislative decrees, international covenants and treaties with the constitution...Thus, interpretation refers and is specific to those legal documents and not the constitution."[185]

A third member of the Constitutional Review Commission, Dr Hashim Kamali, explains the difference between the two camps as a question of approach. Dr Kamali, who agrees with His Excellency the Second Vice President that the Supreme Court does have the power to interpret the Constitution, argues that "yay sayers" are guided by the overall meaning and purpose of the article, while the "nay sayers" are informed by a grammatical analysis in their interpretation of Article 121.[186] Dr Kamali explains that if one were to look at the "overall meaning and purpose" of Article 121 it is logical to conclude that the Supreme Court has the power to interpret the Constitution. He acknowledges that when reading the Dari text it might be somewhat forced to interpret "the pronoun 'their — aanha'" as including the Constitution. Thus, he agrees with the "nay sayers," that on a strict grammatical reading, "aanha," may not include the Constitution. Nonetheless, Kamali suggests that if one were to examine the text within its overall meaning and purpose the correct view is that constitutional interpretation is within the purview of the Supreme Court.[187]

If one were to look at Article 157, it contains no express language giving power to the ICOIC to interpret the Constitution. Dr Kamali notes that it was the intention of the drafters to give the ICOIC a supervisory role to ensure the implementation of the new Constitution as well as the Bonn process. In particular, it was thought that the ICOIC could play an important supervisory

183 See also Dempsey and Thier, "Resolving the Crisis," 3.
184 Sarwar Danish, *Constitutional Law of Afghanistan.*
185 Ashraf Rasooli, *Analysis and Critic to Afghanistan Constitution*, (Kabul: Saeed Press, 1389).
186 Kamali, "Afghanistan's Constitution Ten Years On," 12. See also footnote 45 of the paper where Dr Kamali refers to a Constitutional Workshop in Kabul in August 2008, where all three were present as well as Habibullah Ghalib and discussed their different approaches and reasoning behind their interpretation of Article 121. At the workshop, Mohamad Qasim Hashimzai specifically noted that "the drafters of Article 121, who were all alive, intended to include constitutional interpretation within the purview of that article and therefore of the SC jurisdiction."
187 Ibid.

role during the transition period, where the Constitution granted the transitional government numerous powers to enact decrees.[188] Article 157 also appears in Chapter 12, which contains, "transitional provisions," and further warrants a reading that the ICOIC was not meant to have powers of interpretation.[189] Additionally, Article 64 of the Constitution, which gives the President the authority to, "supervise the implementation of the constitution," uses identical language to Article 157.[190] If the ICOIC's supervisory powers are interpreted to include the power of interpretation, then it is possible to similarly adopt an expansive view of the President's supervisory powers to include the power of interpretation. However, such a function was never envisaged by the drafters, and would undermine the separation of powers under the Constitution.

One additional factor that warrants against the ICOIC having an interpretative role is the fact that in its current incarnation, the Commission has been given a role in reviewing draft legislation once it has been passed by the cabinet before being sent to Parliament. Thus, the Commission faces a conflict of interest if it were asked to decide on the constitutionality of legislation that it assisted in drafting.

Since the establishment of the ICOIC, both the Supreme Court and the Commission have continued to interpret the Constitution, giving different opinions, sometimes on the same issue, at the same time. In a controversial example, in the aftermath of the 2010 parliamentary elections, the President sought the view of the Supreme Court on the constitutionality of the Special Election Tribunal. Unsurprisingly, the Supreme Court upheld the constitutionality of the Tribunal. At the same time, the ICOIC issued an opinion of its own rejecting all grounds used by the Supreme Court and held that the Special Election Tribunal is unconstitutional.[191] The electoral dispute continued, creating a constitutional and political crisis, until the matter was resolved through a political compromise.

Over time the ICOIC has not only ruled on issues relating to constitutional law, but also matters relating to the interpretation of Afghan statutes. This is a clear encroachment into the jurisdiction of the Supreme Court. As noted above under Article 121, the Supreme Court clearly has the power to interpret domestic laws for their compliance with the Constitution.[192] At present the law enacting ICOIC allows the Commission to receive questions from the President, National Assembly, the Supreme Court, AIHRC, IEC and Administrative Reform and Civil Service. A number of government agencies have sought the view of the ICOIC on a range of issues, relating to domestic statutes.[193] For example, the Cabinet Secretariat sought the view of the ICOIC on the question of the status of Afghan prisoners in Tajikistan who have been imprisoned for longer than 20 years (the maximum prison sentence under Afghan law is 20 years).[194] The Minister for Parliamentary Affairs asked the ICOIC to clarify the role of the Anti-Corruption High Office and the police.[195] AIHRC sought the view of the ICOIC on the legal status of detainees in the Bagram and Pol-e Charkhi prisons under Afghanistan's Memorandum of Understanding with the United States.[196]

Currently there is no legal or political consensus over who has the power to interpret the Constitution. On the one hand, given the leniency of the Supreme Court towards the executive, it would seem precarious to resolve the question in favor of the Court. On the other, the powers granted to the ICOIC appear to be contrary to a plain reading of the Constitution. Moreover, at times the ICOIC's robust opinions appear to be politically motivated by a certain resistance to executive overreach, rather than purely legal reasoning.[197] A permanent solution to the issue would be to amend the Constitution, clarifying which institution has the power of interpretation.

188 Kamali, "Afghanistan's Constitution Ten Years On," 13.
189 Ibid.
190 Ehler et al, *Constitutional Law of Afghanistan*, 172.
191 For more on this see Ghizaal Haress, "Adjudicating Election Complaints," 22-25.
192 *Constitution of Afghanistan*, Article 121.
193 Kamali, "Afghanistan's Constitution Ten Years On," 37, note 142.
194 Ibid.
195 Independent Commission for Overseeing the Implementation of Constitution (ICOIC), legal opinion regarding compliance of anticorruption law design with the Constitution, no. 7, 2012 (SY 1391).
196 Kamali, "Afghanistan's Constitution Ten Years On," 37, note 142.
197 Ghizaal Haress, "Adjudicating Election Complaints," 29.

The process for amending the Constitution requires convening a Loya Jirga, whose membership must include members of the National Assembly, Provincial Councils and district councils. As noted above, district council elections have not yet been held. The quorum for Loya Jirga requires that at least 50 percent of its members be present; without the presence of the district council members this requirement cannot be met.[198]

An alternative, and procedurally less onerous way of resolving the matter, would be to enact a law clarifying the jurisdiction of both entities. Article 121 provides that interpretation of the four enumerated items will be done "according to law." Similarly, Article 157 provides that the ICOIC shall supervise the Constitution and be established, "in accordance with the provisions of the law." Thus, a way out of the current quagmire is to adopt a law clarifying the role of each body. In this regard, Musa Mahmodi notes that "considering the standoff between the three branches of power and differing views on the authority and source of power to interpret the constitution, it is unlikely that they will agree to develop a law to clarify the procedures for this interpretational task and end the dispute over this article."[199]

The President did attempt to resolve the issue via a presidential decree, which limited the role of the ICOIC to review draft laws after approval by cabinet, before being sent to the National Assembly.[200] In practice, the decree has done little to dampen the ICOIC's work on interpreting, not only the Constitution, but also domestic statutes. Commentators advise that first, a political compromise should be reached between the relevant institutions, before attempting to legislate a solution.[201] In particular, all three branches of government must come to an agreement on who has the power to interpret the Constitution, and agree to abide by the decisions reached by the respective body.

Views differ as to what should be an appropriate role for the ICOIC. Some agree that ICOIC should continue to issue advisory opinions on whether draft laws comply with the Constitution.[202] In particular, the ICOIC should carry out its constitutionally mandated role of ensuring that the Constitution is properly implemented not just by the executive but also by "all entities in the country."[203] There is also a role for the ICOIC to issue advisory opinions on inter-branch disputes and on the constitutionality of "actions" of the legislature and the executive, especially given that the latter does not appear to fall within the Supreme Court's jurisdiction.[204] The Commission could also examine the constitutionality of laws enacted prior to 2004.[205]

198 At present only 385 of the required 789 members are holding office. See Tom Ginsburg, "Comparative Constitutional Review," http://www.usip.org/sites/default/files/ROL/TG_Memo_on_Constitutional_Review%20for%202011_v4.pdf (accessed 1 November 2014). Ginsburg suggests that a practical way to resolve this dispute would be to interpret the quorum as 50 percent of the number of offices actually elected; to do so otherwise would be to mean that constitutional amendments couldn't take place until hostilities cease.
199 Musa Mahmodi, "Constitution" (02 April, 2014).
200 Presidential Decree (No. 11371, 14 November 2010).
201 Kamali, "Afghanistan's Constitution Ten Years On," 37; Dempsey and Thier, "Resolving the Crisis," 9.
202 Kamali, A"fghanistan's Constitution Ten Years On," 37; Dempsey and Thier, "Resolving the Crisis," 7-8.
203 Ghizaal Haress, "Adjudicating Election Complaints," 33.
204 Dempsey and Thier, "Resolving the Crisis," 7-8.
205 Ibid.

7. Practice of Issuing No-Confidence Votes

After the Spanta episode, Parliament began to use its powers to summon ministers more frequently. The wider political context played a key role in Parliament's more zealous approach to its oversight functions. In part, after the 2010 parliamentary elections where the President had attempted to re-engineer the electoral results by establishing an extra-constitutional Special Election Tribunal, there was significant bad blood between the newly elected MPs and the executive. There were also clashes among key personalities with the legislature and the executive. Additionally, within a highly fragmented Parliament, summoning ministers and seeking to dismiss them was the only way MPs could unite to both retaliate against the President, as well as to mark their protest over how the country was being governed. The Palace's response to these no-confidence issues was varied. At times the President's office accepted the no-confidence votes, and allowed ministers to step down; however, in other instances while seeming to accept the no-confidence vote, the President has allowed the minister to continue serve in government, or in some instances, re-appointed them to another closely related portfolio. The Parliament attempted to curb this practice by passing a law limiting the period within which a minister can function as an "acting minister" to two months.[206] However, in practice some ministers remained as acting minister far beyond the prescribed two-month time frame.

In 2011, following the outcry over the Special Election Tribunal, Parliament sought to issue no-confidence votes against Attorney General Aloko and six Supreme Court justices. Aloko had played a key role in the investigation of the electoral fraud allegations against the newly elected MPs, and the Supreme Court justices had upheld the constitutional validity of the Special Election Tribunal. Following the no-confidence votes, none of the officials stepped down. The legal basis for impeaching the Attorney General and the Supreme Court justices was shaky at best. The WJ is required to approve the Attorney General's appointment; however, there are no provisions in the Constitution expressly granting the WJ power to remove the Attorney General.[207] Similarly, under Article 127 of the Constitution, the WJ can dismiss a Supreme Court justice where two-thirds of the WJ vote to demand that a justice be tried for a specific "crime related to job performance or committing a crime."[208] However, in the vote before the WJ, though two-thirds of its members did successfully vote to dismiss the Supreme Court judges, no crime related to job performance was identified. As noted above, the Supreme Court's response to the attempted impeachment was even more revealing. In its periodic gazette, the Court stated that only the President has the power to dismiss Supreme Court judges, and not the Parliament.[209] This is plainly not the case. A combined reading of the relevant provisions clearly indicates that the President has the power to appoint, retire, and accept the resignation of judges at the primary and appellate court levels. However, when it comes to Supreme Court judges, their term is secure unless the WJ seeks to dismiss them via the procedure identified under Article 127.

In August 2012, Abdul Rahim Wardak, the Minister for Defence, and Bismillah Khan Muhammadi, Minister of Interior, were questioned before Parliament, and both failed to survive no-confidence votes against them. The reasons for their being hauled before Parliament was Afghanistan's lack of clear response to cross-border shelling emanating from Pakistan into Kunar province. Commentators noted that neither minister was questioned concerning well-publicised allegations that both used their positions for personal gain. Minister Wardark had been accused of financially benefitting from NATO contracts awarded to a private security company run by his son, Hamid Wardak.[210] Similarly, at the time, Bismillah Khan had been accused of making government appointments on "personal and factional interests," rather than on merit.[211] The Palace formally

206 *Law for Acting Minister* (*Official Gazette* no. 1051), 2011 (SY 1390).
207 Scott Worden, "A Guide to Afghan Impeachment," *Foreign Policy*, 15 July 2011, http://southasia.foreignpolicy.com/posts/2011/07/15/a_guide_to_afghan_impeachment (accessed 1 November 2014).
208 *Constitution of Afghanistan*, Article 127.
209 Ghizaal Haress, "Adjudicating Election Complaints," 27
210 Fabrizio Foschini, "Parliament Sacks Key Ministers: Two Birds with One Stone?" (Kabul: Afghanistan Analysts Network, 2012) https://www.afghanistan-analysts.org/parliament-sacks-key-ministers-two-birds-with-one-stone/ (accessed 1 November 2014).
211 Ibid.

accepted these no-confidence votes, announcing that both ministers will only continue to serve in an acting capacity until replacements are identified. A mere month later, Bismillah Khan was nominated by the President to replace Wardak as Minister of Defence. Strangely enough, the WJ approved him as Minister of Defence with an overwhelming majority. In fact, at his confirmation session before the WJ, the MPs who had previously voted against him as Minister of Interior made no enquiries as to why he was now suited to head another closely related portfolio.[212]

In 2013, Bismillah Khan's successor in the Ministry of Interior, Mujtaba Patang, was questioned before Parliament and dismissed via a no-confidence vote less than a year into his term. Ostensibly Patang's ousting related to high number of civilian casualties related to increased insurgent attacks.[213] In response, the Palace announced that the matter would be referred to the Supreme Court in order to decide whether the no-confidence was conducted "according to law."[214] However, before the Supreme Court made a final decision, the President introduced a new Minister of Interior, Mohammed Omer Daudzai.[215] Patang himself protested against the vote claiming that he had been summoned by Parliament a total of 172 times; and "based on this calculation [he] would have only had one week to work for the people."[216]

In a number of other instances Parliament has sought to question ministers in circumstances that appeared patently politically motivated.[217] In April 2013, Parliament questioned 11 ministers over their perceived failure to spend their development budgets. In that instance all 11 managed to survive votes against them. In July 2013 Parliament passed a no-confidence vote against Finance Minister Omar Zakhilwal after the latter accused six MPs of corruption and the Attorney General proceeded to investigate the concerned MPs.[218] The practice of issuing no-confidence votes has also further enabled a culture of corruption where ministers regularly pay bribes, provide favours or employ the relatives of MPs in order to secure themselves against being ousted.[219]

On the one hand, Parliament's efforts to hold the executive accountable demonstrate that separation of powers is in fact working. Summoning ministers and attempting to vote them out is an example of inter-branch checks and balances at work.[220] However, Parliament's erratic approach and the executive's varied responses are neither facilitating constitutional government nor political stability. The Parliament needs to adopt a more principled approach to summoning ministers, where their efforts aren't singularly aimed at disrupting the President's legislative agenda or retaliation against personal clashes. Similarly, where the Parliament does issue a no-confidence vote the executive needs to adopt a consistent response.

212 Fabrizio Foschini, "Filling the Power Ministries (3): Three Security Bosses Voted In," (Kabul: Afghanistan Analysts Network, 2012) https://www.afghanistan-analysts.org/filling-the-power-ministries-3-three-security-bosses-voted-in/15/ (accessed 1 November 2014).

213 Margherita Stancati and Habib Khan Totakhil, "Afghan Lawmakers' Vote to Oust Interior Minister Runs into Resistance," *Wall Street Journal*, 22 July 2013, http://online.wsj.com/news/articles/SB10001424127887323829104578621361368850572?mod=_newsreel_5 (accessed 1 November 2014).

214 Al Jazeera, "Karzai Contests Firing of Afghan Minister," 22 July 2013, http://www.aljazeera.com/news/middleeast/2013/07/201372214513133381.html (accessed 3 April 2014).

215 Afghan Government Official, pers. comm., 30 April 2014.

216 Sean Carberry, "An Afghan Minister Fires Back at Impeachment Attempt," NPR, 23 July 2013, http://www.npr.org/blogs/parallels/2013/07/23/204766731/an-afghan-minister-fires-back-at-impeachment-attempt (accessed 1 November 2014).

217 See Gran Hewad and Thomas Ruttig, "Summoning the Ministers: Parliament Damages its Own Image," (Kabul: Afghanistan Analysts Network, 2013) http://www.afghanistan-analysts.org/summoning-the-ministers-parliament-damages-its-ownimage/ (accessed 1 November 2014).

218 Gran Hewad, Thomas Ruttig and Claudio Franco, "Tit for Tat – and Worse: The Long History of Enmity between Parliament and Government," (Kabul: Afghanistan Analysts Network, 2013) https://www.afghanistan-analysts.org/tit-for-tat-andworse-the-long-history-of-enmity-between-parliament-and-government/ (accessed 1 November 2014).

219 Gran Hewad, "Summoning the Ministers."

220 Ginsburg Tom, and Huq Aziz, "What Can Constitutions Do: The Afghan Case?" *Journal of Democracy* 25, no. 3 (2014): 116-130.

8. Conclusion

For historical and practical reasons, under the 2004 Constitution a conscious decision was made to centralise power and create a powerful executive that would have overarching powers to make the whole of government function. The executive under the Afghan Constitution has extensive powers to legislate and has significant control over the appointment of the entire judiciary. This has significantly impacted both the separation and balance of power among the three branches of government. Subsequent steps taken to implement the Constitution, such as enacting an SNTV electoral system, has produced a fragmented parliament that is unable to form coherent political alliances. Similarly, the judiciary has struggled to establish itself as an independent branch, in part owing to a weak constitutional architecture, but also because of a historical lack of institutional capacity in the Afghan judiciary. Ultimately, under the 2004 Constitution both the legislature and the judiciary have struggled to effectively use their oversight powers to hold the executive accountable.

The Spanta episode brought to the fore gaps in the constitutional framework, and inherent weaknesses of each branch of government. Throughout the crisis the executive demonstrated its continued willingness to act in an extra-constitutional manner. This was not merely because of ill intent within the executive; the extra-constitutional actions were enabled by ambiguities and gaps in the current Constitution. The fragmented Parliament, motivated by a distrust of the executive, sought to retaliate by one of the few, though not the only, means at its disposal by retaliating against individual ministers. The Supreme Court, beholden to the executive, continued to conduct judicial reviews in a manner that appeased the government. The ensuing political crisis severely tested the existing constitutional framework and demonstrated that in high-stakes moments, none of the branches of government accepts the constitutional powers and duties of the others.

It has been suggested that these constitutional tussles are merely the “growing pains” of a new democracy. And indeed, that the ongoing conflict between executive and the legislature is evidence that inter-branch checks are working. In the Afghan context these claims need greater scrutiny. On the one hand, at a time when it is needed the most, these political and constitutional battles are eroding public confidence in government institutions. Given the fragile security environment, a question always raised is whether Afghanistan is too fragile to withstand this type of constitutional standoff.

Ten years after the debate on whether to create a prime minister or chief executive post under the Afghan Constitution, amid disputes over the results of the 14 June 2014 runoff presidential election, an agreement was reached to form a National Unity Government. Unfortunately, the discussion over changes in the system of government and the creation of a prime minister or chief executive post was not driven by the question of checks and balances among state institutions. Rather, it was rushed through in order to reach a political solution for a hotly disputed election.

Under the National Unity Government, these questions relating to separation of powers take on a special significance. As the NUG attempts to nominate and install new ministers, the WJ’s goodwill is critical to ensuring that ministers are approved on time and can assume their ministerial positions in a timely fashion. In particular, the possibility of no-confidence votes against ministers can have an added layer of complexity. Given that appointments to ministries are divided between the CEO and the President, differential treatment of ‘CEO appointees’ vs ‘presidential appointees’ by the WJ, Supreme Court and even the ICOIC has the potential to create significant political ill-will and distrust between the different branches of government, as well as within the executive. For example, if the President were to reject a no-confidence vote against one of his appointees and accept a no-confidence vote against a CEO appointee, it may have significant political ramifications, and ultimately undermine the integrity of the agreement underpinning the NUG. Moreover, Parliament itself may seek to exploit these tensions by targeting ministers that could test the goodwill between the CEO and the President.

The ambiguity over who has the power to interpret the Constitution, and adjudicate constitutional disputes can also provide a range of answers to a potential dispute or interpretive question within the NUG. A dispute under the NUG or an interpretive question is not precluded from being sent

to the Courts or even the ICOIC. Whatever legislative decrees are passed to enact the agreement can become the subject of a dispute before a Court, or become the subject of a request for constitutional interpretation. Given that the ICOIC has jurisdiction to hear questions relating to constitutional interpretation from a broader range of parties, including the President, National Assembly, the Supreme Court, AIHRC, IEC, and Administrative Reform and Civil Service, any of these parties concerned about laws that seek to enact the agreement could request the ICOIC to rule on its constitutionality.

Ultimately the solution to these constitutional questions relating to the separation of power must be Afghan-led, where all three branches of government reach a political as well as a legal solution. In particular, all three branches of government must come to a political agreement as to the proper constitutional role for each branch. It is imperative that any solutions reached conform to the existing constitutional framework. In the current context, where constitutional amendment is well back on the agenda, it may be tempting to leave the resolution of these questions until a formal process commences. However, some disputes, such as who has the authority to interpret the Constitution, can be resolved via legislation that clarifies the role of the ICOIC and the Supreme Court. Others, such as the proper role of Parliament and the executive, and whether the President should seek to usurp the role of the legislature by seeking judicial reviews, or by resorting to loya jirga, can be resolved through more deft political solutions.

9. Recommendations

Executive

- Limit the use of rule by legislative decrees. The executive needs to adhere to the requirements of Article 79 of the Constitution, and enact decrees only in genuine cases of "immediate need." In particular, in instances where legislative decrees are passed under Article 79, all such decrees must be tabled before Parliament within 30 days of the latter reconvening, as required under the Constitution.
- Adopt a consistent internal policy as to how to address no-confidence votes. In particular, the executive should comply with the current statute that limits the term of acting ministers to two months.
- Take immediate steps to strengthen the judiciary. The first order of business should include nominating judges to the remaining vacant seats in the Supreme Court. Other outstanding issues such as implementing the constitutionally mandated staggered terms, improving remuneration of judges and facilitating greater autonomy to the Court in developing its budget should be addressed. In particular, the executive should refrain from using the budget process as a means of applying pressure on the judiciary.
- In consultation with Parliament, Supreme Court, ICOIC and other key stakeholders, the executive should propose a bill that clearly delineates the jurisdiction of the ICOIC and the Supreme Court. The law should be passed by Parliament.
- In consultation with members of Parliament, political parties, electoral institutions and civil society, reform the electoral system to promote political parties.
- Enact legislation to clarify the judicial review function of the courts, and expand the range of actors who can seek judicial review.

Judiciary

- In order to address the lack of appropriately trained legal professionals, including judges at the lower court level, the judiciary in consultation with other stakeholders, should initiate serious reform to increase the capacity and competency of judges.
- In nominating judges to lower courts, the judiciary should develop guidelines and procedures to regulate the nomination process and ensure that appointments to the lower courts are based on merit.
- The judiciary needs to take increased efforts to develop a culture to reflect the norms of judicial independence that is provided for under the 2004 Constitution. A starting point needs to be regularly conducting its administrative and judicial functions in a manner that does not undermine its independence.

Parliament

- Use its investigative powers to provide greater oversight to government actions. In particular, use its powers under Article 89 to establish special commissions to investigate government actions.
- Parliament needs to make greater efforts to improve its legislative record. For example, it needs to strengthen its capacity to initiate and review draft legislation.

ICOIC

- The ICOIC should increase its role of providing oversight to other branches of government, and in particular monitor the implementation of the Constitution by all actors.

- There needs to be greater awareness and understanding of the Constitution by all government actors, including parliamentarians. The ICOIC should take action to increase awareness and understanding of the constitution among government officials.
- The ICOIC should come to an agreement with the executive, Parliament, and Supreme Court over the proper role of the Supreme Court and the ICOIC. Following an agreement, the ICOIC should support the law that would seek to clarify the roles of the two institutions.

Civil Society

- Conduct greater research on how the three arms of government functions in practice. For example, there needs to be increased civil society monitoring of both Parliament and the judiciary. They should facilitate increased public awareness of how MPs vote, the work of parliamentary commissions, Parliament's use of oversight powers during the budget process and greater scrutiny of judicial opinions.

International Community

- Demonstrate greater respect for the Afghan Constitution. Political solutions and other development assistance should seek to reinforce and strengthen the existing constitutional framework. For example, the international community can facilitate the key stakeholders to come to an agreement as to the proper role of the ICOIC and the Supreme Court.
- Provide assistance to the National Assembly develop its capacity to draft and review legislation. In particular, provide assistance to parliamentary committees in the form of technical assistance in the drafting and reviewing of legislation.

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