

# Parliamentary Manual

## Legal and Institutional Principles

31 May 2005

# Foreword

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This manual is a legal and institutional resource publication intended for parliamentary candidates, parliamentarians, and legal/political organizations.

The manual is structured to serve as a direct resource document in addition to being a training resource to be utilized by trainers in the field.

The document is mainly based on the Constitution of Afghanistan. It should be used always in direct reference with the Constitution.

The main training (learning) use of the document is to accustom target beneficiaries – specifically those with no legal background – to study and refer to the Constitution.

The document is not intended to cover all legal and institutional aspects of parliamentary responsibility. The intention is to focus information and facilitate discussion among beneficiaries on the Constitution, in the hope that individual efforts will lead those concerned to develop and enhance their knowledge as they interact, debate and research.

Trainers wishing to utilize the manual are encouraged to complement sections with necessary visuals and otherwise illustrate the information as they see fit.

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## Introduction: The Main Features of the Constitution

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The constitution is a social contract. It is **Social** because it is made by society/people, represented by the drafters of the constitution. And it is a **Contract** because it is a legal document (the highest legal document in a state) binding to the people and the state. The purpose of the constitution is to define the state's relation to the people and basic relations among people themselves.

In many ways the constitution and the state are primarily legal structures. In fact, the concept of the modern state that emerged in the 17<sup>th</sup> century, building on the heritage of humanity, is all about the definition of the state's three authorities (**Legislative, Judicial and Executive**) and their relation to the effect of law.

The basic principle in justice and government that evolved then, was that whoever **legislates** (makes Law) should be different from whoever **judges** (applies the Law) and different from whoever **executes** (enforces the Law). This is supposed to guarantee justice and preclude prejudice in the legal process and enable these separate three authorities to monitor each other.

Any constitution in a democracy is supposed to guarantee the separation, independence and balance between the three authorities of the state.



## The Constitution

The constitution is the physical and legal structure of the state. It defines the state's:

1. **Authorities and institutions**  
(Executive, Legislative and Judicial authorities and institutions as well as other independent institutions)
2. **Legal system**  
(How laws are made, by which authorities, according to which principles, how and by which authorities they are applied and how and by which authority they are enforced)
3. **Citizen human rights**  
(Civil, political, economic, social and cultural rights as well as state guarantees of these rights)

It represents the highest will of the people of the state. The Afghan Constitution based on long tradition considers this highest will to be represented by the *Loya Jirga*, higher than the rest of the authorities of the state and the normal will of the people. This is why both the President and National Assembly, representing the will of the people who elected them, can not amend the Constitution. Only the *Loya Jirga* can (**Articles 110, 111**).

As a most important state authority and institution, the National Assembly and particularly the *Wolesi Jirga*, have two main tasks and duties:

1. **To legislate** (make law) and,
2. **To monitor Government performance** (Articles 90, 91, 92, 93, 94).

Both these tasks must be carried out in ways that respect and apply the laws laid down in the Constitution (**Articles 5, 162**).

For a *Wolesi Jirga* member – and for the state and nation as a whole – the Constitution is the mandatory manual. It decides **why** and **how**. The Assembly can only decide **when** and **what**.

## **Constitutionalism**

“**Constitutionalism**” (**Conformity with Constitution**) is the corner stone principle for the legitimacy of parliament actions on political, institutional and legal bases.

### **Politically:**

The Constitution is the higher guarantor of democracy in a state; it defines the rules of democracy:

1. The rights of the majority to lead/decide.
2. The right of minorities to participate/be respected.

So a majority in a parliament has the legitimate right to legislate and monitor the government, as long as it does so according to the rules of the Constitution and respects rights stated in the Constitution.

### **Institutionally:**

As a state institution and authority the National Assembly has the most interaction with the Constitution even on a day-to-day work basis, as defined by rules and regulations on session’s procedures, political monitoring rules and legislation principles, and methods of enactment. A mistake



made by the National Assembly is mostly a Constitutional mistake. These mistakes are much more serious than mistakes in regulation making and Law enforcement (Executive power) or Law application (Judiciary Power). They are hard to fix and their occurrence weakens the institution's credibility and authority.

**Legally:**

The National Assembly is the legislative authority. It has the primary (original) authority to legislate laws (**Articles 81, 90**).

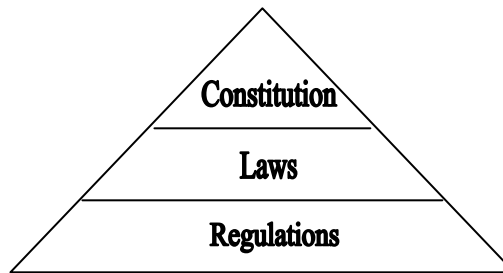
The executive authority (the President and government) have secondary (partial) authority to legislate: they can issue regulations (**Article 76**) at the administrative level and they can issue decrees (**Article 79**). These are temporary rules having the force of Law only when the National Assembly (the primary authority) is not in session. These decrees must be put before the first National Assembly session to be held. The National Assembly after review either confirms them as laws or rejects and abrogates them.

For Law making, the National Assembly is the highest authority. This concept is known in political science and Constitutional Law as "sovereignty of parliament." The only limitation to this sovereignty is the Constitution, because as we said it represents the highest will of the people (**Article 110**).

A Law passed in good procedure by the National Assembly would not be legitimate if it violates the Constitution; this rule is known as the Constitutionality or the legitimacy rule in Constitutional Law.

It simply provides that Laws should obey the Constitution, and regulations should obey the constitution and the Laws.

This figure explains the hierarchy and status of Constitution, Laws and Regulations:



If a Law violating the Constitution is enacted by the National Assembly, it will be invalid (**Article 162**).

It is within the authority of the Supreme Court (Head of the Judicial authority) to declare the Law as non-constitutional and invalidate it when such Law is referred to the Court. This is called the authority of “Judicial Constitutional Review” (**Article 121**).

The National Assembly has the power to abrogate a Law as well, if it later sees the Law as non-constitutional (**Article 90/1**). As the National Assembly has the primary authority of legislation it can make and unmake Laws.

# Chapter I

## Legal Principles



*Parliamentary Manual:  
Legal and Institutional Principles*

# 1 The Constitutional State Structure

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The constitution of Afghanistan established an “Islamic” “Democratic” “Republic” (**Articles 1, 2, 3, 4, 5, and 6**).

**“Islamic,”** as the religion of the state is Islam (**Article 2**) and laws of the state should be in conformity with Islam (**Article 3**).

**“Democratic,”** as power is held by elected representatives (**Articles 4, 6**).

**“Republic,”** as sovereignty lies in citizens forming the nation, with the will of the citizens manifested directly by their elected representatives (**Article 4/1**).

In addition to these three basic principles of the state, the Constitution established a structure of a presidential system mixed with very strong parliamentary powers.

Among the most important features of the presidential systems are:

- state authorities (Executive, Legislative and Judicial) are clearly separated.
- the head of state is the head of Government at the same time.
- The President is directly elected by the people.

We shall see these features below.

## 1.1 State authorities' powers and duties

### 1.1.1 The President:

As the head of state, the President has special authorities in the executive, legislative and judicial fields (**Article 60**). These powers are in addition to his full executive power as the head of Government.

The powers of the President as the head of state are mostly honorary and executive; the majority of effective head of state powers under the Afghan Constitution are shared with the National Assembly or “*Wolosi Jirga*.”

#### *Independent powers of the President:*

1. Inaugurating the National Assembly and *Loya Jirga* session (**Article 64/9**) *Honorary*.
2. Accepting credential letters from state representatives to Afghanistan (**Article 64/15**) *Honorary*.
3. Accepting resignations of Vice-Presidents (**Article 64/10**) *Honorary*.
4. Issuing credential letters for the conclusion of international treaties (**Article 64/17**) *Honorary*.
5. Bestowing medals (**Article 64/ 19**) *Honorary*.
6. Commander in chief of the National Army (**Article 64/3**) *Executive*.
7. Chairmanship of the Government (**Articles 71, 77**) *Executive*.

8. Appointing, retiring and accepting resignations of Justices, Heads of Administrations and high-ranking officials **(Article 64/13)** *Executive*.
9. Taking necessary decisions defending independence **(Article 64/5)** *Executive*.
10. Appointing representatives of state to foreign states and international organizations **(Article 64/14)** *Executive*.
11. Calling referenda **(Article 65)** *Executive*.
12. Establishing commissions to improve administration **(Article 64/20)** *Executive*.
13. Convening the *Loya Jirga* **(Article 64/7)** *Legislative*.
14. Endorsing laws and legislative decrees **(Article 64/16)** *Legislative*.
15. Appointing one third of *Mishrano Jirga* members **(Article 84)** *Legislative*.
16. Vetoing or reviewing National Assembly agreed draft laws **(Article 94)** *Legislative*.
17. Convening extraordinary sessions of the National Assembly **(Articles 107, 104)** *Legislative*.
18. Reducing sentences and issuing pardons **(Article 64/18)** *Judicial*.
19. Approving capital punishment sentences **(Article 129)** *Judicial*.

***Powers shared with the National Assembly:***

1. Determining fundamental lines of policy **(Article 64/2)** *Executive*.
2. Declaring war and peace **(Article 64/ 4)** *Executive*.



3. Dispatching armed forces outside the country **(Article 64/ 5) Executive.**
4. Proclaiming and terminating a state of emergency **(Article 64/8) Executive.**
5. Suspending certain Articles of the Constitution **(Article 145) Executive.**
6. Transferring certain powers of the National Assembly to the Government **(Article 144) Executive.**

Because of the delicate nature of these powers on democracy, sovereignty and state structure levels, all of the above-mentioned powers need the endorsement of the National Assembly, except powers of **(Article 144)** which require consultation with the presidents of both houses of National Assembly and the head of Supreme Court and the powers of **(Article 145)** which require approval of the presidents of the National Assembly and the head of the Supreme Court.

7. Proposing amendments to the constitution with approval of the National Assembly **(Article 147) Legislative.**

***Powers shared with the Wolosi Jirga:***

1. Appointment of government members and heads of independent institutions with the endorsement of the *Wolosi Jirga* **(Article 64/11) Executive.**
2. Appointment of the chief Justice and members of the Supreme Court with the endorsement of the *Wolosi Jirga* **(Article 64/12) Judicial.**



3. Appointment of Vice-Presidents with the endorsement of the *Wolosi Jirga* in the event of death or resignation of appointed Vice-Presidents at nomination (**Article 68**) *Executive*.

**Note** that the powers of (**Article 64/11**) are only shared in appointment, not in dismissal and resignation expectance, and also that the shared powers of (**Article 64/12**) do not include dismissal because Justices' terms are protected by the Constitution and Law to insure independence (**Article 117**).

***Mixed Powers:***

1. Supervising the implementation of the Constitution (**Article 64/1**) *General*.

The general wording of this paragraph allows the President to use any of his previous powers to achieve this duty. The scope of this power is general, covering all powers/authorities/institutions of the state.

The President shall enforce this power through (**Article 157**) as well, by establishing the Independent Commission of Constitutional Supervision. The appointment of Commission members requires the endorsement of the *Wolosi Jirga*. So this is a general power/duty that is implemented independently by the president and jointly with the *Wolosi Jirga* in endorsing appointment of Commission members.



### 1.1.2 The Government (The Executive Authority):

The Government/Executive Authority is comprised of Ministers/Cabinet under the chairmanship of the President (**Article 71**). Each Ministry shall be an administrative unit headed by the respective Minister (**Article 77**).

Ministers can be appointed from amongst National Assembly members, only after such members lose their membership in National Assembly. They are replaced with other members in accordance with the Law (**Article 73**). **Note** the clear separation between state authorities as a main feature of presidential systems.

Ministers are responsible/accountable to the President as their chairman (**Articles 71, 77**) and are politically responsible/accountable to the *Wolosi Jirga* (**Articles 77, 91, 92**).

#### *Duties/Powers of the Government:*

1. Executing provisions of the Constitution, laws and final decisions of courts.
2. Preserving independence, defending territorial integrity and safeguarding the state's interests (**Article 75/2**).
3. Maintaining public order and eliminating administrative corruption (**Article 75/5**).
4. Preparing the budget, regulating finances and protecting public wealth (**Article 75/4**).

5. Planning and implementing development programmes (**Article 75/5**) after approval of the National Assembly (**Article 90/2**).
6. Reporting to the National Assembly at the end of the fiscal year on performance and new programmes (**Article 75/6**).
7. Heading the administration of the Government (**Articles 77, 136, 137**).
8. Making and applying administrative regulations (**Article 76**).

**Note** application of the “Constitutionality” or “legitimacy” rule will require conformity with the body and spirit of any law.

9. Preparing legislative decrees for Presidential endorsement (**Article 79**).

### **1.1.3 The National Assembly (The Legislative Authority):**

The National Assembly is the highest legislative (Law making) institution in Afghanistan (**Article 81**).

**Note** that for Constitution making, the *Loya Jirga* is the competent institution (**Article 110, 111**). The National Assembly is bicameral (has two Houses), the House of the Elders (*Mishrano Jirga*) and the House of the People (*Wolosi Jirga*). The reason behind having two houses of Parliament in this and other Constitutions is to complement the legislative Authority with more specified knowledge and experience. The minimum age of a member in *Mishrano Jirga* (35) is higher than that of a *Wolosi Jirga*

member (25) and the President appoints one third of the *Mishrano Jirga* according to expertise, experience and specific representation (**Article 85, 84**). Yet, in order to maintain democratic and Constitutional principles (that the nation is represented only by elected members) (**Article 4**), only *Wolosi Jirga* has the authority of Government monitoring and political responsibility/accountability (**Articles 77, 91, 92**) and the power to overturn Presidential veto or revision of legislation (**Article 94**). *Wolosi Jirga* also has the power to overturn *Mishrano Jirga* votes on legislation (**Article 100**). Finally, joint sessions of both houses of the Assembly are presided over by the President of the *Wolosi Jirga* (**Article 104**).

***Powers of the National Assembly:  
(Note shared powers with the President)***

1. Enacting, modification or abrogation of laws and decrees (**Article 90/1**).
2. Approval of governmental development programmes (**Article 90/2**).
3. Approval of the state budget as well as grants and loans (**Article 90/3**).
4. Creation, modification and abrogation of administrative units (**Article 91/3, 64/11, 64/12**).
5. Ratification or abrogation of the state's membership in international treaties and agreements (**Article 90/5**).
6. Questioning Ministers through a joint commission with the *Wolosi Jirga* (**Article 93**).

***Powers of the Wolosi Jirga:***  
***(Note that these are shared powers with the President independently, in addition to those powers above as part of the National Assembly)***

1. Demanding elucidation from and making inquires in sessions with any Minister (**Articles 91, 92, 77**).
2. Issuing no-confidence votes on specific Ministers (**Article 92**).
3. Establishing special investigation commissions to investigate/review Government actions (**Article 89**).
4. Deciding on development programmes and the state budget (**Article 91/2**).
5. Approving appointments of Ministers, Heads of independent institutions and Judges of the Supreme Court (**Articles 91/3, 64/11, 64/12**).
6. Initiating draft laws by voting to approve them and refer them to *Mishrano Jirga* (**Article 94, 97**).
7. Overriding Presidential Veto or review of legislation (**Article 94**).
8. Overriding *Mishrano Jirga* opposing vote on legislation (**Article 100**).
9. Proposing impeachment of the President to the *Loya Jirga* as well as convening the *Loya Jirga* for this purpose (**Article 69**).
10. Demanding and approving dismissal of Supreme Court members (**Article 127**).
11. Being consulted by the central bank on the printing of currency (**Article 12**).

#### 1.1.4 The Judicial Authority (Supreme Court):

The Judicial Authority is made up of the Supreme Court as the head of Judicial Authority in addition to courts of appeal (at the provincial level) and primary courts (at the district level) (**Article 116**), as well as special courts (**Articles 69, 78, 122, 127**).

The power of the authority is to apply the Law in all kinds of cases viewed by the courts. The Jurisdiction of the Courts cover all cases filed by persons or institutions including the state as plaintiffs or defendants (**Article 120**). No Law is allowed under any circumstance to exclude any case or area from the Jurisdiction of the judicial authority (**Article 122**).

All final decisions of the courts shall be enforced, except for capital punishment sentences, as well as reduction and pardon of penalties (**Articles 64/18, 75/1, 129**).

The courts in Afghanistan shall apply this Constitution and other Laws. If they do not find rules to apply in the Constitution and laws, the court can resort to Hanafi Jurisprudence as a complementary source of Law (**Article 130**). In cases concerning followers of the Shia sect and only in personal matters, courts are to apply Shia Jurisprudence (**Article 131**).

The Supreme Court has the power of Constitutional Judicial review. At the request of the Government or courts the court shall review laws and decrees in addition to treaties and covenants Afghanistan has joined in terms of

their compliance with the Constitution and their interpretation (**Article 121**).



## 2 The Afghan Legal System

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### 2.1 Introduction: What is the Legal system?

The legal system is

- the way Law is made and what institutions make it,
- the way the Law is applied and by which institutions, and
- the way Law is enforced and by which institutions.

Traditionally and historically, all legal systems began as customary legal systems (where the Law is customary tradition and is applied and enforced by tribal or tribal like councils).

Later systems developed the **form** of the Law (The legal rule) into the following legal systems:

- **Jurisprudential legal systems**  
Where Law is the opinion of Jurists and is applied by courts like the Islamic legal system. The opinion of Jurists, based on the Holy Quran and Sunna, define legal ruling (*Al Ahkam*).
- **Judicial legal systems**  
Where the Law is the previous decisions of courts (precedents) and is applied by courts like the English common Law system
- **Codified legal systems**  
Where the Law is written down by a legislative institution and applied by courts.

Out of the development of different systems and societies, the modern state emerged based on the codified legal system, which proved to be suitable for including the contents of other systems and most efficient in terms of clarity, unity and order of legal rule making. Most importantly, it is the only system that provides the structure and balance of the state authorities - legislative (Law making), Judicial (Law application), and Executive (Law enforcement).

Accordingly, all systems began to shift to codified systems in terms of the **Form** of Law with the emerging of modern states, maintaining and developing the content of legal principles and cultures, and codifying them into written Laws. This began in the Islamic world in the eighteenth century when the Ottoman Empire (*Khelafah*), introduced codified Laws (*Tanzemat* and *Mejlat Al Ahkam Al Adliya*).

Later in the 1920s, Egypt adopted its first codified civil Law. Prepared by the famous Azharite Jurist Abd Al Razeq Al Sanhoury, based on Hanafi Jurisprudence and other sects (*Mathhabs*), and compatible to the French civil Law, this civil code became the basis for most Islamic countries: in particular, all Arab countries and Afghanistan, where a group of Egyptian Jurists drafted with Afghan Jurists the Afghan civil code based on the same Jurisprudence (*Fiqh*), at the order of King Zahir Shah starting in 1968 and promulgated in 1976.

The Judicial legal system (case law) in Anglo-American countries turned as well to a codified legal system effectively, where legislated codified Laws of Parliament largely replaced previous courts' decisions as the applicable Law.





## 2.2 Recent History of Afghan Legal system

Afghanistan began its codified legal system in the early twentieth century with King Amanullah's 1923 Constitution, but because of the early commencement of the system, not all Laws were codified "written." Some were and some were not.

A dual system took place with codified Laws and Jurisprudential Laws. **Article 16 of the 1923 constitution** states, "All citizens have equal rights and duties towards the state in accordance to Sharia and other Laws of the state" and **Article 87** of the same constitution established two types of courts: Sharia and Judicial courts.

During the reign of King Mohammad Zahir Shah, now "Father of the Nation," the constitution of 1964 adopted a fully codified system with only Judicial courts (**Article 97, 98 of the 1964 constitution**).<sup>1</sup> It allowed courts to apply Hanafi jurisprudence as a complementary source of Law when there were no applicable provisions in that constitution or Laws (**Article 102**).<sup>2</sup>

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<sup>1</sup> Article 97 of the 1964 Constitution states: "The Judiciary is an independent organ of the State and discharges its duties side by side with the Legislative and Executive Organs." Article 98 of the Constitution states: "The Judiciary consists of a Supreme Court and other courts, the number of which shall be determined by law...."

<sup>2</sup> Article 102 of the 1964 Constitution states: "The courts in the cases under their consideration shall apply the provisions of this Constitution and the laws of the state. Whenever no provisions exists in the Constitution of the laws for a case under consideration, the courts shall, by following the basic principles of the Hanafi Jurisprudence of the Shariaat of Islam and within the limitation set forth in this Constitution, render a decision that in their opinion secures justice in the best possible way."

With the adoption of the Afghan civil code in the mid seventies as we mentioned earlier, most subject matter of Law became codified. However, since that process did not continue due to a series of wars and because the rule of central government was not able to cover all the Country, the effective legal system of Afghanistan was as follows:

- Formal codified legal system where the state authority had reach.
- Sharia (jurisprudential legal system) where state authority did not have reach or where codified Laws were not enacted.
- Customary legal system where state authority did not reach.

Under these circumstances, the new constitution of Afghanistan 2004 was enacted. It produced a unified codified system as did the 1964 constitution. We shall now examine the characteristics of this system.

### **2.3 The Current Afghan Legal System**

The 2004 Constitution re-established the Afghan legal system. It built on the 1964 Constitution with two main differences:

- The move towards a full democracy with a presidential system in the 2004 Constitution instead of a constitutional Monarchy with the King's oversight in the 1964 Constitution.
- The increase and development of citizen's human rights (chapter 2 and other articles).

On most other issues there is high similarity and compatibility with the 1964 Constitution, which can be considered as a pre-base for the 2004 one. These similarities are the same for the legal system.



### 2.3.1 Legal System Structure

- The higher form of Law in the state is the constitution. All Laws and institutions in the state are governed by the constitution (**Articles 5, 162**).
- The “formal primary rules” are: Laws enacted by National Assembly and endorsed by the President (**Article 94**) and decrees issued by the Government and endorsed by the President having the force of Law during recess of the *Wolosi Jirga* (**Article 79**).
- The lower forms of Law are regulations issued by Government at administrative levels not contrary to the body and spirit of any Law (**Article 76**).
- Courts have full jurisdiction on all cases (**Articles 116, 120, 122**) and they must apply provision of the Constitution as well as other Laws. If there are no provisions related to a case they apply Hanafi jurisprudence within the limits of the Constitution (**Articles 130, 131**).
- The executive authority’s duty is to enforce Laws and courts’ decisions (**Articles 75, 129**). So the primary “Original” power of legislation rests with the legislative authority (the National Assembly) representing the will of the people and entire nation (**Article 104**).

### 2.3.2 Legal System Form

- The Constitution establishes a codified system of written Laws. The Constitution is the higher source of Law (**Articles 5, 162**), with Laws/decrees (**Articles 94, 79**) at a second level.
- Courts must implement the previous sources of Law on all cases that they review. If a court does not find relevant provisions it can turn to Hanafi jurisprudence as a

complementary source within the scope of the Constitution (**Article 130**).

- In personal cases concerning followers of the *Jafari* sect, the courts are directed to apply Shia *Jafari* Jurisprudence as a specific source of Law to such cases only (**Article 131**).

### 2.3.3 Legal System Principles

Law making under the current Constitution is governed by several basic Constitutional principles:

- All Laws of Afghanistan shall adhere to, and be based on, the Constitution as both a source and principle of legislation (**Articles 5, 162**).
- Being an Islamic Republic (**Articles 1, 2**), Afghanistan shall have no laws that contravene the tenets and provisions of Islam (**Article 3**). This means that all major *Mathhabs* of Islam and not a specific *Mathhab* shall be considered as accepted sources and principles of legislation. So if a certain Law is compatible, for example, to a certain rule (*Hukm*) of *Maliki Mathhab* and not to a certain rule (*Hukm*) of Hanafi of *Shafay Mathhabs*, then (**Article 3**) is satisfied since it mentions Islam in general and not a specific sect or *Mathhab*.
- Based on the Constitution, rights and liberties enshrined in this Constitution shall be binding on all institutions and persons (**Articles 5, 6, 7, 59, 162**), including Law making.

The 2004 Constitution has presented Afghanistan with a golden opportunity to rule and develop the country based on two great legal traditions: Islam and Human Rights. The Constitution proves compatibility between Islam and Human Rights by putting both as sources and principles of legislation.



Determined on maintaining this positive merger, the Constitution allows for amendments of all its provisions, except for provisions concerning Islam and provisions concerning Human Rights. The first is not allowed to be amended at all, and the second is allowed amendment only in the development of Human Rights (**Article 149**).

Based on the legal system's **structure** (elected legislative authority), **form** (codified Laws) and **principles** (observance of Constitution, compatibility with Islam and protection of Human Rights), the Parliament has a vital task ahead of reviewing current Laws and studying many other new Laws that are in conformity with the Constitution and its legal system, especially the conformity between Islam and Human Rights.

An equally important task, is to unite and harmonize the current legal system in Afghanistan in accordance with the Constitution.

This task is compulsory and immediate, otherwise violations to the Constitution will continue, citizen's rights will suffer, and development of the country will not go forward.

As we mentioned earlier, in the 1970s the state adopted a fully-codified system where laws are only those which are enacted by legislative authority, and judicial courts are the only institutions in the state authorized to apply the Law and make judgments.

However, as the state was not able to extend this system to the country at large due to consecutive wars, most rural areas of Afghanistan have been ruled until this day by customary Law applied by local *Jirgas*. Before the establishment of this Republic and its Constitution, it was understood that people had to resort to customary



laws because the state and its laws were not functioning. But now as the state is recreated and its Constitution enacted, practicing customary Law is a violation of the Constitution. **Note (Article 54)** of the Constitution mandating the state to eliminate traditions contrary to the principles of Islam and adverse to the interests and welfare of the family.

Customary traditions and *Jirgas* can only have a **legitimate** role in the spheres that are not governed by the Law, as arbitration, non-criminal dispute resolution, and social management in their localities.



## 3 Constitutional Rights

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### 3.1 Introduction

A third component of the Constitution, in addition to the state structure and legal system, is **Constitutional Human Rights**. Being listed in the Constitution gives Constitutional rights the highest legal authority and power in the state. In fact, the 2004 Constitution makes issues of Democracy and Human Rights its main consideration in establishing the state structure and legal system.

Other than these two additional elements of Democracy and Human Rights, the 2004 Constitution builds mainly – as previously mentioned in Section 2.2 – on the 1964 Constitution.

It introduced these elements in compatibility with Afghanistan’s legal system based on Islam (**Article 3**) and provided for a permanent merger of Islam and Human Rights defining the state path on Legal, Institutional and Social destinations.

As such, Constitutional Human Rights collectively and individually are the state’s highest legal consideration in legislation application and enforcement. Rules of “**Constitutionalism**” and “**legitimacy**” (see Introduction) dictate that the state protect and implement each of these rights as listed in the Constitution. In order for the state to be faithful for its three primary listed principles (**Islamic, Democratic, Republic**), it will have to realize all Constitutional rights.

### 3.2 Human Rights' Position in the Constitution

An immediate observation when analyzing the Constitution is that it gives overwhelming **priority** and **prominence** to Human Rights in terms of concept, strategy and specific provisions. We can see this through the following points:

- It dedicates two paragraphs (**5, 8**) in its preamble on the issue, committing the state to observing Human Rights and making the purpose of the state to form a society based on protecting and attaining these rights.
- In its first chapter defining state principles and duties, the Constitution mentions Human Rights directly and indirectly in most of the chapter's articles (**Articles 2, 4, 5, 6, 7, 13, 14, 15, 16**), making these rights by classification and number the state's first and highest priority.
- It discusses Human Rights as the first detailed component (Chapter 2), before any other state structure, institution, or law.
- Chapter 2 {Fundamental Rights and Duties of Citizens} is the largest chapter in the constitution with 38 Articles. When added to the rest of the Human Rights articles in Chapter 1 and other chapters, the total reaches 54 articles. **One third** of the whole document is dedicated to Human Rights and their legal guarantees.
- The scope of Afghanistan's Constitutional Human Rights is extensive, covering:





1. All three **Basic Fundamental Rights** (right to life, liberty and human Dignity) and **Basic Principles of Rights** (principles of equality and non-discrimination).
2. A wide range of various civil, political, economic, social and cultural rights.
3. Special measures applied by the state to realize specific rights.
4. Special Constitutional guarantees protecting Human Rights.

We shall discuss these points in detail in the following section.

### **3.3 Scope of Constitutional Rights**

#### **3.3.1 “Fundamental Source” Human Rights and Implementation Principles**

It is agreed in Human Rights Law that all rights of humans are derived from and based on the **Right to Life**. Preserving this right leads to other “supporting” rights. Moreover, when the rights of **Liberty** and **Human Dignity** are added, these three rights become the “basis” and “source” for all other rights.

Some legal opinions believe that it is enough to state these three “fundamental source” rights, to include all other rights without listing them, because they are all contained in the fundamental rights to life, liberty and human dignity. The three fundamental rights are listed in the Constitution (**Articles 23 and 24**). In addition, the principles of **Equality** and **Non-discrimination** of rights are important to ensure totality and justice in rights implementation. These two principles are also listed (**Article 22**).

The importance of listing the three fundamental source rights and the two main principles in the Constitution is that these elements cover all other rights listed in the Constitution. Furthermore, they cover all other specific rights not listed in the Constitution expressively. **Listing certain rights in the Constitution in this case does not mean that only those “listed” rights enjoy the power and protection of Constitution.**

It simply means that the intention was to clarify certain rights and guarantees in order to make the state’s responsibility clearer in ensuring their realization. So, the state remains constitutionally committed to all rights that fall under, and stem from, the rights to Life, Liberty and Human Dignity in addition to the principles of Equality and Non-Discrimination.

### 3.3.2 Specific Constitutional Rights

#### *Civil Rights*

- Right to citizenship (**Articles 4, 28**).
- Right to be presumed innocent (**Article 25**).
- Right to due process of the Law including principles of (crime is a personal act), (no retroactive jurisdiction), (no extradition without due Jurisdiction) (no persecution and no torture) (free will of testimony) (debt must not deprive freedom). (**Articles 26, 27, 28, 29, 30, 32**).

**Note** application of Right to Human Dignity.

- Right to legal representation, including the right to appointment of an attorney by the accused, right to be informed of charges, right to be appointed an attorney by the state, and privileges of accused-attorney relations (**Article 31**).
- Right to Freedom of correspondence and communication (**Article 37**).
- Right to Freedom of movement (**Article 38**).
- Right to immunity of residence (**Article 38**).

### ***Political Rights***

- Right to Freedom of expression and publication (**Article 34**).
- Right to elect and be elected (**Article 33**).
- Right to establish associations and political parties (**Article 33**).
- Right to peaceful public gathering and demonstration (**36**).

### ***Economic Rights***

- Right to work (**Article 48**)  
**Note** that work conditions fall under “Right to Human Dignity” (**Article 24**) Freedom of occupation choice (**Article 48**) and forbidding of forced labour (**Article 49**).
- Right to be employed by the state according to ability and non-discrimination. (**Article 50/5**).
- Right to own property, including: immunity of property, acquisition of property by state only through

a court decision in addition to prior and just compensation (**Article 40**).

- Right to pay taxes only in accordance with the Law, with legal representation and if based on respect for social justice (**Article 42**).
- Right to retirement (pensions) (**Article 53/2**).

### *Social Rights*

- Right to education (**Articles 43, 44, 45, 46, 17**).
- Right to health (**Article 52**).
- Right to financial and social assistance for needy citizens (**Article 53**).
- Right to family support (**Article 54**).
- Right to development (**Article 13, 14, 6**).

### *Cultural Rights*

- Right to develop knowledge, culture and arts (**Article 47**).
- Right to access information (**Article 50/3**).
- Right to develop national and local sports (**Article 52/3**).
- Right to support and recognition of national groups and languages (**Articles 4, 16**).

### **3.3.3 Special Constitutional Measures**

It is important to note that each **constitutional right** represents a **constitutional duty** on the state to realize that right, and that each constitutional duty on the state represents a constitutional right to implement this duty.

For example, we see that the Constitution contains the “Right to Health” but does not list explicitly that right, listing instead the duty of the state to guarantee health services to citizens (**Article 52**). The same applies to other rights and duties. In order to safeguard and implement rights and duties, the constitution provides for many measures to be taken by the state to that effect, as in “creating a healthy administration” (**Article 50**) or “effective programmes fostering knowledge, culture and arts” (**Article 47**).

The Constitution, realizing that Afghan women have suffered the most in the past, particularly in terms of equality in rights, decided that “special measures” were in order to bridge the gap and supplement the shortages in women’s rights situations.

To guarantee women’s enjoyment of the rights listed in the Constitution and encourage and support actual and real equality in rights, the Constitution adopted certain measures to ensure women’s rights. These measures are known in Human Rights Law as “**affirmative action**” or “**positive discrimination**”.

The Constitution dictates that Election Law should guarantee that two women from each province be elected on a national average - this means that the *Wolosi Jirga* should have at least 68 elected women from across the country (**Article 83**). It also requires that the President choose women for half of the members that he appoints to the *Mishrano Jirga*. (**Article 84**)

The interference of the Constitution in ensuring women’s representation in the *Wolosi Jirga* (**Article 83**) might be viewed by some as contradicting the Principle of Equality and Non-

Discrimination between men and women (**Article 22**). This opinion would be wrong for the following reasons:

- There is a very significant imbalance existing today between men and women in Afghanistan in terms of women's rights and their equality. A “**neutral**” position of the Constitution in this regard would have been encouragement for the continuation of this situation of non-balance and non-equality, making (**Article 22**) **impossible** to be realized.
- Constitutional interventions (**Articles 83, 84**) do not allocate women more seats than is warranted by their population. (**Article 83**) grants women 25% of seats in the *Wolosi Jirga* as a minimum and (**Article 84**) grants women 50% of appointed seats in the *Mishrano Jirga*, while women represent almost 50% of society.  
**Note** that in the *Mishrano Jirga*'s “appointed” seats, the Constitution guarantees full representation of women's 50% percentage in society, but in the *Wolosi Jirga*'s “elected” seats, the Constitution guarantees only half representation of women's percentage in society as a minimum, giving more consideration to the choice of the people.
- **Affirmative Action** or “**Positive Discrimination**” is a temporary measure. It is only to be used until balance is restored to women's situation. When balance is achieved in Afghanistan, the Articles are to be amended by the *Loya Jirga* in order to maintain equality in the legal text after it is achieved in reality.

### 3.3.4 Special Constitutional Guarantees for Human Rights

#### *The Human Rights Commission*

In order to “**monitor respect, foster and protect Human Rights,**” the Constitution established an Independent Human Rights Commission of Afghanistan (**Article 58**). The mandate of the commission is to

- Monitor respect for Human Rights through investigations and assessment reports.
- Receive individual complaints on Human Rights violations.
- Refer Human Rights violation cases to legal authorities.
- Assist victims and legal authorities in defending Human Rights.

#### *Prohibition of Regressive Human Rights Amendments*

In order to guarantee that current constitutional rights will remain even in future constitution amendments, the Constitution allows amendments to Fundamental Rights of the people only if such amendments **improve** those rights (**Article 149**).

#### *Constitutional Commitment to Observe International Human Rights Provisions*

In addition to listing rights and giving them constitutional power and authority, the Constitution commits the state to observing Human Rights Law (**Article 7**) through:



- Observing the **United Nations Charter**, which contains protection and promotion of Human Rights provisions.
- Observing the **United Nations Universal Declaration of Human Rights** which contains all different Human Rights.
- Observing **International Human Rights treaties** that have been signed by Afghanistan: namely
  - ☞ The Covenant on Civil and Political Rights,
  - ☞ The Covenant on Economic Social and Cultural Rights, and
  - ☞ The Convention on the Elimination of all forms of Discrimination Against Women.

This constitutional commitment is very important on a legal level because these signed treaties have the power of normal laws of the state (**Article 90/5**) but with the constitutional order of (**Article 7**) these agreements in addition to the Universal Declaration of Human Rights now enjoy the protection of the Constitution. They thus have more power than ordinary laws, because the Constitution has made their observance a **mandatory duty** of the state.

Thus international treaties have the status of ordinary Laws, but if there is a conflict between them and other Laws they would take priority because of (**Article 7**) of the Constitution.



## 4 Election Law Principles and Procedures

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### 4.1 Introduction

Elections are the most important activity in a democracy. They provide for people's representation and participation in state's authorities, as well as monitoring and judgment (holding accountable) of previously elected representatives.

For those reasons, both Constitutional and Human Rights Law require guarantees of Free, Fair, Transparent and Representative elections.

In Afghanistan, such guarantees are provided by the Constitution directly and by Human Rights treaties ratified by Afghanistan and protected by the Constitution (**Article 7**).

In this section we will review Parliamentary Election principles and procedures (for both *Wolosi Jirga* and *Mishrano Jirga*) as stated by the Constitution and Electoral Law.

### 4.2 Constitutional Principles of Elections

#### 4.2.1 Parliamentary Elections Goals and Effect

(**Article 4**) of the Constitution provides that national "sovereignty" shall belong to the nation directly and through its elected representatives.



(**Article 81**) provides that the National Assembly is the highest legislative authority, manifesting the will of the people and representing the entire nation.

Accordingly, the **goal** of Parliamentary elections is representation and participation of the nation in forming the highest legislative authority. The **effect** of this process is total political representation of the nation, including national sovereignty.

#### **4.2.2 Election Principles and Criteria**

(**Article 33**) states that Afghans have the right to elect and be elected; as such, elections are a Constitutional right enjoying the power and protection of the Constitution.

(**Article 83**) on *Wolosi Jirga* elections states four main principles for elections (free, general, secret and direct). The same four principles are listed for all elections: Presidential (**Article 61**), Provincial (**Article 138**) and Districts (**Article 140**).

In order to guarantee fair representation, (**Article 83**) states that seats allocated to constituencies should be proportional to their population.

Finally, the same article designates a minimum of two seats per province on a national average (**68 seats**) for women, after designating *Wolosi Jirga* seats to number no more than **250**.

### 4.2.3 Elections Management

In order to administer elections according to constitutional conditions, **(Article 156)** orders the establishment of the Independent Elections Commission (IEC), whose mandate is to administer and supervise all elections as well as referenda in Afghanistan.

**(Article 86)** elaborates that the “Commission” (IEC) shall review National Assembly candidates’ credentials.

Finally, the Constitution places a limitation on the National Assembly on amending election law during the last year of the legislative term **(Article 109)**.

We shall see application of these principles in the following section on electoral law.

## 4.3 Electoral Law: Procedures and Principles

### 4.3.1 Constitutional Principles in the Electoral Law

In conformity with the rules of “Constitutionalism” and “Legitimacy” the electoral law must be in full abidance with the Constitution. Afghanistan’s Election Law of 27 April 2005 begins with stating this conformity in its first article **(Election Law Article 1)**. The following articles state the remaining related principles:

- Right to elect and be elected **(E.L Article 1)**
- Free, general, secret and direct ballot **(E.L Article 2)**
- Equality in voters’ participation **(E.L Article 3)**



- One vote for each voter (**E.L Article 4**)
- Free will of candidates and voters (**E.L Article 5**)

### 4.3.2 Independent Electoral Commission

In pursuance of (**Article 156**) of the Constitution, the Electoral Law establishes the structure, jurisdiction and authority of the Independent Electoral Commission (IEC) in (**E.L Article 7 and related Articles**). However, the law states in (**E.L Article 57**) that the Joint Electoral Management Body (JEMB), as the transitional election institution established in Decree 11/1382 of 12 Feb 2004, shall exercise the powers of the IEC until transitional period elections are concluded. Following this, the JEMB shall dissolve as an institution and the IEC shall assume its powers, according to (**Articles 156, 158**) of the Constitution.

This means that the JEMB will function, according to this law, with the powers and conditions of the IEC. The reason for keeping the JEMB as an electoral institution is to benefit from its institutional experience in elections, as it administered Presidential elections and prepared for parliamentary elections in the transitional period.

### 4.3.3 Constituencies

A Constituency is a defined group of **voters** (normally by geographical boundaries) that vote for defined candidates (individual or a group) running for their support.

#### *Wolosi Jirga Constituencies*

(**Article 83/4**) of the constitution dictates that seats allocated to constituencies should be proportionate to



their respective population. It leaves further determination of constituencies to the electoral law.

Accordingly, **(E.L Article 11)** defines *Wolosi Jirga* constituencies as follows:

- Each province shall be one constituency **(34)**
- Kuchi nomads shall have an additional constituency within the whole country **(1)**.
- The total as such is **(35)** constituencies.

### *Seats for Wolosi Jirga Constituencies*

- **(E.L Article 19)** defines the number of seats of the *Wolosi Jirga* to be 249. **Note (Article 83)** of the Constitution.
- **(E.L Article 20/2)** defines the number of seats for Kuchi nomads at 10 seats.
- **(E.L Article 20/3)** defines the remaining 239 seats according to population percentage and specifies a minimum of two seats per province.
- **(E.L Article 22)** requires the IEC to develop procedures and formulae to satisfy **(Article 83)** of the Constitution with respect to female seats (in other words, ensure 2 seats held by women for each province “on a national average” or total of 68 seats). The IEC developed a formula based on one seat per province as an actual minimum and the allocation of the remainder of the seats proportional to the number of seats allocated per province. **(According to the JEMB seat allocation sheet 2-5-2005 ENG)**.

The following chart clarifies the number of seats per province in general, and for females in each province.

Province	Total seats per province	Female seats per province
Kabul	33	9
Kapisa	4	1
Parwan	6	2
Wardak	5	2
Logar	4	1
Ghazni	11	3
Paktika	4	1
Paktia	5	1
Khost	5	1
Nangarhar	14	4
Kunar	4	1
Laghman	4	1
Nuristan	2	1
Badakhshan	9	2
Takhar	9	2
Baghlan	8	2
Kunduz	9	2
Samangan	4	1
Balkh	11	3
Jowzjan	5	1
Sari-i-Pul	5	1
Faryab	9	3
Badghis	4	1
Herat	17	5
Farah	5	1
Nimroz	2	1

Helmand	8	2
Kandahar	11	3
Zabul	3	1
Urzgan	3	1
Ghor	6	2
Bamyan	4	1
Panjsher	2	1
Daikundi	4	1
Kuchi Constituency	10	3
<b>34 Provinces + Kuchi Constituency</b>	<b>249</b>	<b>68</b>

### *Mishrano Jirga Constituencies and Seats*

The *Mishrano Jirga* is a mixed house in formation. According to **(Article 84)** of the Constitution, and consequently according to **(E.L Article 23)**, two thirds of its members are elected (in fact double elected) and one third of its members are appointed by the President of the Republic.

Both articles specify the number of seats of the *Mishrano Jirga* at three times the number of provinces of the country ( $34*3=102$ ).

Two thirds of the houses are elected from two categories: Provincial Councils and District Councils of every Province. These are the two constituencies for the *Mishrano Jirga*.

- 34 members are elected respectively, by and from within, each provincial council, for a period of **four years**.
- 34 members are elected respectively, by and from within, all district councils in each province, for a period of **three years**.
- 34 members are appointed by the president for a period of **five years**, half of which must be women.

These arrangements are according to **(Article 84)** of the Constitution and **(Articles 23, 24, 25, 26)** of Electoral Law.

**Note:** Elections of *Mishrano Jirga* members are held separately from and after Provincial Council Elections and District Councils Elections are held and their respective results are made final, that is after 15 days of the respective Councils' installation **(E.L Articles 24, 25)**.

#### **4.3.4 Voters' Conditions**

##### ***Voter Eligibility***

**(E.L Article 13)** states the following conditions for voters' eligibility in all elections:

- To be at least 18 years old on the day of the respective election.
- To have Afghan citizenship at the time of registration.





- Not to be deprived from civil or political rights by a competent court.
- To be registered as a voter by the IEC.

#### ***Number of Votes per Voter***

(E.L Article 4) states that each voter shall have one vote.

#### ***Voting Location***

(E.L Article 16) states that voters shall **only** vote in the **constituency indicated** on their voter registration card.

#### ***Voter Identification***

(E.L Article 17) states that voters should prove their identity by showing their voter registration cards to designated officials of the IEC at the polling center.

### **4.3.5 Candidates' Conditions**

#### ***Eligibility***

(E.L Article 14) refers to (Article 85) of the Constitution on National Assembly candidacy eligibility:

- Candidates must have obtained Afghan citizenship at least ten years prior to the date of their candidacy.
- Candidates must not have been convicted of crimes against humanity and/or deprived of civil rights by a competent court.
- Candidate must have completed 25 years of age prior to the date of their candidacy for the *Wolosi Jirga*, and 35 years before the date of their candidacy for the *Mishrano Jirga*.

### ***Candidacy exclusions***

**(E.L Article 15)** lists several categories of state employees and other specified individuals who are not allowed to nominate themselves for elections:

- Serving judges.
- Serving Attorney General and Public Prosecutors.
- Serving Ministers and deputies, Governors and deputies and District administrators.
- Serving Mayors and municipal/*Nahiya* administrators.
- Serving members of the Ministry of Defense (MoD), Ministry of Interior (MoI) or General Directorate of National Security (GDNS).
- Serving General Directors, Directors of Ministerial departments and Government offices at central and provincial levels.
- Serving Electoral Officials.
- Individuals who practically command or are who members of unofficial military forces.

### ***Candidacy Nomination requirements***

**(E.L Article 35)** lists the following requirements to be met by National Assembly candidates, with candidacy for the *Wolosi Jirga* being direct and for the *Mishrano Jirga* being through Provincial and District councils:

- Providing a name and clear address.
- Providing a voter registration card or other proof of voter registration.

- Providing names , registration card numbers and signatures or thumbprints of persons residing in the candidates constituency supporting his/her nomination as follows:
  - 300 persons for a *Wolosi Jirga* nomination
  - 200 persons for a Provincial council *Mishrano Jirga* nomination
  - 100 persons for a District council *Mishrano Jirga* nomination.
- Providing a sworn statement attesting eligibility, committing to code of conduct, non belonging to armed groups, and non conviction of crimes against humanity or deprivation of civil rights.
- Filing candidacy deposits as follows:
  - 10,000 Afghani for a *Wolosi Jirga* nomination
  - 4,000 Afghani for a Provincial council *Mishrano Jirga* nomination
  - 2,000 Afghani for a District council *Mishrano Jirga* nomination.

#### 4.3.6 Election Phases

(E.L Articles 33, 34, 36, 38) designate several phases of elections. They require the IEC to decide election dates and to issue an election calendar defining those phases and their dates.

### ***Constituency Challenges***

**(E.L Article 4)** provides that election constituency challenges on geographical boundaries be resolved by the Ministry of Interior (MoI). Such challenges should be raised no later than (170) days before the election date.

### ***Closing of Nominations***

- **(E.L Article 36)** delegates IEC to specify nomination closing dates (initially set for the 2005 elections for 21 May 2005 and then extended to 23 May for the country at large and 26 May for Nangarhar). Upon this date the IEC must publish a preliminary candidates list.
- After publishing the list the IEC must announce a period for challenges concerning the list to be raised.
- After challenges are decided by the IEC, it shall publish a final candidates list and post it at polling centers on the election date.

### ***Election Date***

**(E.L Article 33/1)** states that the IEC shall announce an election date no later than (140) days in advance of the elections (for the 2005 elections, the date was set for 18 September, 2005).

### ***Election Calendar***

**(E.L Article 33/2)** states that the IEC shall announce/publish an election calendar marking all phases and dates, no later than (120) prior to the election date.

### ***Voters List Certification***

**(E.L Article 34)** states that the IEC shall certify the voters list to be used in the election no later than (15) days prior to the election date.

### ***Campaigning***

**(E.L Article 38)** delegates the IEC to declare an official campaign period (to be determined for the 2005 elections), ending (48) hours before the election date (polling date).

### ***Announcing Final Results***

**(E.L Article 49)** states that the IEC shall announce final results after polling has ended, ballots have been counted, and all challenges have been decided by the IEC or Electoral Complaint Commission (ECC). Once these final results are certified by the Commission, they will be final and binding.

## **4.3.7 Election Guarantees**

In order to enforce Constitution and other elections guarantees, electoral law has adopted several measures:

### ***The Independent Election Commission***

The Commission as an independent organ has the mandate to “orderly administer the electoral process” **(E.L Article 7)**.

- **(E.L Article 9)** orders the IEC electoral officials to impartiality, independence, decency, truthfulness and confidentiality.

- **(E.L Article 6)** orders all Governmental and non-Governmental institutions to cooperate with and implement decisions of the IEC.
- **(E.L Article 10)** places several recruitment restrictions on electoral officials to guaranty independence and impartiality.

### *Observers and Agents*

- **(E.L Article 42)** mandates the IEC to regulate National and International observers as well as agents of parties or independent candidates. **Note** that the article grants the rights of these individuals to be present in polling stations and other election centers and to monitor their procedures.
- **(E.L Article 46)** grants an accredited agent the right to object to non qualified voters. After such objection is documented and subject to the decision of the Polling Center Chairperson, it may be accepted or rejected.
- **(E.L Article 47)** orders the Polling Center Chairperson to seal ballot boxes in the presence of candidates' agents and allow them to record the number of seals.

### *Prohibition of Arms near Polling Centers*

**(E.L Article 44)** prohibits carrying any kind of weapon within (500) meters of any polling station. In order to maintain freedom and non-intimidation of voters, security officials authorized by (MoI) are not included in the prohibition.

### *Fair access to Publications and State Media*

**(E.L Article 50)** guarantees candidates' fair and unbiased access and use of state-run Media.

- **(E.L Article 51)** orders the IEC to establish a Media Commission, at least 60 days before election date, in order to monitor coverage of the campaign according to **(Article 50)** of the Constitution.

### **4.3.8 Electoral Complain Commission**

**(E.L Article 52)** orders the IEC to establish an Electoral Complaint Commission (ECC) in order to review and judge electoral complaints.

#### *ECC Formation*

- One member appointed by the Supreme Court.
- One member appointed by the Afghan Independent Human Rights Commission (AIHRC).
- Three international members appointed by the Special Representative of the Secretary General (SRSG) of the United Nations.

#### *ECC Competence and Jurisdiction*

- Complaints relating to electoral offences, as specified in **(E.L Article 53)**.
- Challenges to the candidates list and/or eligibility challenges.
- Decisions of the ECC are final.
- The ECC may accept complaints prior to final certification of results.

- The ECC may consider issues it deems within its jurisdiction on its own initiative.
- The ECC may delegate its authority to commissions at provincial levels.
- The ECC shall develop its own procedures.
- The ECC shall discontinue its work, no later than (30) days following final certification of election results.



## **Chapter II**

# **Institutional and Procedural Principles**



*Parliamentary Manual:  
Legal and Institutional Principles*

## 5 Constitutional Rules and Regulations

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### 5.1 Introduction

To govern and organize their work, parliaments need rules that clarify exactly how the parliament will work. The specific nature and arrangements of such rules are left to the parliament to decide.

Since the parliament has the power to legislate for the state as a whole, it has the power to define its own rules. However, Constitutions usually define certain rules for parliaments relating normally to general structure and operating principles, providing for a Legal Constitutional Framework for such rules and regulations.

The parliament may issue extensive rules and regulations within the limits of what the Constitution dictates.

### 5.2 Constitutional Framework for Rules and Regulations

#### 5.2.1 Issuing Power

The Constitution implies that each of the two houses of parliament, the *Mishrano Jirga* and the *Wolosi Jirga*, can issue their own Rules and Regulations (**Article 87/3**).

Because of their designation as “regulations” rather than “laws,” and because (**Article 94**) defines Law as “what both houses

approve and the president enforces,” the Constitution considers these rules as having the status of “administrative regulations,” not law. However, the parliament can issue a Law that contains rules and regulations for both houses of parliament, because the constitution does not specify expressively how rules and regulations are issued: it merely implies that these rules are decided by each House of the parliament.

The President and Government may issue as well a Decree on Assembly Rules and Regulations for the coming parliament in order to facilitate the work of the Assembly until both houses issue their permanent rules and regulations. The Executive power can do this based on **(Article 79)** “Decree having the force of law.”

If it is agreed that these regulations are not laws, as we mentioned according to the implication of the Constitution, than the Executive power (President and Government) can issue rules and regulations for the coming parliament based on **(Article 160)** which gives in Paragraph 3 the powers- all powers- of the National Assembly to the government, until the establishment of parliament.

After this time, the parliament will have the only power to issue rules and regulations. There would be no need to do so by the government since there would be an operating set of Rules and Regulations, and thus **(Article 79)**’s requirement of an “immediate need” would not be satisfied. **(Article 160)**, as a temporary article, would lose its effect after the first Assembly was established.

### **5.2.2 Parliamentary Posts**

**(Article 87)** designates several parliamentary posts and their duration for each house of the National Assembly:



- Presidents of both Houses (*Mishrano Jirga* and *Wolosi Jirga*), for the term of the Assembly.
- First and second deputies, for the period of one year.
- Secretary and assistant secretary, for the period of one year.

### 5.2.3 Parliamentary Sessions

#### *Sessions Holding*

- (**Article 104**) states that *Wolosi Jirga* and *Mishrano Jirga* will hold sessions separately but at the same time.
- It states as well that both houses will hold joint sessions at the inauguration of the Assembly term and annual sessions, in addition to obeying presidential orders for the Assembly to convene.
- When joint sessions are held, the president of the *Wolosi Jirga* shall head the Assembly.

#### *Sessions term*

- (**Article 107**) states that the Assembly shall hold two regular sessions, annually, and the term of these two sessions is 9 months.
- The Assembly can extend its term if required.
- The president can call extraordinary sessions of the Assembly.
- (**Article 99**) states that if issues of National budget, development programme, national security, territorial integrity or independence are discussed, sessions shall not end until the issue is resolved.

### *Sessions access*

- **(Article 105)** states that Assembly sessions are open unless a request is made for a closed session by the president of Assembly or by at least 10 members after approval of the Assembly.  
**Note** that the same rule can apply to individual house sessions.

### **5.2.4 Joint Commissions**

#### *Resolution commission*

- **(Article 100)** states that if one house rejects the decision of the other, a joint commission comprised of an equal number of members of each house shall be established to resolve the difference.  
**Note** that if this commission reaches a decision it will be enforced after presidential endorsement without going back to the Assembly.

#### *Questioning commission*

- **(Article 93)** states that any joint commission of both houses can question any Minister on specific issues. The Minister must provide an oral or written response.  
**Note** that the *Mishrano Jirga* does not have the power of questioning; only the *Wolosi Jirga* has it, but through this joint commission the *Mishrano Jirga* can participate in political or institutional questioning.

### 5.2.5 Voting and Quorum

(Article 106) states that the quorum for voting of each Assembly house will be established with the presence of the majority of members in the house.

#### *Normal Majority*

- The voting majority according to the same article is a simple majority of 50%+1 of members present at voting, that is unless the Constitution states otherwise.

#### *Special Majority*

- (Articles 69, 94, 100, 127) require a special majority of two-thirds for decisions to be taken regarding issues specified in those Articles.

### 5.2.6 Law Making Regulations

#### *Law Proposal Submission*

- (Article 97) states that for each House, 10 members of the House can submit Law proposals for that House.
- Law proposals need approval of one fifth of the members in that House in order to be included in the House working agenda for voting.

#### *Law Proposal Initiation*

- (Article 97) states that in principle, Law proposals should be first submitted or “initiated” in the *Wolosi Jirga*. After approval, proposals can be sent to the *Mishrano Jirga*.
- (Article 98) makes an exception to the above rule: if a proposal is in regards to the state budget or a

government development programme, it must be “initiated” or submitted first to the *Mishrano Jirga* and then referred with the House opinion to the *Wolosi Jirga*.

**Note** that such proposals are Law proposals on the specific issues above only.

### ***Law Proposal Discussions and Voting***

- **(Article 97)** states that the *Wolosi Jirga* shall first debate draft laws, then vote on the proposal after the debate. The vote must be on the draft Law as a whole and not on article by article basis.

**Note** that the Constitution does not specify this procedure for the *Mishrano Jirga*, so the *Mishrano Jirga* can choose its own procedure.

### ***Period of Proposal Consideration***

- **(Article 97)** states that the *Wolosi Jirga* must decide on Law proposals in one month’s time after receiving the proposal.
- The same Article gives the *Mishrano Jirga* 15 days to decide on Laws after reception.

**Note** that although the Constitution talks about discussion period of **received** proposals, the same period will have to apply to proposals **initiated** in the *Wolosi Jirga*.

## **5.2.7 Constitutional Limitations**

### ***Tax Law Limitations***

- **(Article 96)** states that if a draft Law is proposed on new taxes or reduction of state income, it will be

admitted to a House of the Assembly only if a compensation source is included in the proposal.

***Election Law Limitations***

- **(Article 109)** states that amending proposals – including new laws – for elections are not allowed during the last year of legislature.



## 6 Parliamentary Structure

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### 6.1 Introduction

In order to organize the parliament's work, certain structures are created within the Assembly "by members" to fulfill its duties and other structure are created from outside of the Assembly to support its work.

Constitutions and constitutional practice are concerned with the first category "within the Assembly," and are almost the same for most parliaments (Presidency, committees and commissions). Exterior administrative support is normally left for regulations and varies according to different parliaments.

We shall discuss these two categories of structures further below.

### 6.2 Interior Parliamentary Structure

#### 6.2.1 President of the House

Each House must elect a President for the term of the Assembly. The President's role is to preside over the House sessions and direct debates. In addition to this, the President has the following specific powers:

- Heading and directing the administrative structure of support (**Article 87**).
- Representing the House while in recess in giving permission for the Executive to detain a member of that

House.

**Note** that this authority is shared with deputies and secretaries as part of the “administrative board” (**Article 102**).

- Representing the Authority of the Assembly when a state of emergency is declared and parliamentary sessions are suspended. Both presidents of Assembly Houses and the chief justice have to be **consulted** by the President of the Republic before **transferring** some Assembly powers to the Government (**Article 144**).
- Representing the Authority of the Assembly in a state of emergency. Both Presidents of the Houses of parliament and the chief justice have to **approve** the President of the Republic’s order to **suspend or restrict** (**Articles 27/2, 36, 37/2, 38/2**) of the Constitution (**Article 145**).

### 6.2.2 Rest of the Administrative Boards

Each house will elect from among its members the following individuals for the period of one year:

- First deputy
- Second deputy
- Secretary
- Assistant secretary

These individuals, in addition to the president of the house, shall be the “administrative board” of each of the two houses of parliament, and their role is to form and head the “administrative teams” of the house (**Article 87**).



**Note** the difference in title: “administrative board” designated in **(Article 102)** is for members of the house structure, while “administrative teams” designated in **(Article 87)** are (outside parliament) extra-parliamentary administrative support.

### 6.2.3 Specialized Committees

These are specialized permanent committees that are formed of members of the house in various thematic areas. These include the Political committee, Economic committee, Legal committee, Foreign relations committee, etc.

Specialized committees are very important for the work of a house of parliament, because most of the specialized work and research on draft Laws and discussion topics is done by these committees and then presented to the house for voting.

Usually, members elected or selected to these committees have expertise in the thematic area and others tend to represent blocks or parties in the house.

As is the constitutional tradition in most countries where these committees are established, the Afghan constitution mentions a specific committee in **(Article 12)**, the **economic committee** of the *Wolosi Jirga*, which should be **consulted** by the central bank regarding printing of currency.

Thus in order to fulfill this article, the establishment of an Economic committee in the *Wolosi Jirga* is mandatory, and the rest

will have to be established according to the need and discretion of each house.

#### **6.2.4 Temporary Commissions**

When an issue arises in the course of work of an Assembly house that needs follow-up and concentrated work, a commission for “That Purpose” (**Ad-hoc**) may be established.

##### ***General Commissions***

- According to the decision of the respective house, commissions can be formed to study issues under discussion and report their findings to the house. According to (**Article 88**) the respective house is free to establish such commissions according to their respective Internal Rules and regulations.

##### ***Investigation Commission***

- (**Article 89**) states that the *Wolosi Jirga* can establish a special commission to investigate and review government actions at the proposal of one third of its members.

##### ***Joint Questioning Commissions***

- (**Article 93**) states that the Assembly can form a joint commission of both houses in order to question any minister on specific issues.  
**Note** that the minister must respond and that the *Mishrano Jirga* alone does not have the power of questioning.

### *Joint Dispute Resolution Commissions*

- **(Article 100)** states that if one house of the Assembly rejects the decision of the other, a joint commission must be formed to resolve this dispute. This commission represents the will of both houses. If it agrees on a decision than it will be enforced after Presidential approval, without going back to the Assembly.

### **6.3 Exterior Parliamentary Structures of the Administrative Team**

In order to enable the work of the Assembly, a wide range of administrative, logistical and specialized support must be established. The Assembly and each house will be in charge of these structures which are called “administrative teams.” The Administrative Board of each house (President, first and second Deputies, first and assistant secretary) will form and head these supporting administrative structures according to rules and regulations based on **(Article 87)**.

A most important component to these teams/structures are **specialized departments**. They serve as administrative and technical support to each house and the Assembly. Units such as the Legal Department, Financial/Economic Departments and others, must be established and staffed with experienced professionals in order for them to serve Assembly and its houses.

## 7 Constitutional Law Making: Procedures and Techniques

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### 7.1 Introduction

Legislation or Law making is the most important task for a Parliament. It is the “specialty” of the legislative Authority, which holds – as we mentioned before – the “Original” and “Primary” power of legislation.

Because of the “Rule of Constitution” through the “Constitutionalism” and “Legitimacy” principles, the process of legislation by the Assembly has to be in **Full** conformity with constitutional provisions, whether on procedures, principles, sources or legal effect.

We will discuss these issues under procedures and techniques as a summary, but readers are urged to refer to all previous sections for a comprehensive explanation of Law Making requirements.

### 7.2 Constitutional Law Making Procedures

#### 7.2.1 Draft Law Proposing

**Government:**

- (Article 95) states that as a general rule, Law proposals shall be prepared by the Government and presented to the *Wolosi Jirga*.

- For draft laws dealing with **Budget and Financial** affairs, **(Article 95)** states that only the Government can propose those particular draft laws.
- **(Article 98)** states that such draft laws prepared by Government will be presented first **as an exception** to the *Mishrano Jirga* and this house must refer after its decision to the *Wolosi Jirga*. The exception in proposing and presenting to the *Mishrano Jirga* first in these cases can be explained by the urgent and technical nature of budget and financial proposals.
- Another exception to the general rule are Laws which relate to the judicial Authority. In order to respect the independence of the Judicial Authority, the Supreme Court should prepare these Draft laws, which are then presented through the Government to the *Wolosi Jirga* in accordance with **(Article 95)**.

### *Wolosi Jirga*

- The *Wolosi Jirga* is the main house within the Assembly for legislation because it is directly and fully elected by the people for this purpose.  
**Note (Article 4).**
- So, the *Wolosi Jirga* is – except in the case of Budget and Finances – **the first house to receive** draft laws. If the house rejects the draft then it is “defeated” or cancelled.  
**Note** that although this is not specifically mentioned in the Constitution, it is evident from the procedural sequence in **(Article 97)**.

- The *Wolosi Jirga* can also **initiate** a Law proposal in the house according to **(Article 97/7)**. This is done by the proposal of at least 10 members of the house and presented to voting. If one fifth – or more – of the members vote in favor, it will be included in the house agenda (but is still not approved by the house). It will then take its turn until it is presented for discussion/debate and then voted on for Law approval, according to **(Article 97/2)**.

### ***Mishrano Jirga***

- This house is the second house in Law making. It receives draft Laws that have been approved and referred by the *Wolosi Jirga*. The draft laws are put forward for discussion and voting in accordance with **(Article 97)**.  
**Note** that the Constitution does not specify a procedure for debate and voting for this house (whether voting on the draft should be done as a whole or article by article). This is left for Rules and Regulations that are determined and approved by the Assembly.
- **Note:** In addition to the exceptions of Budget and Finance draft laws, which are submitted by the Government to the *Mishrano Jirga* first, the *Mishrano Jirga* can propose draft laws according to the same procedure of the *Wolosi Jirga* **(Article 97/7)** – ie, propose a law by 10 members and have it approved for inclusion in the house agenda by one fifth of the house members.
- Because **(Article 97)** states that proposals should be first presented by the Government to the *Wolosi Jirga*



and the only exception is stated in **(Article 98)** on budget and finances, draft Laws proposed by this house on other issues have to fall under **(Article 97)**. This means that they should be referred to the Government and presented to the *Wolosi Jirga* in accordance with the Constitutional procedures cycle. The *Mishrano Jirga* should not vote on final approval of the draft, but should vote only on accepting the draft for discussion and send it to Government in order for the latter to present it to the *Wolosi Jirga*.

### 7.2.2 Draft Law Process: Sequence and Time

#### *Normal Sequence*

- After the *Wolosi Jirga* receives a draft proposal from the Government, the house has up to one month to vote on the draft. If the house rejects the draft, it is cancelled; if the house approves of the draft, it is referred to the *Mishrano Jirga*.
- After the *Mishrano Jirga* receives the draft, it has up to 15 days to vote on it. If it approves it, the draft is referred to the President. If the President endorses it, the draft will become an enforceable Law. If the President remains silent, the draft is automatically considered as endorsed and enforceable after 15 days from receiving it **(Article 97)**.

#### *Presidential Rejection or Veto*

- If the president rejects the draft Law before 15 days after Assembly referral, then the Law is referred back to the *Wolosi Jirga* with a presidential explanation of rejection. If the *Wolosi Jirga* after debate can re-

approve the Law with a two thirds majority of votes, the Law will then be considered as endorsed and enforceable (**Article 94**).

### ***Mishrano Jirga Rejection***

- If the *Mishrano Jirga* votes to reject a draft proposal that is approved and referred by the *Wolosi Jirga*, then (**Article 100**) on “difference resolution”, takes effect as follows:
  1. A joint commission of equal numbers from both houses is established to resolve the matter.
  2. If the commission reaches an approval of the draft law, this draft shall be presented directly to the president for endorsement and becomes an enforceable Law.  
**Note** voting quorum within this commission is simple majority 50%+1, because (**Article 100**) insists on an equal number from both houses and because (**Article 106**) promotes simple majority as a general principle.
  3. If the commission rejects the draft or does not reach a decision, then the draft is considered rejected and sent back to the *Wolosi Jirga*.
  4. If the *Wolosi Jirga* approves the draft with a two thirds majority, then the draft is referred **directly** to the President for endorsement and enforcement.  
**Note** that in presidential rejection and in *Mishrano Jirga* rejection, the *Wolosi Jirga* is granted an

over-turn power because of its state as the fully and directly elected house.

### 7.2.3 Thematic Law Making Considerations

Although an Assembly member might not have a legal background, he/she is personally responsible in Law making, because he/she represents the will of the people.

This is why it is important for an Assembly member to learn as much as they can about Law and Law making, as it is will be their political, legal and personal responsibility. It is not required for an Assembly member to become a legal expert. However, it is required that she/he consult legal experts. If this is done, she/he will be able to perform duties with optimal ability, without making errors that would cost the state and the nation.

The same would apply to other fields and professions. Experts in the field must be consulted by Assembly members. For the Assembly and both its houses, there are two types of institutions which must be given great institutional attention in Law making: the legal committee in each house and the legal department. The first represents the **legal brain** of the house, while the second represents the **legal resource** of the house /Assembly. The rest of the committees and departments are important as well, and require the utmost investment, support and cooperation of all Assembly members.

In addition to consulting experts, Assembly members should make the following efforts personally:



1. Conducting a thorough study and analysis of the Constitution on a continuous basis.
2. Before considering proposing a certain law, asking for extensive research on that topic from their respective advisors, including:
  - a. A study of **comparative laws** (the law of countries with legal system that is similar to Afghanistan's).
  - b. A study of **related Afghan Laws** to understand the relation between the proposed Law and the laws already in place.
3. Conducting a final review of the law before proposing it. This review should be from a **constitutional** perspective, including Islamic legal arguments and Human Rights provisions.

**Note** that Islamic Jurisprudence includes several schools of Jurisprudence (*Mathhabs*) and not only Hanafi Jurisprudence. In addition, comparative Islamic laws should be researched because they provide Rules (*Ahkam*) and opinion (*Ijtihad*) that fall under (**Article 3**).

## 8 Public and Constituency Relations

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### 8.1 Introduction

As mentioned earlier, the goal and effect of parliamentary elections is, among other things, representation of the people in the highest legislative authority in the state. This authority represents the entire nation and national sovereignty (**Article 81**).

(**Article 81**) provides further that every member of the Assembly shall judge according to the general interest as well as supreme benefit of the people.

This wording is important because it orders Assembly members to represent the entire nation, not only their respective constituencies. So Assembly members are responsible for both direct representation of their respective constituency and general representation of the nation as a whole. Another important consideration is that local interests of these constituencies are supposed to be represented by Provincial and District council members.

In order to better represent the entire nation and their constituencies' national interests, Assembly members should maintain strong relations with various segments of society and institutions.

## 8.2 Institutions and Stakeholders of Concern for Assembly Members

### 8.2.1 Constituency Council Members

Regular meetings with Provincial and District Councils members from the National Assembly members' constituency are important because they help convey **views** and **issues** of the people in those localities. They are also important in order for National Assembly members to know more about these councils' **programs** and **needs**, and in order for him/her to take those needs of general and national concerns to the Assembly.

### 8.2.2 Direct Public Meetings

At the constituency level and beyond, it is important for an Assembly member to meet with the **public directly**. It is understood that time constraints of an Assembly member would not allow him/her to do this continuously, but as much as possible it should be maintained as a **frequent practice**.

### 8.2.3 Civil Society Organizations

Whether locally-based or issue-oriented, civil society groups including NGOs, are crucial parties for the Assembly and individual members' work. They can **orient** on **general** and **public opinion** issues, policies and projects that are debated or implemented, and most importantly, they are best positioned to provide specialized data and information on issues of interest. **Specific briefing** on **specialized subjects**

from respective NGOs and other institutions are very important and informative.

#### 8.2.4 Media Outlets

Media outlets (TV, radio and press) are crucial for an Assembly member to better inform and interact with the general public. **Clarity** and **briefness** are important in order for the **expressed message** to be best received by the public. The same would apply to international media, which is very important for communication with international public opinion. Assembly members should be aware of the **interests** and **culture** of the “**audience**” of these outlets and express themselves in the most clear and positive way for such audiences.

#### 8.2.5 Information Technology

The Internet is a very important means of **communication** and source of **information**. It is of great benefit for Assembly members (and the general public), especially in these times where national research institutions in Afghanistan are in early stages of establishment. An Assembly member can **orient** him/herself on almost any topic (legal, economic, political, etc) by utilizing the Internet.

#### 8.2.6 International Organizations

Afghanistan has received major **assistance** and **support** from the “International Community” represented by United Nations organizations and other international NGOs. This critical assistance and support is expected to continue for the



**foreseeable future.** Hence, an accurate understanding of the **role, programs and plans** of the International Community is indispensable in order to form a **knowledgeable** opinion about their input. Furthermore, these institutions have accumulated a “wealth of **knowledge**” relating to Afghanistan, and as such they are an important source of data and information for an Assembly member.

These categories were listed in the context of **individual** interaction of an Assembly member. The collective “**official**” relation of the parliament on these and other issues falls **beyond** the scope of this manual, as they are within the **sovereign** decision of the parliament.



**United Nations  
Development Fund for Women**

