

Delays of Elections and the Constitutional Legitimacy of the Jirga

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1. Introduction

The repeated postponement of the elections to the Wolesi Jirga, which were supposed to be held in the Persian calendar year 1394 (2015), has raised a number of difficult questions of constitutional law. Like most constitutions, the “Basic Law” of the Islamic Republic of Afghanistan neither defines or lists the circumstances in which elections may be postponed, nor does it clarify the implications a postponement has for the legal validity of acts taken by elected state organs once their constitutional term has expired. This article examines which constitutional principles, apart from the doctrine of necessity, have to be taken into account in assessing these questions. In particular it analyses the relevance and the meaning of the principles of democracy, rule of law and separation of powers in this context. It also discusses if, and to which extent, the

existence of the circumstances justifying the postponement of elections and the scope of the powers of the acting assembly during the interim period are subject to independent review. The example of the postponement of the Wolesi Jirga elections helps to better understand the meaning and the limits of constitutional law in times of crisis.

2. The postponement of the 1394 (2015) Wolesi Jirga elections

According to Article 83 paragraph 1 of the Afghan Constitution, regular Wolesi Jirga elections were due to be held between the 3rd of Sawr and the 2nd of Jawza of the Solar Hijri calendar¹ year 1394 (i.e. between scope of the powers of the acting assembly during the interim period the 23rd of April and 23rd of May of the Gregorian calendar year 2015). However, the elections were not held as the overhaul of the Afghan electoral system, which constituted a central element of the power-sharing agreement between President Mohammad Ashraf Ghani and the so-called Chief Executive Abdullah Abdullah, had not even begun due to disagreement between the two politicians. While both agreed that no election should be held before having introduced a new system of voter registration², having allocated a quota of seats to political parties³ and having taken measures to reduce election fraud⁴, they disagreed on the process and the contents of the promised reform. Efforts of the President to introduce a new Elections Law and a Law on the Structure, Duties and Authorities of the Independent Election Commission (IEC) and Independent Electoral Complaints Commission (IECC) through decree failed, as the Wolesi Jirga struck down such decrees in Jaddi 1394 (December 2015) and Jawza 1395 (June 2016).⁵ The incapability of the National Unity Government (NUG) to

1. The Solar Hijri calendar is the official calendar of Iran and Afghanistan. The year begins on the 20th or 21st March of the Gregorian calendar.

2. Afghan voters hold voting cards that were issued in 2001, which are not limited to particular areas and can thus be used in any polling station. Moreover, voters have been registered three more times since 2001, resulting in a total of 20 million election cards – much more than the estimated 12 million voters. See David Loyn, “Afghanistan’s attempts to reform voting face failure”, BBC News, 14 February 2015, available at www.bbc.com/news/world-asia-31445182, accessed on 29th December 2016.

3. Political parties can register officially as organizations but the electoral system does not provide them with any function. See Anna Larson, “Political Parties in Afghanistan, United States Institute for Peace Special Report no”. 32, March 2013, available at <http://www.usip.org/sites/default/files/SR362-Political-Parties-in-Afghanistan.pdf>, accessed on 29th December 2016.

4. See Scott Smith, *Afghanistan’s Troubled Transition: Politics, Peacekeeping and the 2004 Presidential Election* (Boulder, Colorado: Lynne Rienner, 2011); Noah Coburn and Anna Larson, *Derailing Democracy in Afghanistan: Elections in an Unstable Political Landscape* (Columbia, 2014); and Noah Coburn, “Afghanistan: The 2014 Vote and the Troubled Future of Elections”, Chatham House, (March 2015), available at www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150319Afghanistan2014VoteCoburn.pdf, accessed on 29th December 2016.

5. Ali Yawar Adili and Martine van Bijlert, “Pushing the Parliament to Accept a Decree: Another Election

reform the electoral system prompted important donors, including the United Nations Development Programme (UNDP), to freeze funds for related assistance projects.⁶

When it became clear that elections would not be held in time, some jurists and politicians argued that the term of the existing Wolesi Jirga would automatically continue until the Independent Election Commission (IEC) would announce the names of the newly elected Members of Parliament, pointing at Art. 83 para. 1 of the Constitution, which stipulates that the present assembly's term ends "after the disclosure of the results of the elections".⁷ However, the cited provision contains further conditions:

Art. 83 para. 1 sentence 2 and 3

"The work period of the Wolesi Jirga shall terminate, after the disclosure of the results of the elections, on the 1st of Saratan of the fifth year and the new parliament shall commence work. The elections for members of the Wolesi Jirga shall be held 30-60 days prior to the expiration of the term of the Wolesi Jirga."

The flexible condition ("after the disclosure of the results of the elections") and the fixed condition ("1st of Saratan of the fifth year") must be fulfilled cumulatively. The wording of this provision does not indicate any hierarchy between these two conditions. Such hierarchy can also not be derived from any systematic or teleological argument. It is important to note that the results of elections can only be disclosed if these have been held, as the constitutional provision specifies, "30-60 days prior to the expiration of the term of the Wolesi Jirga". Holding the elections in time is thus a necessary precondition of the termination of the term of the existing Wolesi Jirga. All three conditions - elections duly held, results disclosed, and the fixed date arrived - had to be fulfilled on the 1st of Saratan of 1394. However, the responsible Afghan state organs irreversibly missed this date. Shortly before the decisive day, President Ghani extended the Wolesi Jirga's term by decree.⁸

without Reform"?, in Afghan Analysts Network, 10 June 2016, available at <https://www.afghanistan-analysts.org/pushing-the-parliament-to-accept-a-decree-another-election-without-reform/>, accessed on 29th December 2016; and Ali Yawar Adili, Kate Clark, Lenny Linke and Salima Ahmadi, "Another hurdle for elections in 2016: MPs reject presidential decree on electoral commissions", in Afghan Analysts Network, 17 June 2016, available at <https://www.afghanistan-analysts.org/another-hurdle-for-elections-in-2016-mps-reject-presidential-decree-on-electoral-commissions/>, accessed on 29th December 2016.

6. Jessica Donati, "Frustrated donors end funding for Afghan parliamentary elections". Reuters World News, 12 June 2015, available at <http://www.reuters.com/article/us-afghanistan-election-idUSKBN00S18S20150612>, accessed on 29th December 2016.

7. Argument presented to the authors of this article in talks at the Wolesi Jirga of Afghanistan, June 2015.

8. Mujib Mashal, "Afghan Parliament's Term Is Extended After Squabbles Delay Elections", in New York Times, 19 June 2015, available at http://www.nytimes.com/2015/06/20/world/asia/afghan-parliaments-term-is-extended-after-squabbles-delay-elections.html?_r=0, accessed on 29th December 2016.

A few weeks later, President Ghani appointed a Special Electoral Reform Commission (SERC), which presented its proposals in Sunbula 1394 (August 2015). Not surprisingly, the outcome was discussed in a highly controversial manner. While the NUG approved most of the SERC's recommendations, both houses of parliament - the Wolesi Jirga and the Meshrano Jirga - rejected the respective presidential decree. In Jaddi 1394 (December 2015), the SERC issued a new set of proposals.⁹

In the same month, the IEC scheduled Wolesi Jirga elections for the 24th of Mizan 1395 (15th of October 2016)¹⁰. This decision came as a surprise to most observers, since the electoral reform process was still very unclear. After a heated controversy, the Head of the IEC, Ahmad Yusuf Nuristani, stepped down and the election date was again postponed. An early observation by Martine van Bijlert and Ehsan Qaane proved to be very true:

"The irony of the inclusion of electoral reform in the NUG agreement is that the stipulations that were meant to ensure that electoral reform would be taken seriously, now seem to have had the opposite effect. Substantive electoral planning is deadlocked in the absence of clarity on what kinds of reforms the government might be able to agree upon."¹¹

3. Constitutional legality of the extension of the mandate of the Wolesi Jirga

Already in early 1394 (2015), politicians, observers and ordinary citizens raised the critical question of the constitutional legality of the Wolesi Jirga from the 1st of Saratan 1394 (22nd of June 2015) on. Were the Members of Parliament, who had been elected in 1389 (2010) for a period of five years, entitled to continue to convene, vote on legislative bills and take other decisions? Or would all of their decisions taken after the 1st of Saratan 1394 have to be considered unconstitutional? The authors of this article have come to the conclusion that the mandate of an elected Wolesi Jirga may be extended beyond the constitutionally defined time limit only in exceptional circumstances, in

9. Shahmahmood Miakhel, "In Afghanistan, No Leadership Means No Elections", in Foreign Policy, 29 January 2016, available at <http://foreignpolicy.com/2016/01/29/in-afghanistan-no-leadership-means-no-elections/>, accessed on 29th December 2016.

10. Martine van Bijlert, "The IEC Announces 2016 Election Date – but what about Electoral Reform"? , in Afghan Analysts Network, available at <https://www.afghanistan-analysts.org/the-iec-announces-an-election-date>, accessed on 29th December 2016.

11. Martine van Bijlert and Ehsan Qaane, Elections in Hibernation: Afghanistan's stalled electoral reform, in Afghan Analysts Network, 17 June 215, <https://www.afghanistan-analysts.org/elections-in-hibernation-afghanistans-stalled-electoral-reform>, accessed on 29th December 2016. For the text of the NUG agreement see <https://www.afghanistan-analysts.org/miscellaneous/aan-resources/the-government-of-national-unity-deal-full-text>, accessed on 26th December 2016.

which case the Wolesi Jirga would even be obliged to continue its work. However, its mandate may be extended only for a limited time period. Moreover, being an acting organ, the competencies of such an assembly are limited.

a) Constitution demanding permanent existence of a Wolesi Jirga

The fact alone that Art. 83 does not mention the possibility of a postponement of the election of a new Wolesi Jirga does not imply that such postponement is inadmissible in all circumstances. Such a rigid interpretation of Art. 83 would be contrary to the purpose of the provision and the principle of separation of powers, which it helps to implement. Art. 83 para. 1 sent. 2 rather presupposes that a Wolesi Jirga must exist at any time, without any time gap: "The work period of the House of People shall terminate, after the disclosure of the results of the elections, on the 1st of Saratan of the fifth year and the new parliament shall commence work."

The constitutional principle of democracy (Preamble and Art. 6 of the Constitution) and that of the separation of powers, which forms an essential element of the rule of law (Preamble of the Constitution), also presuppose the permanent existence of a Wolesi Jirga.¹² They do not only entitle the existing Wolesi Jirga to continue to exercise its functions after the 1st of Saratan of the fifth year of its legislative term; they even oblige it to do so, due to its indispensable functions in the state. According to the principle of the separation of powers, the legislative, executive and judicial tasks are assigned to the different state organs in such a way that each of them can control and balance the power of the others. Clearly, the Wolesi Jirga is the most important organ of the legislature and performs two main functions that are essential for the functioning of the state: it passes laws and it exercises control over the executive. Besides it has a number of other important tasks, such as ratifying international treaties and approving the appointment of ministers, Supreme Court justices and members of independent commissions. If the mandate of the Wolesi Jirga ended without the present assembly being replaced by a new one, the Afghan state would fall back into a situation similar to that in which it was during the so-called transitional period when President Hamid Karzai ruled the Islamic Republic of Afghanistan without a parliament.¹³ However, the Constitution does not allow such unchecked presidential rule after the end of the transitional period, which terminated with the inauguration of the National Assembly on 28th of Qaws

12. As to the state principles see Ramin Moschtaghi, "Constitutionalism in an Islamic Republic: The Principles of the Afghan Constitution and the Conflicts between them" in Tilmann J. Röder and Rainer Grote (eds.), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, p. 683 foll. For a Dari translation of the article see *Journal of Afghan Legal Studies* 1 (1394/2015), p. 9 foll.

13. Articles 159-160 of the Constitution.

1384 (19th of December 2005). Thus, in exceptional circumstances resulting from factors outside the control of the Wolesi Jirga, the Government, and the Independent Election Commission, the continued existence of the Wolesi Jirga as an acting organ is constitutionally justified.

b) Factors justifying the postponement of elections and the acting of a Wolesi Jirga

The continuation of the term of the existing Wolesi Jirga may be justified if free, general, secret, direct (Art. 83 para. 1) and fair (Art. 83 para. 2) elections for a new assembly cannot be conducted within the constitutionally prescribed timeframe for reasons that lie beyond the control of the state organs, and therefore a new assembly cannot convene in time. In the concrete case, the postponement of the 1394 (2015) elections and the continuation of the existing Wolesi Jirga as an acting organ might have been justified, had it been impossible to conduct “general”, “fair” and “free” elections. The other constitutional requirements (i.e. secret, direct) seem less relevant in the present context.

“General” elections are elections in which representatives are chosen in all constituencies of the state, with all persons who are entitled to vote having the actual possibility to effectively vote. A fixed number or percentage of constituencies or voters, the exclusion of which would lead to the conclusion that the elections were not “general”, cannot be defined. Certainly, not every violation of the right to elect, which is protected in Art. 33 of the Constitution, leads to an election not being “general”. To take this effect, the exclusion of citizens or groups of citizens must potentially have an impact on the result of the elections. On the other hand, the possibility of a defective result in just one constituency could be considered sufficient. However, before drawing the conclusion that there is a high probability that an election will not be “general”, the IEC, which is in charge of organising the elections, must take all possibilities to reduce the effect of expected deficiencies in consideration. For example, it can plan by-elections in constituencies where external circumstances lead to the substantiated expectation that elections meeting the constitutional requirements cannot be held on the day of the nation-wide vote.

According to Art. 83 para. 2 of the Constitution, “The elections law shall adopt measures to attain, through the electorate system, general and fair representation for all the people of the country (...).”

Elections are “fair” when all votes have the same numerical weight (“one voter, one vote”) and have the same chance of influencing the outcome of the election. The actual weight of the vote in determining the outcome of the election depends on the voting

system adopted by the constitutional assembly or the legislator: while in most of the voting systems, the votes for the runners-up in the constituency are lost, proportional voting systems try to ensure that all votes are taken into account in the final distribution of parliament seats. But even proportional voting systems cannot achieve absolute equality of votes in the determination of the composition of a parliamentary assembly. Due to different numbers of voters in different constituencies and other factors the impact of individual votes will usually not have exactly the same impact on the election results. It is the duty of the legislator and the IEC to reduce, with their respective means, the inequalities to a minimum.

The criteria of an election being “fair” and “free” further require that undue influence on voters as well as all forms of electoral fraud be eliminated. The Government and National Assembly, when designing the electoral system, and the IEC, when organising elections, must take all the necessary measures within their powers to prevent influence on voters, electoral fraud and other forms of manipulation that could impact the outcome of elections.

As a general rule, the prognosis of a probability of serious violations of provisions or general principles of the constitution that is high enough to justify a decision of the IEC to postpone elections, may only be based on factors that lie outside of the scope of influence of the state. For example, an earthquake that has significantly damaged the infrastructure across the country could prevent the IEC from opening polling stations in some districts.

Afghanistan’s volatile security situation, which can definitely impact the IEC’s ability to organise elections in certain areas, is only partly an external factor. On the one hand, the risk is real: Voters and polling stations were attacked in past elections by actors that are opposed to the state.¹⁴ On the other hand, the Government has, and must deploy, effective means to reduce their influence on the elections to a minimum.

Likewise, election fraud and similar kinds of irregularities¹⁵ cannot be considered as purely external factors, because the state has and must use its means to prevent them and reduce their effects. If representatives or employees of state institutions are involved in

14. Less security incidents than expected occurred during the 2014 presidential election. See Yaroslav Trofimov, Margherita Stancati and Nathan Hodge, *Afghans Turn Out to Vote Despite Taliban Violence in Wall Streets Journal*, June 16, 2014, available at www.wsj.com/articles/afghans-turn-out-to-vote-despite-taliban-attacks-which-killed-68-people-1402833350, accessed on 29th December 2016.

15. Fraud was a significant problem in the 2014 presidential election. See Carlotta Gall, *In Afghan Election, Signs of Systemic Fraud Cast Doubt on Many Votes in The New York Times*, 23 August 2014, available at www.nytimes.com/2014/08/24/world/asia/in-afghan-election-signs-of-systemic-fraud-cast-doubt-on-many-votes.html, accessed on 29th December 2016.

election fraud or irregularities, one can even less speak of external factors.

Finally, and importantly, lack of funding provided by the Government for the elections - which could result in the IEC being unable to realize the polls - is not an external factor and thus cannot justify a decision to postpone the elections. From a constitutional law perspective, the state is unconditionally obliged to provide the funding and all other necessary support for the elections. Similarly, predictable technical or logistical difficulties and the need for electoral reforms cannot justify the postponement of elections. The responsible state organs must take care of these matters in time, including the enactment of the necessary legislation at least one year before the election (Art. 109 AC).

In 1394 (2015), Afghan state officials including IEC representatives mainly explained the postponement of the elections with the delay of the promised reforms and the decision of the international donor community not to provide the necessary funding.¹⁶ However, as explained above, both arguments do not serve as justification from a constitutional law perspective. The Afghan Government was obliged to undertake the reforms in time and to provide the funding, no matter from which sources. Accepting the argument that there was not enough money to hold elections would be particularly precarious, as it would invite future governments to delay elections at any time they please with the same excuse.

c) Only IEC mandated to decide on justification of postponement

Answering the question if external factors lead to a high probability that free, general, secret, direct and fair elections for a new assembly cannot be conducted within the constitutionally prescribed timeframe, and if elections therefore need to be postponed, is the exclusive task of the IEC, which has been given the comprehensive mandate and which has the necessary expertise to prepare, conduct and supervise all elections.¹⁷ The necessary assessments, which form the basis of its decisions to schedule and postpone elections, are an integral part of the tasks of the Commission. Neither the Government nor the Wolesi Jirga may take such decisions or influence them, as they are actors in the

16. Statement of Yusuf Nuristani, Chairman of the IEC, in the plenary session of the Wolesi Jirga on 18 May 2015; statement of Sarir Ahmad Barmak, IEC Commissioner in an interview with Tolo News on 20 May 2015; both cited in: Ehsan Qaane and Martine van Bijlert, "Elections in Hibernation: Afghanistan's stalled electoral reform in Afghan Analysts Network", 17 June 2015, available at www.afghanistan-analysts.org/elections-in-hibernation-afghanistans-stalled-electoral-reform, accessed on 28th December 2016.

17. Art. 156 of the Constitution reads: "The Independent Elections Commission shall be established to administer and supervise every kind of elections as well as refer to general public opinion of the people in accordance with the provisions of the law."

system of checks and balances between the different state powers and could be tempted to misuse the power to postpone elections for their own interests. Representatives of the Government and of the Wolesi Jirga would be well advised not even to comment on the respective assessments and decisions of the IEC.

It should be noted at this point that an extension of the term of the Wolesi Jirga through presidential decree can hardly be reconciled with the principle of the separation of powers.

4. Possibilities of independent review of the IEC's postponement decisions

Here the question arises as to whether the decisions of the IEC to postpone the elections are subject to independent review. The Constitution does not expressly allocate this task to any state organ. To begin with, the establishment of a special tribunal would violate Art. 122 of the Constitution¹⁸ and the formation of a special commission by the Government or the Wolesi Jirga would be highly problematic with a view to the separation of powers.

The Supreme Court (SC) has a limited mandate in constitutional matters. Art. 121 of the Constitution stipulates:

“At the request of the Government or courts, the Supreme Court shall review the laws, legislative decrees, international treaties and international covenants for their compliance with the Constitution and provide their interpretation in accordance with the law”.

The scrutiny of the constitutionality of a decision of the IEC to postpone elections is certainly not included in the first part of the mandate, i.e. the review of constitutionality of specific legal documents. It could though be part of the second, more general mandate of the Supreme Court if this includes the interpretation of the constitution. This is not clearly expressed in the wording of Art. 121, and a matter of controversy since many years. Mohammad Hashim Kamali, however, has convincingly argued that that “if one looks beyond grammar and assumes the overall meaning and purpose of the article, it would make sense to say that constitutional interpretation is included within the SC jurisdiction.”¹⁹ The Government could thus submit a carefully formulated request

18. Art. 122 reads: “No law shall, under any circumstances, exclude any case or area from the jurisdiction of the judicial organ as defined in this chapter and submit it to another authority. This provision shall not prevent formation of special courts stipulated in Articles Sixty-Nine, Seventy-Eight and One Hundred Twenty-Seven of this Constitution, as well as cases related to military courts. The organization and authority of these courts shall be regulated by law.”

19. Mohammad Hashim Kamali, “Afghanistan’s Constitution Ten Years On: What Are the Issues”? in AREU Issues Paper, August 2014, p. 11, available at <http://www.areu.org.af/Uploads/EditionPdfs/Afghanistan's%20>

to the Supreme Court, asking to clarify the meaning of Art. 83 (1) with a view to the justification of the postponement of the Wolesi Jirga elections.

Another institution that could bring light into the matter is the Independent Commission Overseeing the Implementation of the Constitution (ICOIC), which is mentioned in Art. 157 without any specification of its mandate. The Commission was created as late as in 1389 (2010) after two years of power struggle between the Wolesi Jirga and the Government. Its mandate is rather broad. Art. 8 of the ICOIC Law provides as follows:

For the purpose of a better supervision of the application of the provisions of the Constitution, the Commission shall have the following duties and authorities: (...)

(2) Supervision of the observance and application of the provisions of the Constitution by the President, Government, National Assembly, Judiciary, the administrations, institutions and state and non state organizations;

(3) Providing legal advice relating to issues arising from the Constitution to the President and National Assembly; (...)

(6) Reporting to the President of the Republic any observation of a violation of and deviance from the provisions of the Constitution; (...)."

Art. 9 of the ICOIC Law defines which institutions may submit requests to the Commission:

"Competence to Request

The following higher authorities are competent to refer the issues arising from the provisions of the Constitution to the Commission for the purpose of requesting legal advice:

(1) The President of the Republic;

(2) The two houses of the National Assembly;

(3) The Supreme Court;

(4) The Independent Human Rights Commission, the Independent Elections Commission and the Administrative Reform and Civil Service Commission."

The Commission could thus on the request of the IEC itself or other state organs mentioned in the cited article assess if the IEC has properly applied the provisions of

Constitution%20Ten%20Years%20On%20What%20Are%20the%20Issues.pdf, accessed on 26th December 2016. As to the constitutional mandate of the Supreme Court, see also Mohammad Qasim Hashimzai, "The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan", in: Tilmann J. Röder and Rainer Grote (eds.), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, p. 665 foll., particularly 675-676. For a Dari translation of the article see *Journal of Afghan Legal Studies* 1 (1394/2015), p. 87 foll.

Art. 83 (1) the Constitution in its decision to postpone the Wolesi Jirga elections (Art. 9 (2) ICOIC Law). It could also be asked to provide its legal opinion in the form of legal advice to the President or the National Assembly (Art. 9 (3) ICOIC Law), or report to the President upon its own initiative (Art. 9 (6) ICOIC Law). It must be noted, however, that the constitutional basis for the Commission is extremely thin, as its competencies are not at all defined in the Constitution.²⁰ Moreover, it is still unclear if opinions provided by the ICOIC are advisory or binding.²¹

In contrast, there is a more effective option to independently review at least some of the decisions of the acting Wolesi Jirga. Art. 121 of the Constitution clearly gives the Supreme Court the mandate to review the constitutionality of laws, which includes the question whether the assembly that passed a law had the competency to do so.

5. The IEC's continued responsibility to schedule elections

After the IEC has taken a decision to postpone elections, it must continuously monitor the situation and assess if the external factors that justified the postponement have changed. As soon as the external circumstances allow for the realisation of elections, the IEC must decide on the date, inform the relevant state organs and the public, and start with its preparations.

Elections must be held no later than two months. This time limit is not mentioned in the constitution for this specific situation, but for the case of emergency, which is similar enough to allow for an analogy. Art. 147 sent. 3 of the Constitution provides that "Within two months after the termination of the state of emergency, elections shall be held." Very clearly, the Constitution expects that the IEC will be able to organize elections within two months after exceptional circumstances - here: the state of emergency - have disappeared.

After the elections, the IEC must count the votes, determine the result and announce it, and the newly elected Wolesi Jirga must prepare for its first session. This whole process may not take longer than 60 days, as can be concluded from Art. 83 sent. 3 of the Constitution.

20. See Farid Hamidi and Aruni Jayakody, "Separation of Powers under the Afghan Constitution: A Case Study", in AREU Case Study, available at <http://www.areu.org.af/Uploads/EditionPdfs/1507E%20Saperation%20of%20Powers%20Under%20the%20Afghan%20Constitution%20A%20Case%20Study.pdf>, accessed on 28th December 2016.

21. Mohammad Hashim Kamali, "Afghanistan's Constitution Ten Years On: What Are the Issues?", "in AREU Issues Paper", August 2014, p. 11, available at <http://www.areu.org.af/Uploads/EditionPdfs/Afghanistan's%20Constitution%20Ten%20Years%20On%20What%20Are%20the%20Issues.pdf>, accessed on 29th December 2016.

Of course, newly arising external factors may lead to the renewed prognosis that the realization of elections would implicate a high probability of serious violations of provisions or general principles of the Constitution, and force the IEC to further postpone the parliamentary elections and by this justify a further extension of the mandate of the acting Wolesi Jirga. For example, during the colder half of the year - roughly, between the months of Mizan (September/October) and Hamal (March/April) - it can be impossible to travel to some parts of the country due to geographic and climatic conditions such as landslides or mountain passes closed by snow, and thus impossible to realise general elections.

6. Limitations of the powers of an acting Wolesi Jirga

It is important to note that the powers of an acting assembly are significantly limited compared with those of a Wolesi Jirga whose legislative term has not yet lapsed. It is a well-established principle in democracies that elected officials may continue to execute their constitutional functions if it has not been possible to elect their successors in time. However, in such a case they must limit themselves to the most urgent activities and decisions that may not wait until the inauguration of their successors without risking serious damage to the state and its citizens. For instance, they would be allowed to adopt a provisional budget to ensure the maintenance of basic public services without major disruption. By contrast, they would have no mandate to decide on fundamental reforms of the state, the economy or the political system. Such decisions must be left to the new parliament elected in free, general, secret, direct and fair elections and thus enjoying full democratic legitimacy.

7. Conclusions and outlook

This case study allows drawing a number of conclusions. First of all, there is an urgent need to create the necessary preconditions for Wolesi Jirga elections. It might be wise to refrain from attempting to completely alter the electoral system, which might take even more time, and instead to carefully improve the existing system and hold elections as soon as possible. Afghanistan needs a parliament that enjoys full democratic legitimacy. Secondly, the case study has shown that the construction of the National Unity Government, which once served to avoid a further escalation of the struggle between the camps of the competing presidential candidates Ashraf Ghani and Abdullah Abdullah, rather hampers reforms. Thirdly, it demonstrates how the conflicting mandates of the Supreme Court and the ICOIC contribute complicate than facilitate the solution of

conflicts between different state organs. This problem could only be solved through an amendment of the Constitution. This, however, requires the election of a new Wolesi Jirga.²² Finally, the deep rift between the Government and Parliament is worrying. In a country that is so tired of conflict and desperate for peace, elected officials should be the first to overcome old divisions and effectively collaborate for the common good.

22. The Members of the Wolesi Jirga are members of the Constitutional Loya Jirga, which is exclusively entitled to change the Constitution (Arts. 110 (1), 111 (2) of the Constitution).