

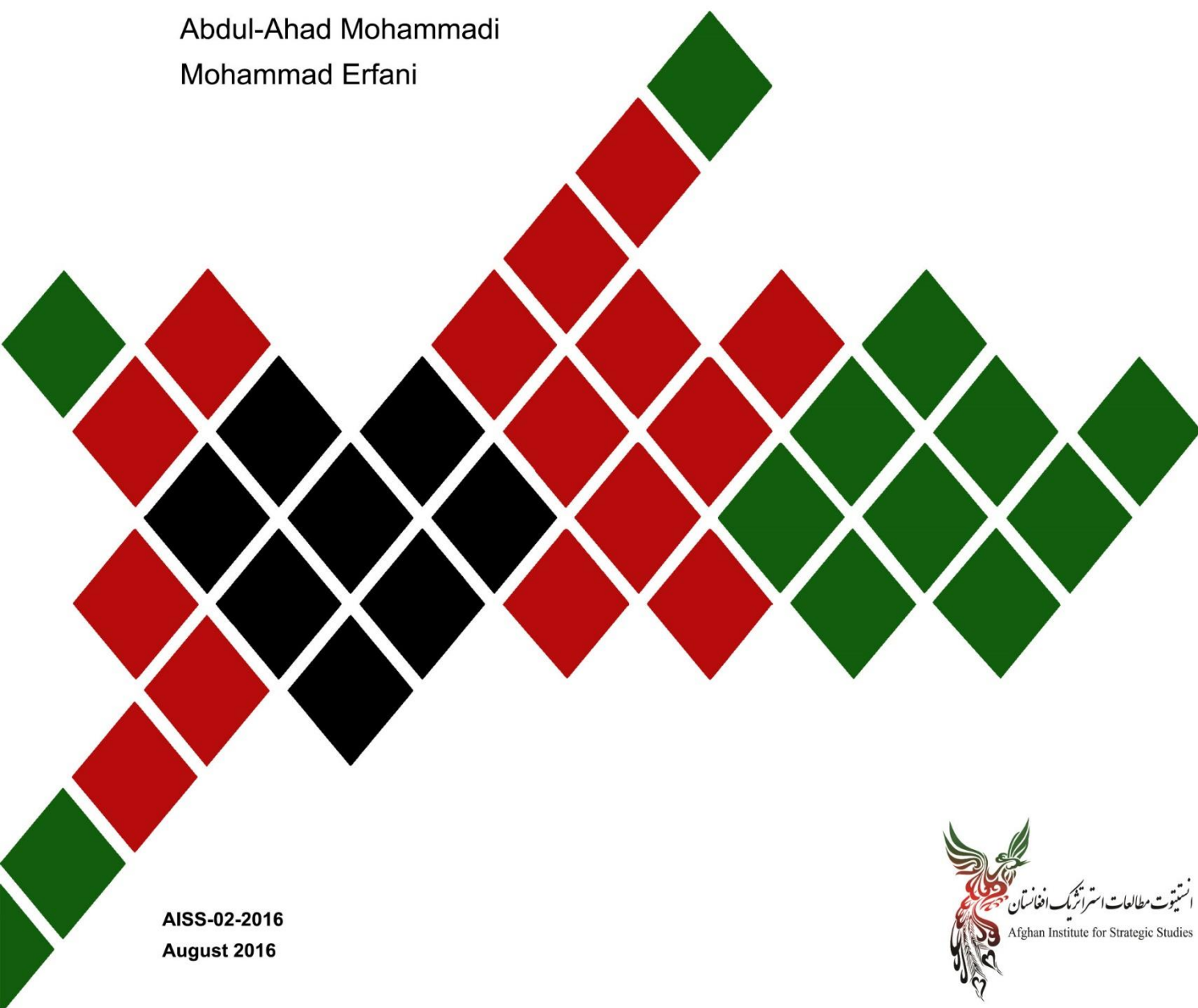
# Afghanistan's Constitution and the Society in Transition

## Assessment of Public Opinion and Proposals for a Constitutional Amendment

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### **About the Afghan Institute for Strategic Studies**

Afghan Institute for Strategic Studies (AISS) is an independent research institution that its research and studies focus on strategic issues. This institute was established in October 2012, it aims to create an intellectual space for addressing strategic issues pertaining to Afghanistan in the wider regional and international contexts. In order to be a part in improvement and growth of democracy, security, peace, good governance, etc. in the society, AISS is dedicated to conduct independent researches, translation and publication of scientific and academic books and articles, and to hold national and international seminars and conferences.

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## PREFACE

The needs of post-conflict societies, such as Afghanistan, are peculiar. Usually societies undergo huge and tremendous transformations during protracted and longer period conflicts. Afghanistan is not an exception. In post-conflict situation, it might be difficult to measure the extent of such transformations. For this very reason *institution-building* effort should take into consideration the *transitory* nature of post-conflict situation. Of course, constitution is the blueprint, or roadmap, for endeavors of institution-building in any society, and while crafting a constitution in a post-conflict society special attention must be paid to the societal transformations during conflict period and hence the transitory nature of institutions. In other words, institution must remain flexible and amenable to change *per* the requirements of society and politics. Put differently, politics and institutions should be responsive to the transformation and changes of a society rather politics ignoring such a period of transformation.

This is especially the case when a society enters an era of democratic experimentation. Obviously, politicians might desire to shape society and the nation-to-come through institutions (reform from above), but this relationship is and should not be a one-way route; rather it is, or should be, a dialectical relationship. This we know from hindsight and experience of other nations. In a democratic setup, therefore, politicians must always remain open to demands of the populous as well they should be ready to allow people's preferences to shape the institutions. Politicians' insensitivity and unresponsiveness to transformations, especially during periods of conflict, as well as their ignoring of the demands of the people might result in disconnect between the two and hence risk illegitimacy of the political system. But, on the other hand, a lack of vision on the part of politicians is a non-starter as well. Thus, both are highly important interlinked.

Here inevitably jargons of constitutionalism must be used. Two concepts are familiar to students of constitutionalism: "rigid" and "flexible" constitutions. While *rigid* constitutions make the procedure of its amendment very complicated and difficult, whereas *flexible* ones make the process of amendment easy. From above it could be deduced that particularly the post-conflict societies require *flexible* constitution and the institutions it gives rise to as in order to be responsive to demands of the people as they need to take into consideration societal and political transformation undergone during the periods of conflict. Due to this fact, some post-conflict societies have adopted a "sunset clause" in their constitutions (for example, Iraqi constitution has a "sunset

clause” and after 10 years it must be revised and amended based on a socio-political experience of this period).

The framers of the 2004 constitution of Afghanistan have designed an extremely “rigid” ones. To amend it another institution, the Constitutional Loya Jirga, must be assembled. The quorum of it consists of members of *shoray milli*, the national assembly, provincial and district council members. From the promulgation of the 2004 constitution up until 2016, however, this body has never met because the government has been unable to hold district council elections. Furthermore, not only must such an array of institutions be present to make the necessary quorum possible but two thirds support is required for any proposed amendment to the constitution.

A cursory analysis show that the framers of the 2004 constitution not only have intended to make it *rigid*, but also they have made sure that it is *extremely rigid*. This intention of the framers could be interpreted as the denial of the dialectic nature of interaction between *institutions* and the *people*. In other words, the framers wanted to shape the populous through institutions and they intended to deny the people possibility of influencing institutions democratically.

But now after 12 years of experimentation with the current constitution it might be just the time to ask some difficult questions about such an intention. Also, it is worth considering the value of other institutions that the constitution gave rise to. For example, the national assembly is largely made of up “independent representatives” of the *people* and political parties play almost no meaningful role there. The term “independent” might sound nice, but the past 12-year experience shows that absence of political parties in the parliament, among other things, means lack of discipline, principles and clear vision, too, on the part of “independent representatives” of the *people*. On other hand, the fact that political parties usually have clear program and can discipline their members makes parliament a less amenable to political manipulation by the government.

Hence, they can play a meaningful role in the process of democratic representation. By a *political design* the election law, electoral system and election institutions made it difficult for political parties to play an important role in politics. Now not only we need to academically study the role of political parties, electoral system, democratic representation in the light of the 12 years’ experiment, but also, we must ask tough questions about the philosophy of existence of *Loya Jirga* and the *rigidity* of the 2004 constitution. All of them are important and serious topics for future study.

In this spirit after 12 years of the enactment of the 2004 constitution this study aims to tease out public opinion about the constitution in the light of the experience the people under it. In the introduction part you will further read as to why there is a need for process of amendment and revision of the constitution and why this process should be rather “flexible,” especially in a post-conflict society such as Afghanistan.

## **CHAPTER ONE: OVERVIEW**

### **A: The Research basis**

As it will be explained later, the subject of this research is the analysis of public views on the necessity of the constitutional amendment. Therefore, the first step is responding to these two questions: Why the constitution should be adjustable in the first place? And now that it is, why is it necessary to obtain and analyze public opinion, and the requirement to take into consideration needs and proposals through conducting surveys and interviews? Theoretically the answer to these questions is based on the following principles.

First, the principle of public sovereignty and a democrat system:

Although the constitution is the country's main and sustainable legal framework for the government, political parties and citizens, but this constancy does not mean that once the people approve it they lose the right to revise and amend it in the future. Thus, a constitution is not a document written on stone. Far from it, the principle of popular sovereignty and a democratic system requires that people, even part of them, should be able to change the constitution and amendment it or turn it into a national debate and demand adjustments in the constitution.

Second, the constitution as an equitable framework for social cooperation:

Per this principle, whenever there is a problem which makes it impossible to ensure equity and justice for all during implementation of the constitution, it is necessary to amend it. In fact, creating the institution of constitution and a system based on that, is the most effective way to guarantee justice, equality, and fair distribution of resources, including ensuring an effective and inclusive participation, creating balance in the governmental competency, and people's fundamental rights and freedoms. If this institution loses its functionality in one or more of the mentioned issues or does not have this capacity at all, and thus, causes dissatisfaction and objection between all or part of citizens, a revision and adjustment is required. In fact, through this process, governments are able to deal with some rebellions and even armed resistances and bring back peace and reconciliation to their countries.

Third, functionality and effectiveness of good governance:

Based on this principle, establishment of effective and good governance is one of the main objectives of political systems based on the constitution. This goal

is mainly achievable and pursued based on how the governmental body and its main institutions, political and administrative system and other technical divisions including electoral system and management, and monitoring mechanisms of the constitution implementation, are devised and organized. Equally, all the above-mentioned issues, namely how to adjust the main governmental structure, are effective in creation of an equitable framework for social partnership and national unity.

Forth, based on these principles, Afghanistan's Constitution has also approved an amendment procedure.

Therefore, a constitutional amendment itself, based on the mentioned principles, is the continuation of implementation of the constitution. According to these principles, obtaining and analyzing viewpoints of different groups of people about the issue of a constitutional amendment, and considering their demands and opinions about shortcomings and strengths of the constitution, should be the basis of any adjustment.

This research, is designed based on all these principles and given the principles 1 to 3, its goal is to obtain public opinions and experts analysis about the necessity of constitutional amendment. Through this way, it can propose a way to persevere democracy, ensure an effective functional of government, and guarantee equity and equality for all citizens within the framework of the constitution.

## **B: The Research Objectives**

The main objective of this study is to help the process of the constitutional amendment. The research tries to provide a ground for a national dialogue for all citizens to reach an agreement on a model with fewer technical problems which is compatible with the country's status, and at the same time can have the maximum satisfaction of different sides, which might lead to an equitable framework for a sustainable social partnership.

## **C: Importance and necessity of the research**

As it is well-known, a constitutional amendment is a term that is explicitly stated in the political agreement which ended the crisis of 2014 presidential elections. But, on the other hand, it has been nearly 13 years that the constitution has been implemented in the country. During these years, its probable weaknesses have become clear and there have been some demands from the people about its amendment and modification. Therefore, this study is about the public and

experts' views on constitutional amendment, and these views are analyzed based on fundamental rights of citizens as well as based on social and political necessities of a country plagued by conflicts and insurgency. And this, is important for Afghanistan from different aspects. First, how much strength and legitimacy the current constitution and a system which is based on the constitution has in the public opinion should be assessed. Second, how much demand there is for the adjustment and what the requirements and situations are (including the possibility that government structure itself can be a factor in creating crisis in elections) which make these demands inevitable should be considered. Third, which parts and articles of the constitution are under question and how much demands for amending the constitution are reasonable, justified and necessary should be established. Forth, how these articles should be amended, or in other words, what are the alternatives. And finally, how much the proposed options are technically feasible and by reviewing these proposals, how better results for alternative options can be achieved. Also it is important to know in case of disagreement, how analyzing the options and samples can lead to a consensus. All these are impossible without a thorough assessment or study. Therefore, the study makes several matters in stake: the issues of the necessity for an amendment, the articles that need adjustment, and possible mechanisms etc. This, at least makes it possible for all members of society, government, civil institutions, and political parties to participate in a national open debate about the constitutional amendment which can help reaching a consensus on an equitable framework.

#### **D: The Research Methodology**

In the aftermath of disputes over the results of presidential election in 2014 and formation of National Unity Government (NUG), a national debate on constitutional amendments seems necessary in Afghanistan more than ever. The NUG is formed as a result of an agreement which emphasizes the necessity of constitutional amendment to define the newly established position of the office of the chief executive (OCE) beside the office of president. Hence, even the possibility of a change in political system of the country is considered. In addition to this core issue, during recent year, experts and critics have suggested several opinions on the need for a revision of some articles of the constitution, which include a diverse range of issues.

In order to provide a greater transparency of views about the amendment of Afghanistan's Constitution and difficulties related with it, the Afghan Institute for Strategic Studies has conducted a research to assess public opinion in 10

provinces across the country (Bamyan, Badakhshan, Balkh, Ghazni, Ghor, Kandahar, Kabul, Kundoz, Nangarhar, and Herat). This survey, which was launched in early 2016, aimed to gather comments and views about the constitution and its amendment regularly. Specifically, it is focused on three issues: awareness about the current constitution; assessment of the current constitution; and views about the adjustment and amendment of the current constitution.

For conducting this survey, both quantitative and qualitative methods were used. In the quantitative part, the research group designed a questionnaire that reflects the main questions about the constitution and its amendment. To determine the sample, eight groups of respondents in Afghanistan were identified and categorized. The questionnaire was tested by a group of 30 respondents from different walks of life. After that, it was sent to the field researchers and they gathered views and comments of eight sample groups in different provinces. The total number of people, who participated in the poll, is 800. The following figure presents targeted groups whose opinions and comments have been collected and analyzed in this research study.

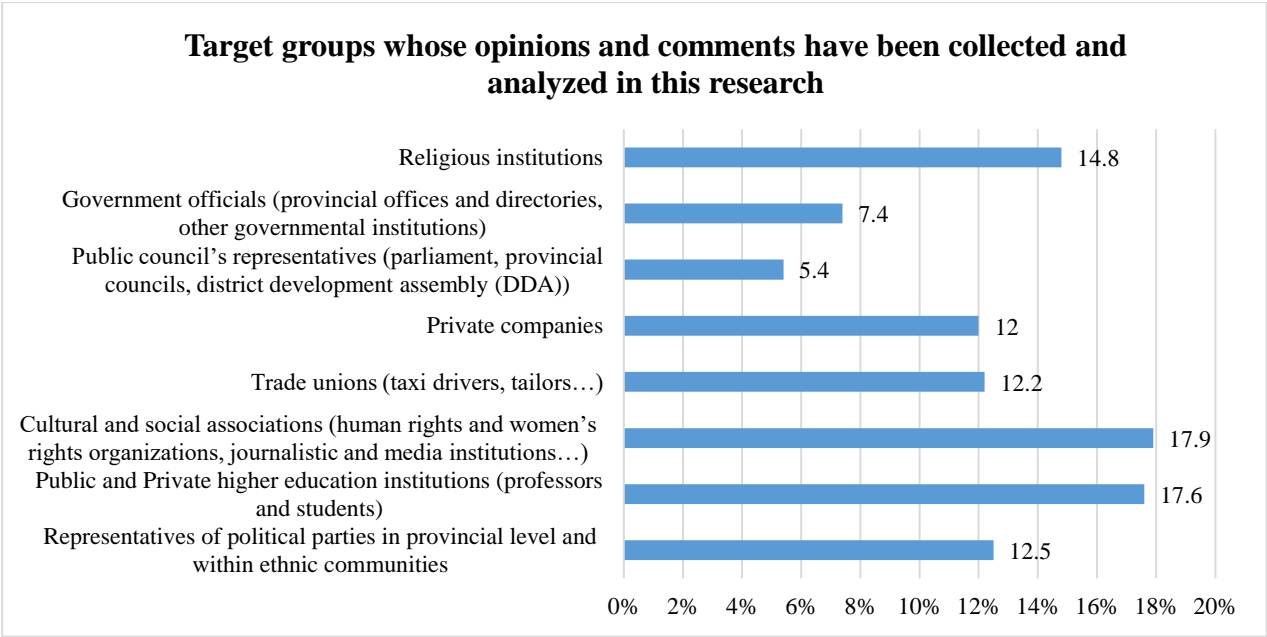


Figure 1: Study samples

In qualitative part, an in-depth interview was conducted with 34 elites including lawmakers, jurists, government officials, people involved in drafting and preparing the constitution, participants of the constitutional Loya Jirga (grand assembly), civil rights activists, academics, and university professors. The qualitative interview included some questions from the quantitative

questionnaire and also some more specific questions. According to the range of controversial issues, the team tried its best to choose these people because they represent different groups and factions in the country.

## **CHAPTER TWO: DATA ANALYSIS**

In this chapter the collected data, obtained through research questions, will be presented. As it was explained in methodology, the data has been collected by two methods: first, qualitative interviews with experts, and second, a quantitative measuring of public opinion through a questionnaire (used in 10 provinces).

In both approaches, we asked our respondents about their views on the issues related to the constitution. The results of both parts (qualitative interviews and questionnaire) are included in this paper.

### **On the drafting and ratification process of the constitution**

We asked following questions from our respondents about the process, through which the constitution is drafted and approved:

- 1) What is the difference between the current and previous constitutions in the way they are drafted and approved?
- 2) To what extent democratic methods and principles were applied in ratification of the current constitution?
- 3) To what extent the establishment of institutions for drafting and approving the constitution was based on a balanced and inclusive participation by all segments of the society?
- 4) To what extent discussions and reaching to a conclusion have been based on free will and a balanced participation of people?

### **Respondents' views**

In general, the respondents' answers can be summarized as the following:

An overwhelming majority of the respondents believe that the method used for drafting and ratifying the current constitution, was different from previous constitutions.

The constitutional Loya Jirga was fairly democratic and participants expressed their opinions freely.

An absolute majority of respondents opined that the constitution ratification was based on a consensus.

The average opinion is that only a few differences can be found between the approved draft by the Loya Jirga and the final draft that was ratified as the country's constitution.

Some experts believe that the process of ratification could be reviewed in some aspects and therefore, it was not a perfect process.

According to most experts, the ratification process of the 2004 constitution of Afghanistan has some fundamental differences from the previous ones. The level of national comprehensiveness and balance in the composition of drafting committee, reflection of different groups' opinions at every level of the ratification process, the extent of democratization of the Constitutional Loya Jirga, and the final process of the ratification until it was officially signed are the indicators which are being assessed in this chapter.

The majority of respondents believe that there are distinctive differences between the ratification process of the current and previous constitutions: people were involved and their ideas and recommendations were considered in the process. Support of the international community and their presence, besides the importance of their expertise, the presence of foreign experts and observers created a fairly equitable and free environment. Although, according to the majority of respondents, Afghans did not lose the ownership of this whole process by foreign presence. However, the role of the US Ambassador at the time, Mr. Zalmay Khalilzad, who himself was an Afghan-American, cannot be ignored; not only for helping to reach a consensus by breaking an impasse, but also for imposing the presidential system, of course through debate and compromises. Also it can be said that the delegates and participants were representing people's will to some extent. For example, Ashraf Rasooli, Senior legislative advisor of the ministry of justice and member of the constitution drafting commission explains this distinctive point as follows:

“Afghanistan's constitutions were usually passed through Loya Jirgas, but these Jirgas were so different. For example, in the past, Loya Jirgas were just a formality. But the recent Constitutional Loya Jirga was definitely not a formality. There were some specific rules to define who can participate in the Loya Jirga or apply for a candidacy. Well, if it was not a direct election or a referendum, it was a second-rate election... the 2004 constitution was approved in a very big Loya Jirga. Through the United Nations it was endeavored to bring a few people who were eligible to represent the nation to act in the process of constitution ratification.”<sup>1</sup>

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<sup>1</sup>. Ashraf Rasooli: Senior legislative advisor of the ministry of justice; member of the constitution drafting commission; (interviewer: Mohammad Erfani; interview date: 26/3/2016)

Ali Amiri, lecturer at Ibn-e-Sina University and a member of the electoral reform commission, put it this way “First, there was a large group individuals who were working on a draft and approval of the (2004) constitution. After drafting commission finished its work, various aspects of it were reviewed by a commission of 38 members. During this period, various groups of the society were contacted, and a survey was conducted to collect public views. Also there were a number of international experts and consultants present at the time. Their expertise in law-making was very helpful. In addition, it was different in terms of ratification because previous Loya Jirgas were only a formality, but this Loya Jirga was one of the longest [session] where many discussions and controversies took place over some articles of the constitution. From this perspective, it was democratic [gathering].”<sup>1</sup>

In general, the differences from the perspective of the overwhelming majority of experts can be summarized as following:

First, in previous constitutions there was little will to reach a broader consensus with all segments of the society so that no one feels excluded. But this was the positive point about the current constitution.

Second, a broad and conclusive dialogue with various groups, including civil society, took place before finalizing the process.

Third, the dialogue turned into a national debate.

Forth, an election was held.

Fifth, the constitutional Loya Jirga, to some extent, represented various groups of society.

Sixth, issues were raised and discussions ensued freely in an open dialogue. As Ghazal Hares, Lecturer at American University of Afghanistan and a member of Independent Commission for Overseeing the Implementation of the Constitution, said “using this method in a specific way, made it possible to obtain the approval of influential groups and individuals, including Jihadi leaders, regarding the constitution. As a result, no one opposed the constitution,

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<sup>1</sup>Ali Amiri: Lecturer at Ibn-e-Sina University (interviewers: Mohammad Erfani and Safitullah Taha; interview date: 9/3/2016)

but they all instead nominated themselves for the presidency and in the parliament within the framework of the constitution.”<sup>1</sup>

Respondents believe that the Bonn agreement and the role played by the international community in reaching that agreement created a special and effective situation for approving the constitution. They acknowledge that the presence and supervision of the international community was effective in relation to transparency, diversity, free space, and a will to hold a dialogue in reaching an agreement. These features will be explained later according to experts’ views. But, it is worth mentioning that these features did not exist in the process of law making in the past, or if it did, it was not to this extent, especially with regard to taking into consideration of people’s ideas and recommendations.

However, some believe that there is not much difference between the ratification process of the 2004 constitution and the previous ones and it is only the circumstances at the time that imposed some requirements on it. “I can say the ratification process of this constitution was the same as others. Other constitutions were always created under the will and pressure of government; not of the people’s aspirations. In general, all of them have been created on two basis: either they were a mere imitation and interpretation of other countries’ constitutions by the people in power. That is not only true regarding the current constitution, but also the one ratified during the era of King Zaher Shah’s... or they are created according to the requirements of time ...Taliban were defeated, the Americans were here, and with them the free market system and democracy.”<sup>2</sup> Said Sayed Masood, lecturer at the University of Kabul and a member of Constitutional Loya Jirga.

Also some respondents believe that the Loya Jirga is essentially a non-democratic institution and it was used as a tool by a specific group to impose their ideas and will on the constitution ratification process. They say the group was successful to do so. Mohammad Javad Sultani, lecturer at Ibn-e-Sina University says “Loya Jirga is not essentially democratic... Jirga was a

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<sup>1</sup>. Ghazal Hares: Lecturer at American University of Afghanistan (Interviewer: Mohammad Erfani; interview date: 13/4/2016)

<sup>2</sup>. Sayed Massoud: Lecturer at the university of Kabul; member of Constitutional Loya Jirga (interviewer: Safiullah Taha, interview date: 12/4/2016)

metaphor of a team which was imposed on the people of Afghanistan.”<sup>1</sup> Some respondents talk about existence of pressure and interferences during the process and some other have emphasized the existence of such pressures in specific cases. Also, in view of a group of interviewees, there was lack of experts and people with knowledge of law in the commissions, especially in Loya Jirga. In a survey conducted to collect people’s ideas, it became clear that most of the people did not have enough knowledge about the constitution or what essentially should be included in its content and this knowledge was not provided to them. Also, the draft was unavailable to the people. So, it could be said that they were commenting and discussing the constitution with little idea of what they were talking about. Therefore, they were only discussing the issue in general. According to some respondents, participants gave recommendation about, for example, establishment of a system of premiership, but these demands and collected data were not analyzed by the secretariat to make it available to the commission. In addition, some changes were applied to the final draft that was signed. Later these points will be explained in details.

On the composition of the drafting committee, the majority of respondents believe that ostensibly it was made up of an inclusive ethnic composition. For example, Saifurrahman Stanikzai, deputy of the Afghanistan Academy of Science said in the drafting commission of the constitution, all ethnic and religious groups had their representatives.<sup>2</sup> According to Mohammad Sediq Patman, Member of the constitution codification commission and member of the New National Front, the process of ratification happened in an open space and the balance in ethnic groups’ participation was considered more than past<sup>3</sup>. Ghazal Hares talks about the issue with more detail “As I know, a balanced gender, ethnic and religious participation was planned, although this balanced composition was more considered in the scrutiny commission which was far bigger.” She adds that most of the work was done in the second phase not the first. But some also think that the drafting commission was working under the influence of the government. One interviewee, who spoke on the condition of anonymity, claimed that the draft of the constitution which was prepared by the

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<sup>1</sup>. Mohammad Javad Sultani: Lecturer at Ibn-e-Sina University (interviewers: Mohammad Erfani and Safiullah Taha; interview date: 8/3/2016)

<sup>2</sup>. Saifurrahman Stanikzai; Deputy of the Afghanistan Academy of Science; (interviewer: Safiullah Taha; interview date: 13/3/2016)

<sup>3</sup>. Mohammad Sediq Patman: Member of the constitution codification commission and member of the New National Front; (interviewer: Safiullah Taha; interview date: 30/4/2016)

drafting commission was rejected by the Loya Jirga, because of the following reasons: “There was no diversity in the composition of the drafting commission of the constitution. It was completely selective and homogeneous. There was no chance for a free dialogue. The members of the commission were all like-minded and under the influence of the government. They just approved every plan of the government.” But this respondent did not give any detail as to whether the drafting commission mentioned here is the first primary commission comprised of eight people, or it also includes the scrutiny commission as well. It seems per the context that, where it is said that the Loya Jirga rejected the draft and the commission was working under the influence of the government, the respondent meant all the commissions that worked toward the draft constitution which later was presented to the Loya Jirga by the head of transitional government.

Some respondents believe that the government which at the time was led by the head of transitional government, interfered in the draft prepared by the commission and it resulted in many changes in the draft, which of course had happened before it was presented to the Loya Jirga for approval. For example, the position of the prime minister as the head of government and the constitutional court was removed from the final draft. According to Abdul Hafiz Mansoor, Afghan MP and a Member of the Constitutional Loya Jirga, “after the initial version drafted in the first stage, based on what I know, the draft had been changed 23 times before it was approved. And the only reason was the direct intervention of President Hamid Karzai. His main argument was the section about the change of system from premiership to a presidential system. Gradually this replacement took place in the draft while most people were in favor of the system of a prime minister.”<sup>1</sup>

In general, respondents think that during the process of the constitution’s ratification, efforts were made that people’s views and demands get reflected in the constitution. According to Abdullah Shafayi, Member of the Independent Commission for Overseeing the Implementation of Constitution, “due to the measures and actions of the drafting commission and their numerous trips across the country and even among the Afghan refugees in neighboring countries, the answer to the question of whether the opinions and demands of different segments of the society were considered in the process, is positive.”<sup>2</sup>

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<sup>1</sup>. Abdul Hafiz Mansoor: MP; Member of the Constitutional Loya Jirga (interviewer: Safiullah Taha; interview date: 31/3/2016)

<sup>2</sup>. Abdullah Shafayi: Member of the Independent Commission for Overseeing the Implementation of Constitution; (interviewer: Mohammad Erfani; interview date: 25/4/2016)

Different parts of society had the chance to give their opinions and comments to the drafting committee. Although the mechanism adopted by the relevant committees made it possible for all parts of society to represent their thoughts and demands to the constitutional commissions, but some interviewees (including Fawzia Koofi, MP from Badakhshan province) argue that not all of these views, for example, the notion of prime ministerial system, were reflected in the constitution. According to Ahmad Saeedi, Lecturer, and member of the constitutional Loya Jirga, more attention was paid to religious values than human rights and civil freedoms.<sup>1</sup> Another interviewee, Mohammad Javad Salehi, Head of Goharshad Institute of Higher Education believes that various forces and groups tried to impose their views, and they all were successful, however, the amount of their influence was different.<sup>2</sup> According to some other interviewees (including Ghazal Hares), one problem was that people's views and comments about the issue, which were collected during the survey, first of all were not well analyzed and categorized so that they could be used in the next meetings of the codification commission in order to find a comprehensive solution which ensures all different views to be measured in the constitution.

According to Ashraf Rasooli, "all viewpoints from various groups of society, including different ethnic groups, were included in the primary draft of the constitution...But unfortunately, there were two problems: first, the commission's secretariat was under the influence of an individual who used his power and connections to bring changes in people's views as he wished, so people's views were not actually reflected as they should have been... then some other changes came along which resulted the current state of confusion, desperation and frustration."<sup>3</sup>

Others believe that lack of public knowledge about the constitution and commenting under the influence and pressure of armed groups, made people unable to accurately express their thoughts. Kawun Kakar, Member of the electoral reform commission, UNAMA employee during the process of constitution ratification, and a member of constitutional Loya Jirga says "with

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<sup>1</sup> Ahmad Saeedi: Lecturer, and member of the constitutional Loya Jirga; (interviewer: Mohammad Erfani; interview date: 10/4/2016)

<sup>2</sup> Dr. Mohammad Javad Salehi: Head of Goharshad Institute of Higher Education; (interviewer: Mohammad Erfani; interview date: 12/3/2016)

<sup>3</sup> *ibid*

regard to the constitution, firstly, people should have been given some accurate awareness. But in general, people did not have much information about it. Constitution is a political and technical document. Public knowledge of technical aspect is so little... one concern of people was to what extent they can express their opinions freely. At that time, there were numerous armed groups and they had power in lots of areas. Beside that we had very little experience about democracy.”<sup>1</sup>

Some of the interviewees mentioned that neither people were consulted about the constitution nor the draft was available to them. And also, they were not given the information about what exactly were the topics included in the constitution. Therefore, inevitably they only commented on general issues. For example, people were told that the commission is trying to prepare the constitution and they need to speak out about issues they want to be included. Then, the participants would say in general they wanted justice.

“In the recent constitution, one obvious point is that much effort was spent in terms of formality to show that the constitution reflects the will of the people of Afghanistan, while in reality the mechanism which intended to reflect the people’s demands and interests in the constitution was not efficiently met in practice. For example, the meetings held to discuss these issues—I personally observed one or two of them—were not in their essence, like a discussion at all. Hundreds of people would gather at the same place. Then a person would come and say that work is underway on the new constitution, these are the topics, and now you should say what you want. Then everyone would answer for example saying ‘we want justice,’ ... I think, despite the unprecedented extent of recourse to people, we did not have a mechanism that worked like a referendum. Therefore, the current constitution is not so different with regard to the constitution-making procedures in Afghanistan during past century. If there was slight changes it mostly was as result of the presence of the international community and experts present during the process.”<sup>2</sup>

In response to the question of to what extent the constitutional Loya Jirga and its atmosphere was democratic, most of the respondents believe that the way it was held and worked was according to the situation at that time, and therefore

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<sup>1</sup>. Kawun Kakar: Member of the electoral reform commission, UNAMA employee during the process of constitution ratification, and a member of constitutional Loya Jirga, (interviewer: Mohammad Erfani; interview date: 3/5/2016)

<sup>2</sup>. *ibid*

it was democratic. Ahmad Zia Rafat, lecturer at Kabul University and former spokesman for the Independent Election Commission says “If we take the realities of Afghanistan at that time into account, the Loya Jirga was a more democratic mechanism than having only a small group of people like a commission in charge of decision making. Do not forget that we did not have a parliament at that time.”<sup>1</sup>

About the diversity of the Loya Jirga members and its potential to represent the interests of different groups and trends in the society, respondents gave interesting accounts of the situation. For example, according to Palwasha Hassan, Head of Afghan women’s education center, and member of the constitutional Loya Jirga “about 100 women were among the 500 members of the Loya Jirga and these women made a strong pressure group in favor of women which had an effective strong bargaining power.”<sup>2</sup>

About the procedure and the atmosphere of the Loya Jirga, most of respondents believe that people could speak freely and it was full of discussions, criticisms, disputes, lobbying, and objections that lasted almost for three weeks. The participants reached to a kind of consensus about the disputed points. This consensus was the result of lots of consultations and bargaining by the leaders of different ethnic, political and social groups, which except for women’s caucus, were all formed based on the ethnic divisions. Of course, the intervention and probably leveraging of the international community representatives also had been effective in reaching an agreement. The first step of the Loya Jirga procedure was to divide the members into 10 committees. Then, in these committees, the draft of the constitution was thoroughly read and discussed by the members and the controversial issues were recognized. After that, these issues were discussed in the Understanding Committee which included the committee’s boards of directors, the Loya Jirga board of directors, fractions, and national and foreign lobbying groups (according to Mr. Patman, there was a kind of lobbying inside the Loya Jirga to bring all ethnic groups together<sup>2</sup>) and at the end they would find a way to reach an agreement. Shah Mahmood Miakhel, Country director of the United States Institute of Peace, and member of the constitutional Loya Jirga says “The atmosphere under

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<sup>1</sup>.Ahmad Zia Rafat: Lecturer of journalism at Kabul University and former spokesman for the Independent Election Commission; (interviewer: Mohammad Erfani; interview date: 12/3/2016)

<sup>2</sup>.Palwasha Hassan: Head of Afghan women’s education center, and member of the constitutional Loya Jirga; (interviewer: Mohammad Erfani; interview date: 3/4/2016)

<sup>3</sup>. ibid

which the discussions were going on was free and open. So everyone was able to express their opinion and thoughts, nobody would prevent or stop dialogues and debates between the participants. It was not only true in the public meetings, but also in the Loya Jirga committees. The problem was that most of the issues took a political form. The controversial issues could cause serious disputes, for example, there was emphasis that the word “resistance” should be included in the constitution, national anthem, etc. Another problem which also existed in the Loya Jirga was lack of technical knowledge by the members as they only corroborated on their political interest which led to the current controversy.”<sup>1</sup>

Meanwhile, a few respondents stated that the Loya Jirga should not be called democratic, because it essentially is a traditional institution and cannot coordinate with the democratic mechanisms. So basically an open and free atmosphere for dialogue between participants was impossible and it is only the language of power and the will of a specific group which was imposed on the people of Afghanistan through the Loya Jirga.<sup>2</sup> According to Nizamuddin Abdullah, Senior advisor of Independent Administrative Reforms and Civil Services Commission, the description of the constitutional Loya Jirga meetings show that some theories and views were raised but no attention was paid to them.<sup>3</sup>

Some of the respondents regard the Loya Jirga participants as non-specialists and indicated that in this kind of organizations and for such a sensitive technical matter such as constitutional ratification, the participation of experts should be prominent so they could overcome the controversies in better manner. Ali Reza Rohani, member of Independent Human Rights Commission and lecturer at the University of Ibn-e-Sina commented “People, who participated in the constitutional Loya Jirga, did not have the required potentials and essential qualities for understanding the constitution or its approval process, and creation of a democratic and modern system for the future of Afghanistan. They also lacked the necessary knowledge and information about the issue. In addition, the Loya Jirga was in fact the opportunity for specific groups to impose their views on each other... most of the people who were present at the Loya Jirga at

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<sup>1</sup>. Shah Mahmood Miakhel: Country director of the United States Institute of Peace, and member of the constitutional Loya Jirga; (interviewer: Safiullah Taha; interview date: 7/5/2016)

<sup>2</sup>. Mohammad Javad Sultani

<sup>3</sup>. Nizamuddin Abdullah: Senior advisor of Independent Administrative Reforms and Civil Services Commission; (interviewer: Safiullah Taha; interview date: 12/3/2016)

the time of constitution approval were representatives of the same ethnic, religious, and tribal views and beliefs. The only important thing for them was whether their views and demands were included in the final version of the constitution.”<sup>1</sup> According to some interviewees, in some cases like the province of Ghazni, the Loya Jirga representatives were chosen under pressure and influence of local officials.<sup>2</sup>

Critics have mentioned the following as some of the weaknesses of the constitutional Loya Jirga:

- The procedure of the Loya Jirga was arranged by the government.<sup>3</sup>
- The head of government at that time, supported by Zalmay Khalilzad, intervened and advocated for their views on matters of controversy.<sup>4</sup>
- Some people believe that the draft version of the constitution was at first in English and was later translated to Persian (or Dari). It means the people of Afghanistan did not have the ownership of the process.<sup>5</sup> Of course, it should be mentioned that by the testimony of the writer of this report, who was a member of the codification commission, this claim is baseless.
- There was no open and separate discussion about articles of the constitution in the general assembly.<sup>6</sup>
- To suggest any changes in an article that could be raised at the general assembly for voting, it was required to collect 170 signatures and that was too difficult as it would prevent groups from freely turning their recommendations and concerns into a general debate.<sup>7</sup>
- The possibility of raising all theories did not exist. Some thoughts and theories could not be mentioned at all.<sup>8</sup>

In response to the question of whether the constitution eventually was approved by the vote of the majority or as result of a political settlement, the respondents

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<sup>1</sup>. Ali Reza Rohani: Member of Independent Human Rights Commission and lecturer at the University of Ibn-e-Sina; (interviewer: Mohammad Erfani; interview date: 27/3/2016)

<sup>2</sup>. Sayed Massoud

<sup>3</sup>. Abdul Hafiz Mansoor

<sup>4</sup>. Ashraf Rasooli

<sup>5</sup>. Mohyeddin Mahdi: Member of Wolesi Jirga from Baghlan and member of the constitutional Loya Jirga; (interviewer: Mohammad Erfani; interview date: 3/4/2016)

<sup>6</sup>. *ibid*

<sup>7</sup>. Palwasha Hasan

<sup>8</sup>. Kawun Kakar

have different views. Most of the respondents stated that it was ultimately approved due to a political settlement which led to a consensus in the general assembly of the Loya Jirga, not by votes. According to Karamatullah Sediq, Head of Islamic studies department of the ministry of Haj and Islamic affairs, “the constitution was approved by agreement not the majority’s vote.”<sup>1</sup> Or as Mohammad Qasem Hashemzai, Head of the Independent Commission for Overseeing the Implementation of Constitution explained, “When they finally announced that the constitution was ratified, it was not indicated whether it was by the majority vote... as all participants present at the Loya Jirga raised hands and showed their agreement. Well, there were some minority groups which had some comments, but the constitution was approved anyway and no one from minorities or others showed any opposition.”<sup>2</sup>

Although some respondents are not satisfied with the way of reaching the agreement. For example, Sima Samar, Head of Independent Human Rights Commission believes “it was the result of manipulating individual ideas by promises of money and other privileges.”<sup>3</sup> Others (including Ahmad Wali Massoud, Head of the Massoud Foundation and member of the constitutional Loya Jirga) regard the agreement as the result of pressure and deception. It should be noted that agreement here means the consensus of all members on all controversial issues like presidential system, national anthem, national languages, dual citizenship, etc.

In fact, some of the respondents are completely unsatisfied and opposed of the process of reaching the agreement.

Some of the respondents think this agreement was based on the majority vote. However, this group was not present at the constitutional Loya Jirga, and their opinion is based on mere assumption. And there is another group which believes that in some cases, for example, on the issue of national anthem and women’s rights, the agreement is based on the majority vote and in some other cases it was not. Although as it was mentioned before, they are not direct narratives

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1. Karamatullah Sediq: Head of Islamic studies department of the ministry of Haj and Islamic affairs; (interviewer: Safiullah Taha; interview date: 7/5/2016)

2. Mohammad Ghasem Hashemzai: Head of the Independent Commission for Overseeing the Implementation of Constitution; (interviewer: Safiullah Taha; interview date: 12/3/2016)

3. Sima Samar: Head of Independent Human Rights Commission; (interviewer: Safiullah Taha; interview date: 10/4/2016)

from the Loya Jirga. However, they represent the view of some experts about the process of ratification of the constitution.

But the claim that the approved draft of the constitution by the Loya Jirga was later was distorted by the head of transitional government has always remained controversial. A large number of the respondents stated that they have heard about it. However, they do not know about the details of it. A small group of respondents believe the changes brought after the draft was approved by the Loya Jirga, were trivial and grammatical, not any change in the meaning and content of the constitution. And finally, according to Farid Hamidi, Attorney General of Afghanistan “for the time being there is almost a consensus or unanimity in this regard, and everyone always cites the constitution as it is. I think the general public agreement is that the current constitution is the constitution of Afghanistan.”<sup>1</sup> Mohammad Sediq Patman believes that there had been no changes in the approved version.

But as it was noted before, there is another group of interviewees who believe the approved version of the constitution by the Loya Jirga was distorted in many instances and in some case fundamental changes were inserted. This group mostly give the examples of Article 20 which stipulates the language of the national anthem, as well as the second clause of Article 16 that was added later, which says “all national academic and administrative terminology of the country is preserved” as testament of this distortion. Mohammad Zia Farahmand, head of Information and Public Relations Department of the Independent Commission for Overseeing the Implementation of the Constitution gives a precise statement: “In 1390 we did a study entitled ‘the constitution from drafting to approval and publication’ as part of the work of the Commission of Supervision of Enforcement of Constitution. In this study, which in fact was done by our department, we found two cases which are different in the approved version by the Loya Jirga and the official version that was published. For example, this part was added to the Article 16 of the constitution: ‘all national academic and administrative terminology of the

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1. Farid Hamidi: Attorney General of Afghanistan; (interviewer: Mohammad Erfani; interview date: 19/4/2016)

country is preserved', it did not exist in the version that was approved by the Loya Jirga."<sup>1</sup>

Mr. Patman explains that the basis of this change was the decision of the Understanding Committee at the last day of the Loya Jirga which decreed that national terminology or the common terms in the country such as "Pohantoon (University)", etc. should not be changed. He claimed that he has the handwritten document of the Mr. Mojadadi who was the head of the Loya Jirga. According to him, these terms as the national terminology are part of national identity of Afghanistan as a country<sup>2</sup>. But the copy of this document which was used in Mr. Mohammad Sarwar Danish's book, "Constitutional law of Afghanistan", indicates that it was about Article 149 which suggests that the principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism, and national terminology of the country's official languages, will not be amended. He argues that Mr. Mojaddadi presented this document with his signature to the members of adjusting committee which was formed after the end of the Loya Jirga. He claimed that there was an agreement about the issue during the last day of the Loya Jirga in Understanding Committee, but they did not have the time to include it in the version that was approved in general assembly of the Loya Jirga. Then, this committee added the phrase "all national academic and administrative terminology of the country is preserved" to Article 16, rather than submitting that the national terminology which existed in official languages is non-modifiable.<sup>3</sup>

In another case, Naqibullah Faye, head of the Afghan National Standards Authority, former MP from Faryab province, and member of the constitutional Loya Jirga argued that the term "Turkish" language was supposed to be used instead of "Uzbek" and "Turkmen" languages, but it was removed from the approved version of the constitution.<sup>4</sup>

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1. Mohammad Zia Farahmand: Head of Information and Public Relations Department of the Independent Commission for Overseeing the Implementation of Constitution; (interviewer: Mohammad Erfani and Safiullah Taha; interview date: 6/3/2016)

2. *ibid*

3. Sarwar Danish: Constitutional law of Afghanistan, third edition, Kabul, Ibn-e-Sina University Press, 1394, page 338-339.

4. Naqibullah Faye; Head of the Afghan National Standards Authority, former MP of Faryab, and member of the constitutional Loya Jirga; (interviewer: Mohammad Erfani; interview date: 12/3/2016)

What presented so far was experts’ views on the drafting and ratification process of the constitution. We intended to reflect what this influential group of society thinks about the process and we have seen the general prospect is positive by a great extent. In fact, it shows that different social forces enjoyed influence and power in a wide range of issues. According to Dr. Mohammad Javad Salehi, “to some extent, all groups of society enjoyed this power under the circumstances during the ratification process; they could express their comments and include their ideas to the constitution. Although some had more power than others, but there is no doubt different groups could reflect their ideas.”<sup>1</sup> That situation led to partial satisfaction of the people about the drafting and the ratification process of the constitution. Some questions related to details of this process have not been included in the questionnaire of this study, because answering such questions requires historical knowledge which people might not be unaware of it.

**The importance of the constitution**

One very important issue was to obtain people’s opinions about the importance of the constitution and the system based on it. Although in this regard, the experts were not directly asked to give their views, but by analyzing the content of their statements it is obvious that all of them presume the necessity of a constitutional based system. To obtain the public opinion on the matter, several questions were included in the questionnaire.

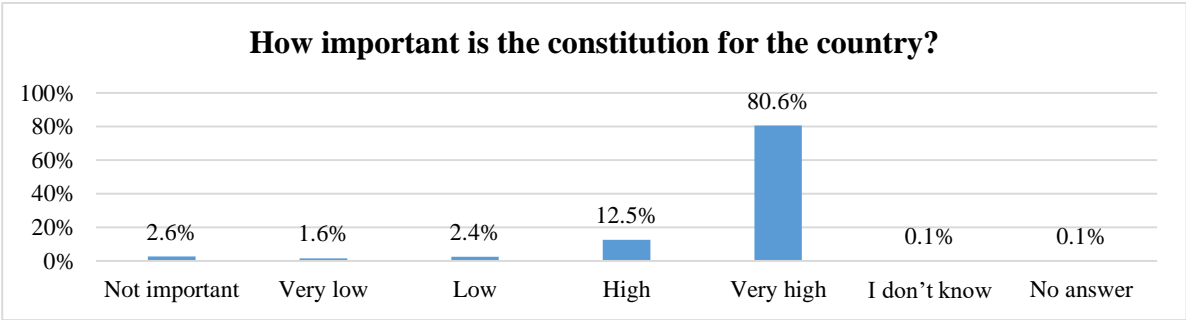


Figure 2: The importance of the constitution in respondents’ views

Public opinion about the importance of the constitution which obtained in the survey can be represented in two ways:

First, by a direct question about the importance of the constitution and second, by asking their views on the alternatives of a constitutional system.

<sup>1</sup>. ibid

Figure 2 indicates the response to the question of how important the constitution for the country is. An absolute majority (80.6%) of the respondents answered that the constitution has a very high importance for the country, while 12.5% answered it has a high importance for the country. Whereas those who believe the constitution is unimportant, constitute less than 3% of the respondents.

People also were asked about the achievements of the constitution and the figure 3 reflects the response to this question. The respondents scored some achievements of the constitution from zero (lowest) to five (highest). The average score for the options of “ensuring freedom of expression”, “strengthening political parties and civil society organizations”, “protecting the rights of women”, and “ensuring popular sovereignty through free elections” is more than three. While the average scores for the options of “making the government accountable to the people”, “managing the development and economic affairs”, “ensuring equal rights and justice for all ethnic groups, tribes and all citizens of Afghanistan”, is less than three.

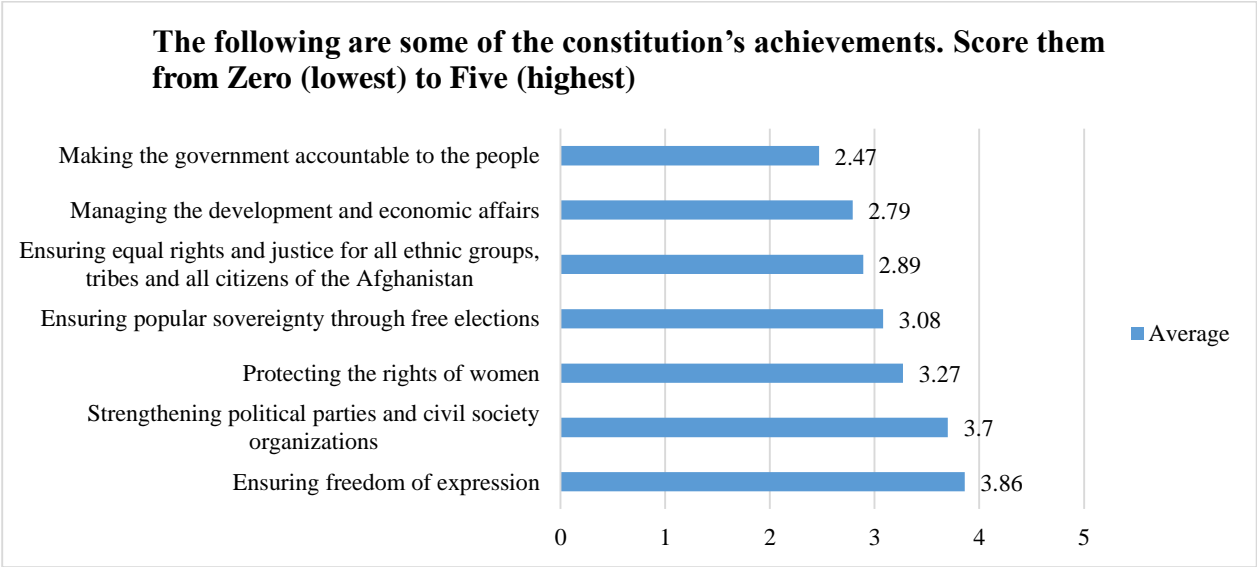


Figure 3: The average of respondents’ opinion about achievements of the constitution.

Another question which was asked from respondents was to express their opinion about the possibility of litigation based on the constitution. Figure 4 indicates the answer to this question “in your opinion, do the people of society can appeal in accordance to the constitution if there is any violation to their constitutional rights?” Almost the majority of the respondents (more than (49%) give the positive response. More than 35% of the respondents believe it is possible to some extents. And the number of people, who gave the negative response, is less than 10%.

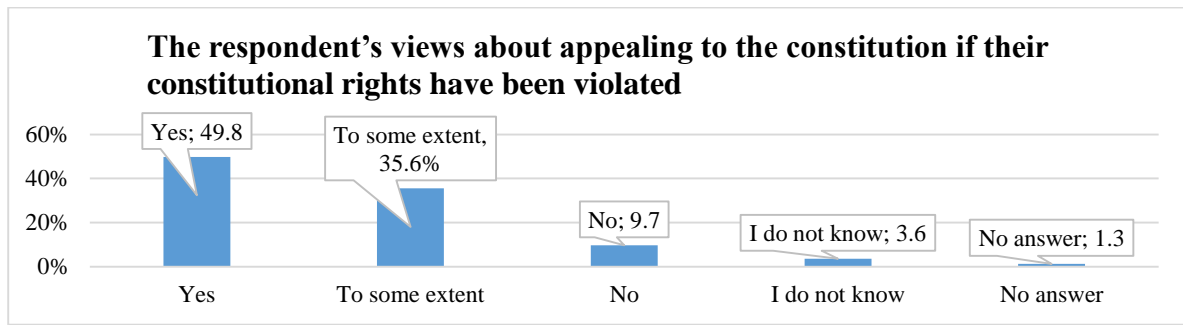


Figure 4: The average opinion about the trust of the survey society about the possibility of litigation based on the constitution.

Figure 5 indicates public opinion about the question of to what extent the constitution is protecting their fundamental rights and freedoms. It shows that almost 51% of the respondents gave a positive answer and chose options of “high” (33.2%) and “very high” (17.6%).

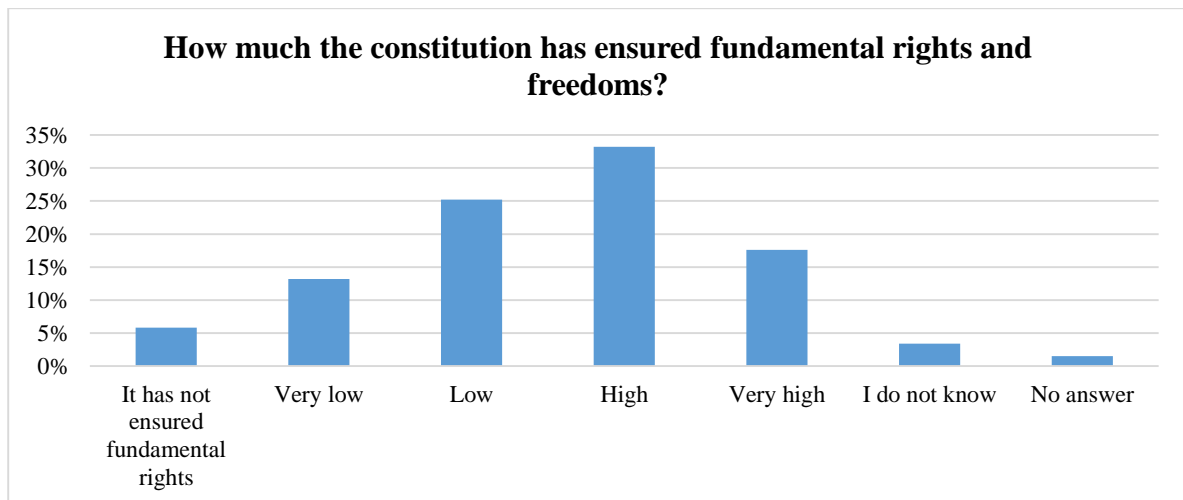


Figure 5: The respondents' views about the potential of the constitution to ensure fundamental rights and freedoms of the people.

The respondents also were asked about alternatives to a constitutional based system, which can be considered as an indirect assessment of public opinion about the importance of having a constitution. Their comments have been as the following figure.

Figure 6 indicates the answer to the question as to whether a system based on Islamic Emirate of the Taliban can be a viable alternative to the current system or not. The absolute majority (76%) gave a negative response, while only 2% of the respondents gave a positive one.

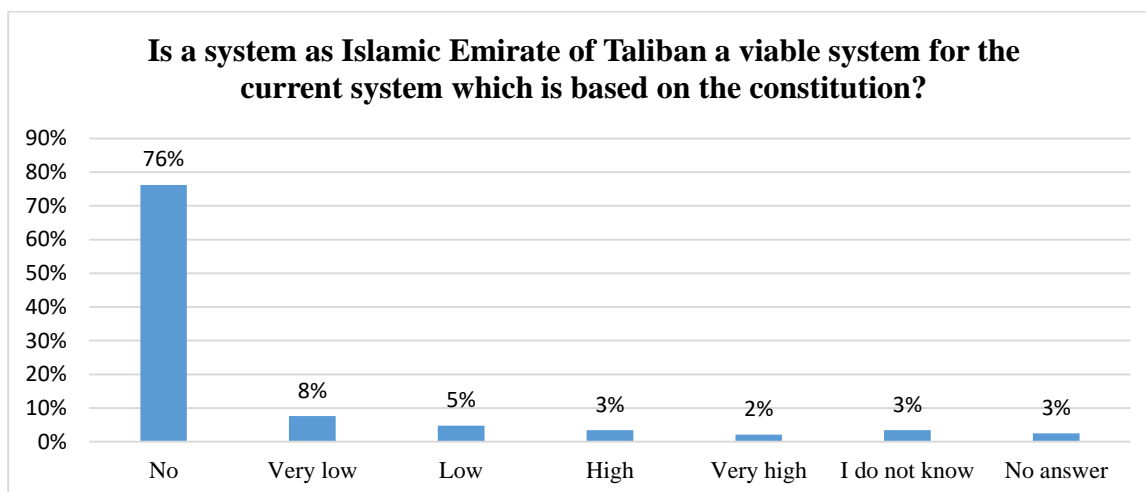


Figure 6: The respondents' views on the viability of a system as Islamic Emirate of Taliban for the country.

In general, the respondents' comments about the importance of the constitution, achievements of the constitution, possibility of litigation based on the constitution, and alternative constitutional systems, significantly indicates the importance of the constitution in public opinion.

### **Fundamental rights and freedoms, Islam and human rights**

In this section, fundamental rights and freedoms, and more specifically, the right to equality and rejection of any discrimination, women's rights and freedoms, freedom of press, freedom of expression, the right to access information, and the compatibility of Islam and human rights, are analyzed. An overwhelming majority of the respondents believe that fundamental rights and freedoms are well enshrined in the constitution. They indicated that Afghanistan's commitment to international human rights treaties is important in this regard. Farid Hamidi, Attorney General of Afghanistan commented that "Fundamental rights and freedoms are the same rights and freedoms that are approved and protected in the constitution of Afghanistan. The commitment of the Government of Afghanistan to the international treaties, obligations, conventions and documents to protect these rights and freedoms is enshrined well in the constitution. Afghanistan's commitments towards these rights and freedoms and the rights and freedoms which are protected by the constitution of Afghanistan and other laws of the country, consist the rights and freedoms of the people of Afghanistan."<sup>1</sup>

About the issue of ensuring equal rights and freedoms for women, there is a consensus that in comparison to previous constitutions of Afghanistan, the

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<sup>1</sup>. ibid

current constitution desirably considers the equality between women and men and protects this equality. Fawzia Koofi, member of the parliament from Badakhshan province says “This constitution stipulates a positive discrimination in relation to political participation of women and denounces any kind of discrimination against women in almost all other issues, for example, the rights of citizenship.”<sup>1</sup>

However, several interviewees consider the positive discrimination for political participation of women as a defect of the constitution. Ahmad Saeedi, lecturer, says “The rights given to women in the constitution, are not generated from the constitution itself... they are generated by the actions of the civil society, intellectuals, and western civilization, but anyhow the content of the constitution has not been implemented. For example, we say women and men have equal rights, but where in the country women and men enjoy equal rights? When someone nominates him/herself for the parliament, if there is an equal right, then winner should be the one who has more votes, but for women they use the positive discrimination to increase women quota. From a certain province, there should be two women, from another province, three women and so on. Even if a woman has only 200 votes, she is the winner, while a man who has 5,000 votes is not.”<sup>2</sup> Some other respondents also believe that freedoms are not clarified transparently. “In many cases enjoying these rights and freedoms is subjected to the law. For example, the statement of “freedom of expression shall be inviolable in accordance to the law”<sup>3</sup>, means that legislator can impose conditions and restrictions on this right and make the freedom of expression virtually subjected to strict conditions.”<sup>4</sup>

A few respondents refer to the Article 3 which restricts enactment of any law to the condition that it should not be in contradiction to the Islamic Sharia, and

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<sup>1</sup>. Fawzia Koofi: Member of the Wolesi Jirga from Badakhshan; (interviewer: Mohammad Erfani; interview date: 23.3.2016)

<sup>2</sup>. *ibid*

<sup>3</sup> Article Thirty-Four of the constitution declares that “Freedom of expression shall be inviolable. Every Afghan shall have the right to express thoughts through speech, writing, illustrations as well as other means in accordance with provisions of this constitution. Every Afghan shall have the right, according to provisions of law, to print and publish on subjects without prior submission to state authorities. Directives related to the press, radio and television as well as publications and other mass media shall be regulated by law.”

<sup>4</sup>. Kawun Kakar

argue that this condition is just another source of confusion in the law regarding the rights and freedoms.<sup>1</sup>

Another group of respondents believe that despite the emphasizes on the equal fundamental rights and freedoms, the constitution contains unequal ethnic values and in the construction of the power structure of the ethnic groups have different weight politically, and this does not provide equitable chance for growth of all citizens and languages.<sup>2</sup>

Per the clear majority of the respondents, freedom of the press, the media, freedom of expression and the right to access information, are well enshrined in the constitution. They consider this as a major achievement.

“In relation to the freedom of expression, in comparison to the past, we are in a good shape; ... we have been successful because the TV and radio have come out of government monopoly, which is different from the past. They are private now. We have numerous media outlets. The problem of mismanagement of the media is a different issue which is not related to the constitution. Access to information is ensured per the law. So, we have the legal mechanism.”<sup>3</sup>

In response to the question of whether Islam is compatible with the constitution, most respondents believe that Islam has a strong legal status in the constitution and basically there is no opposition between Islam and the constitution. Another group maintains that the status of Islam in the constitution has been considered so solid that it can cause a very strict religious interpretation of the constitution.<sup>4</sup> Also some respondents are of the view that, giving Islam so high and solid status, can afford an anti-human rights and anti-egalitarian interpretation of the constitution. Sima Samar, commented “Islam has a high status in the constitution and its example is the existence of Article 3. I think, how we do regard Islam and human rights matters. It is our way of thinking which can cause misinterpretation of everything, including Islam and human rights.”<sup>5</sup>

In contrast, those interviewees who represent religious institutions (e.g. religious scholars), seem satisfied with the legal status of Islam in the constitution. But they also argue about the lack of a mechanism of encountering

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<sup>1</sup>. Ahmad Zia Rafat

<sup>2</sup> Mohyeddin Mahdi

<sup>3</sup>. Ahmad Zia Rafat

<sup>4</sup>. ibid

<sup>5</sup>. Sima Samar

a law which is contrary to Islam. They implicitly mentioned the lack of this mechanism as a defect of the constitution.<sup>1</sup> While according to Hamdullah Fayeque, teacher at the faculty of Sharia and Law of the Salam Institute of Higher Education, articles 2 and 3 of the constitution give a good status to Islam and if they were implemented correctly, besides being able to guarantee the comprehensiveness of the constitution, leave no excuses for the government [armed] oppositions.<sup>2</sup>

In response to the question about the status of human rights, the majority of respondents argue that the constitution obligates the Government of Afghanistan to respect and implement human rights.

Regarding the emphasis in the constitution of protection both Islam and human rights, some respondents believe that this commitment indicates no conflict and it creates a balance between Islam and human rights.

“I think one of the strength of this constitution is that, on the one hand, it takes into consideration the religious values of the people of Afghanistan, which is Islam and, on the other, it recognizes the followers of other religions, too. It acknowledges freedom of religion. Therefore, as a modern state, as a government who is concerned about the equal fundamental rights and freedoms of its people, it creates a good balance between Islam and human rights.”<sup>3</sup>

Some of respondents believe that this balance is the result of the reliance of law on a moderate version of Islam.

“The question here is the state of the relation between international conventions about human rights and Islamic laws. I think the efforts were made to use a moderate version of Islam so there wouldn’t be much difference between the international conventions and Islamic laws.”<sup>4</sup>

Some others believe that the restriction in the constitution against the enactment of any law opposed to Islam, means there is no obligation about its compliance with Islamic law. Because, as they explain, according to this condition, a law can only be contrary to Islam if it is against the necessary and consensual rules

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<sup>1</sup>. Karamatullah Sediq

<sup>2</sup>. Hamdullah Fayeque: Teacher at the faculty of Sharia and Law of the Salam Institute of Higher Education; (interviewer: Safiullah Taha; interview date: 5/5/2016)

<sup>3</sup>. Farid Hamidi

<sup>4</sup>. Kawun Kakar

and it is less probable. “The constitution is compatible with Islam and human rights. In many instances like people’s rights and freedoms, there is no opposition between Islamic principles and the constitution. The contradictories in the constitution with regard to the commitment of Afghanistan to human rights values are few. Of course, this explanation is true if we cite a moderate version of Islam, not a backward interpretation of Islam which can virtually make problems.” Abdullah Shafayi said. <sup>1</sup>

Advocates of this view, in addition to basically accepting there is no opposition between Islam and human rights, also admit that there are some specific cases of contradiction between Islam and human rights, but, they emphasize, these are only exceptions, not the rule. Saifurrahman Stanikzai, says “Islam guarantees the rights in general and human rights in particular. But there are a few point of dispute between the Islamic laws and the international conventions and human rights declarations. For example, Islam has a clear position against the conversion to other religions, or about the marriage between Muslims and non-Muslims.”<sup>2</sup> In fact, the advocates of this theory, which are a majority, do not see any opposition in mixing Islam and human rights and creating balance between them. Among them, however, some also believe that compatibility of Islam and human rights depend on the interpretation of Islam. Therefore, with a strict interpretation of Islam, Article 3 can provide the ground for ignoring and violating fundamental rights of individuals under Islamic laws.

But a significant number of respondents express their doubt about the compatibility of Islam and human rights and argue that there are some cases of contradiction between human rights and Islam, particularly the common interpretation of Islam in Afghanistan. “First we should clarify differences between Islam and human rights, then see how much the constitution could adjust them. What we call freedom of expression, can be compatible with Islam only to some extent. In other words, the Muslim community will not tolerate different beliefs and opinions. According to article 3 ‘In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.’ Even this article is against freedom of expression. Because Islam tolerates freedom of the expression only in a limited way. So, there is no justification for someone who is a Muslim, or born in a Muslim family, to convert to another religion and simply put Islam aside. Islam cannot accept this and this is against

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<sup>1</sup>. Abdullah Shafayi

<sup>2</sup>. ibid

freedom of expression [conscience]. I, therefore, suggest the common interpretation of Islam should be revised. It is a peculiar hermeneutics in Afghanistan, and it is so close to the Taliban's interpretation.”<sup>1</sup>

Meanwhile, some interviewees stress the existence of a semantic ambiguity in relation to Islam and ask the following question: Which Islam? Because there is no single narrative of Islam. “When we say ‘Islam’ it is only a general category under which there are too much diversity and differences of views that today all Muslim are fighting each other. Which Islam we are comparing to human rights? This is one point. The next point is that we compare which part of Islam with which part of human rights? Anthropological and philosophical assumptions and presuppositions? Theology? Sharia and law? Ethics? What parts of Islam? The fact is that we need to acknowledge that human rights is a new modern civilization phenomenon. I believe the comparison of a new phenomenon of a modern society and a phenomenon which is formed in a traditional society, is not right. We must define our stance as to whether we can live our lives without human rights, or not?”<sup>2</sup>

Some interviewees, including religious scholars, while recognizing the compatibility of Islam with human rights and denying any conflict between them, believe that some particular instances of contradiction between Islam and human rights must be considered as exceptions and such cases should be considered and implemented per Islamic laws.<sup>3</sup>

In fact, these views show the general belief that experts see no serious contradiction between Islam and human rights, although some people cannot accept this view as given and cannot ignore the contradictions, even as exceptions.

Findings of Study about the fundamental rights and freedoms, including women's rights

The survey also asked respondents their opinions about fundamental rights and freedoms, including women's rights. The findings can be represented as follow.

**Women's rights:** The following figure indicates answers to the question as “to what extent women can have equal rights and freedoms equal with men, in

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<sup>1</sup>. Mohyeddin Mahdi

<sup>2</sup>. Mohammad Javad Sultani

<sup>3</sup>. Hamdullah Faye

accordance to the constitution.” The absolute majority of respondents (71.4%) believe they can enjoy equality to a high extent (34% “very high”, 36% “high”). The percentage of the respondents, who believe women cannot have equal rights with men per the constitution, is less than 2%.

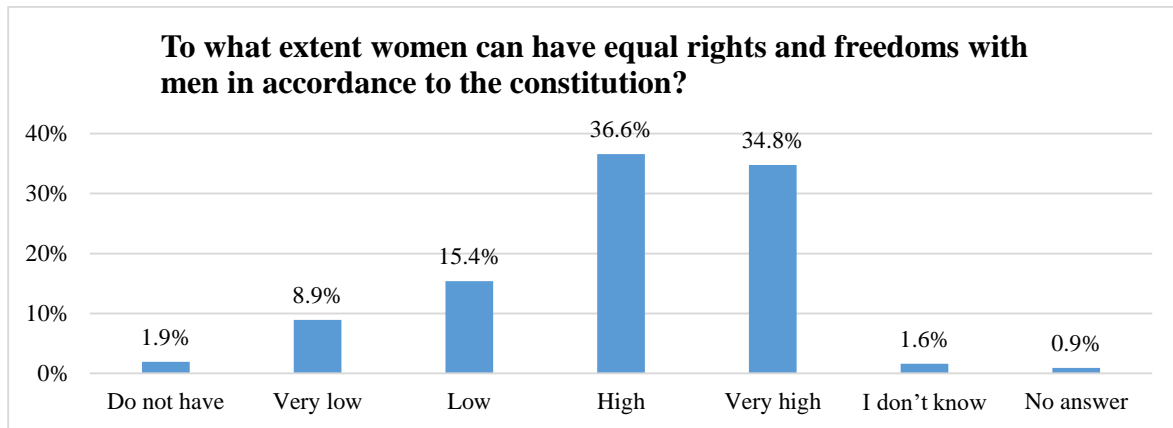


Figure 7: The respondents' opinions about the role of the constitution in creating equality between women and men.

Figure 8 is another part of the previous question: Whether the constitution provides these rights and freedoms to women? Many the respondents (38.8%) believe the constitution does provide these rights and freedoms in a high level (more than 20% replied “very high”). But less than 6% replied that the constitution does not protect women’s rights and freedoms.

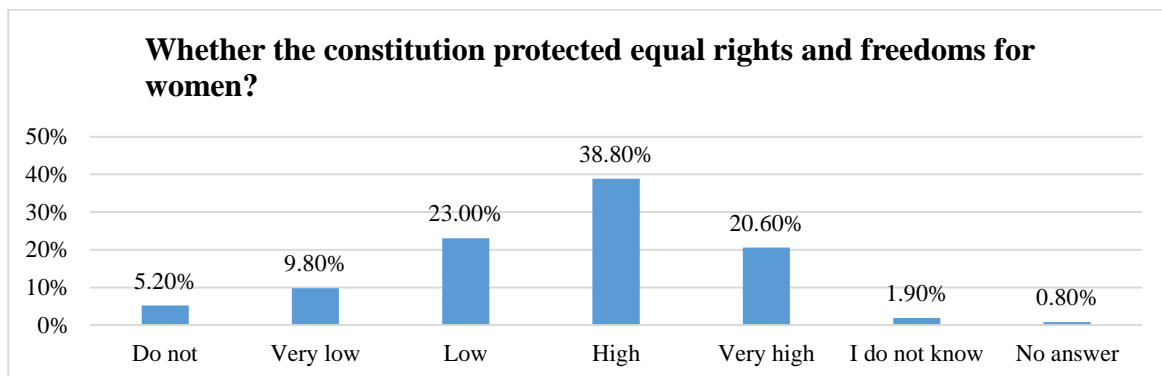


Figure 8: The respondents' opinions about the rate of the constitution success in protecting equal rights and freedoms for women

#### Protecting fundamental rights and freedoms by the constitution

The following figure indicates answers to question as to what extent the constitution protects the fundamental rights and freedoms. The majority (33.2%) believe it is protecting fundamental rights and freedoms to a high extent. More than 17% chose the option “very high,” while more than 25% of the respondents think it is “low”.

To what extent the constitution protects the fundamental rights and freedoms?

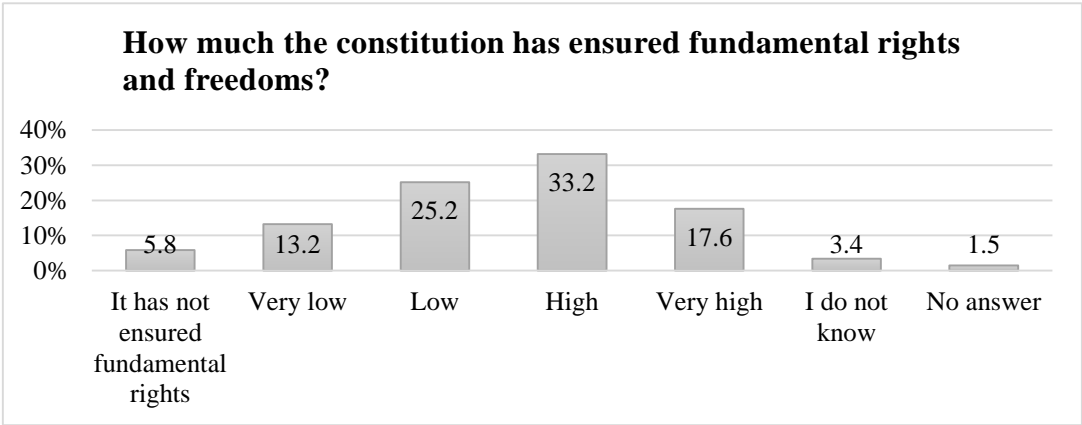


Figure 9: The respondents’ opinions about the rate of the constitution’s success in protection citizen’s fundamental rights.

Islam and the constitution

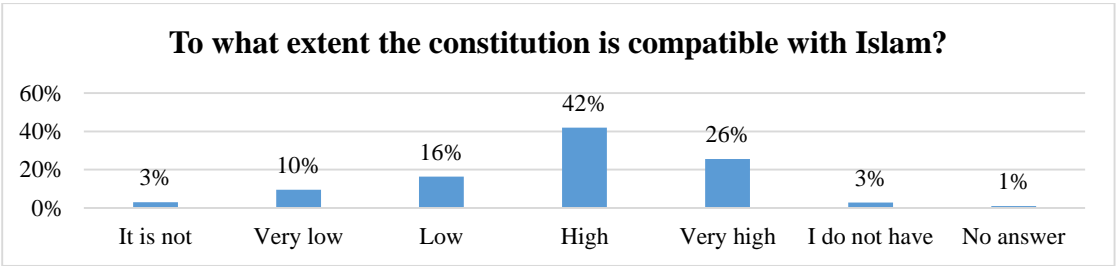


Figure 10: The respondents’ views about compatibility of Islam with the constitution.

The public survey findings are consistent with the experts’ opinion. In response to the question as that to what extent do you think the current constitution is compatible with Islam, the absolute majority of the respondents replied that it is highly compatible (26% “very high”, 42% “high”). Only 3% of the respondents believe the constitution has no compatibility with Islam. (Figure 10)

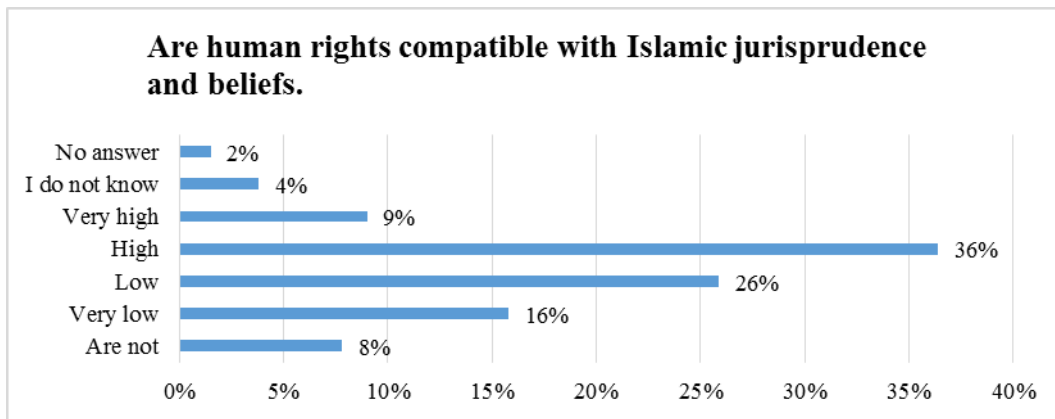


Figure 11: The respondents' views about human rights' compatibility with Islam.

**Islam and the Human rights** Figure 11 shows the response to the question whether human rights are compatible with Islamic jurisprudence and beliefs, or not. The percentage of the responds are as follow: (36%, “high”), (9%, “very high”), (26%, “low”), and less than 10 percent believe that human rights is not compatible with Islam. Answers to these questions adds to the idea that the majority of the respondents believe the Taliban system (Islamic Emirate) is not a viable alternative system, instead the constitution is very expressive and meaningful. It significantly shows public support for the constitutional values and fundamental rights and freedoms.

#### The respondents' views on the economic system of Afghanistan

The views about the economic system envisaged in the constitution, are divided into two groups: More than half of the respondents believe that market economy is not a suitable system for Afghanistan and has no good result. They argue that the market economy is not compatible with the realities of Afghanistan and this country is not ready to adopt it. So, they suggest a mixed system of economy.

“It is stated in the Article 10 of the constitution that we adopt the market economy. I am opposing this system, because we were not ready in terms of its requirements. We needed to move gradually and slowly toward this system. It should have been mentioned in the Article 10 that our goal is the market economy, but to get to this ideal another mechanism was necessary as tool: a mixed economy system. In my view, mixed economy is a vehicle and a path to market economy. Any system which meets the needs of people is a desirable system. So an economic system can be chosen according to needs of the time.”<sup>1</sup>

<sup>1</sup>. Seyed Massoud.

While a group of the respondents point to other alternative as Islamic economy and socialist economy, there is also a group that believes that market economy is efficient for Afghanistan and it only needs to be adjusted according to the country's requirements. Sima Ghani, Executive director of the People's Movement against Corruption commented "I am in favor of free market... the market should be free. But Afghanistan is a war-torn country. Many factors such as who has the money, who oversees decision-making, political issues, etc. played their role in preventing the country's economy to realize development in a way that it should. It was manipulated."<sup>1</sup>

A number of the respondents believe that market economy is not inconsistent and contrary to the government intervention to regulate it by establishing a more suitable system to provide social services. They believe that the deficiency of the system could be ensured by state intervention.<sup>2</sup> In fact, the intention of a significant number of the respondents, who criticize the market economy, is that a free market itself cannot realize economic justice and minimum access to welfare by all and exactly here the intervention of the government is necessitated. Their criticism, therefore, is about the classic definition of market economy, not all kinds of it.

### **Findings of the study about the country's economic system**

Figure 12 indicates the response to the question as to what kind of economic system is defined in the constitution. An absolute majority (68%) believe the free market economy system is defined by the constitution. And 13% replied they do not know what kind of economy is defined by the constitution.

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<sup>1</sup>.Sima Ghani: Executive director of the People's Movement Against Corruption(interviewer: Mohammad Irfani, interview date: 6/4/2016)

<sup>2</sup>. Mohammad Sediq Patman

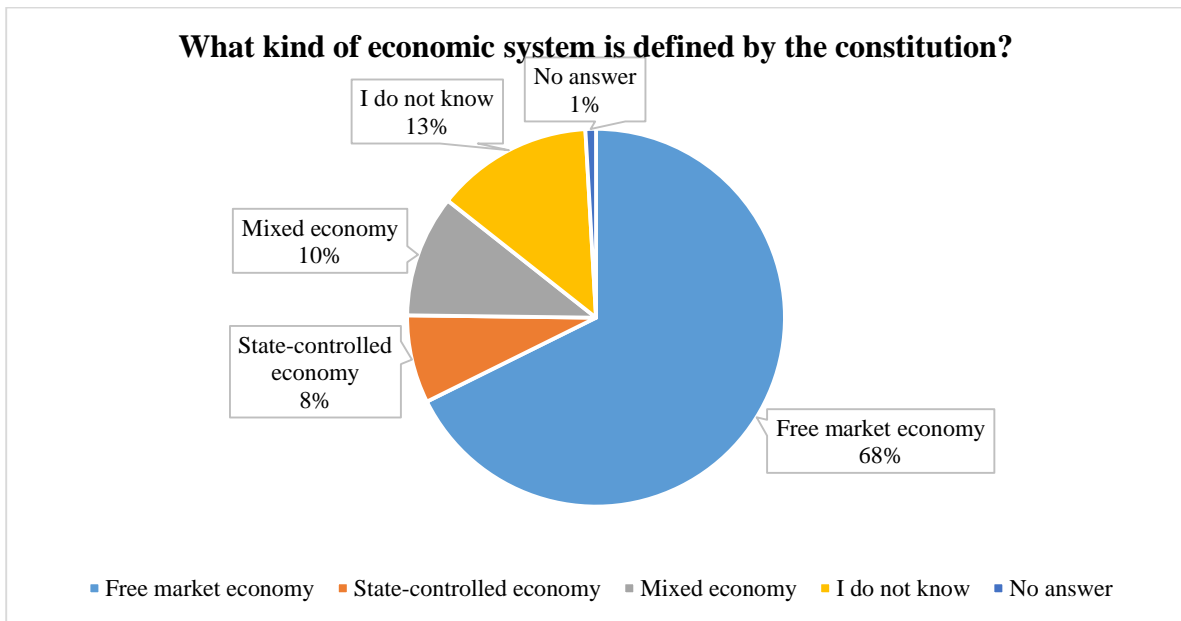


Figure 12: The respondents' awareness about the country's economic system based on the constitution.

The following figure shows responses to the question of what the respondents think is the best economic system for the country, and 23% of the respondents replied “market economy”, 15% replied “state-controlled economy”, 24% replied “mixed economy” and 37% believe the best system is the “market economy” alongside the government support for people.

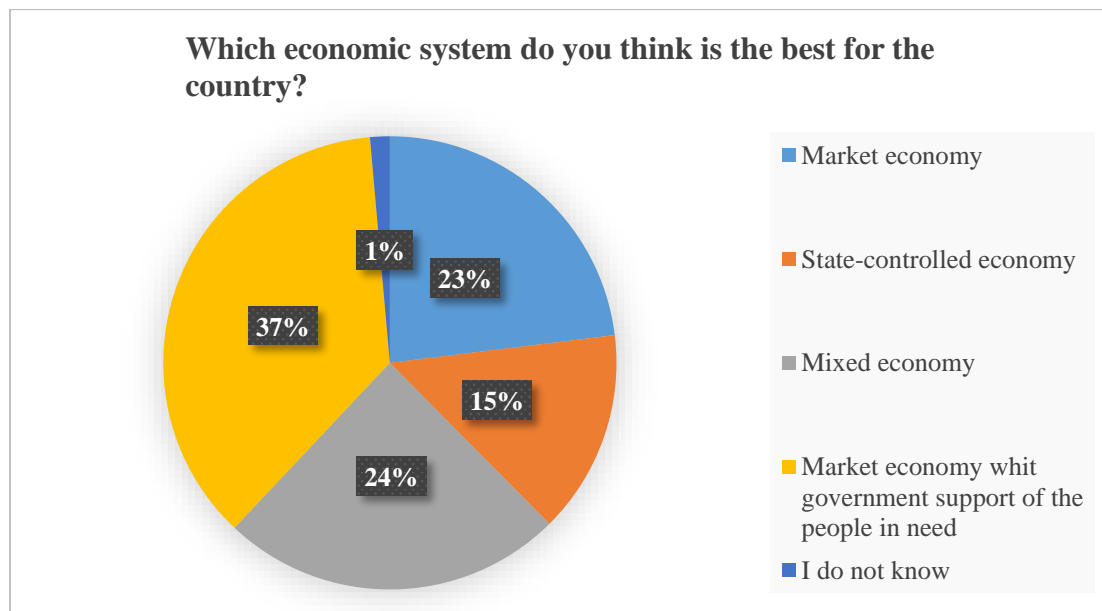


Figure 13: The respondents' views about best economic system for the country.

### **Main governmental institutions and organizations**

The main governmental institutions and organization have a decisive role in determining power structure, the methods of its distribution and ensuring

people's participation in it. To assess these institutions and organizations, the respondents' views about the type of administrative system (specially the status of the local government), ensuring a balanced participation of all ethnic groups in the government, the type of political system (presidential, semi-presidential, parliamentary), applied trends, the status of the National Assembly (in the context of the separation of the powers), and the electoral system, will be presented in this section.

## **Local government**

In response to the question about the status of the local government in the constitution, about one third of the respondents believe that the constitution pays enough attention to the local governments, but the required authorities are not granted to local governments per the law.

“Local government is defined in the constitution as “*velayat*” (province) which is the local administrative unit. But beside this unit, there are other organizations as well, as provincial council, district council, village council. There are also municipal councils for each city. The constitution provides us only a simple definition of all these.... But governor competency, the process of choosing a governor are the matters which the constitution has not defined and can be defined by the law.”<sup>1</sup>

A number of respondents recognize the importance of having a central government and believe that a strong central government would give a comprehensive authority to the government and ensure the power of leadership of the government across the country.

“I think that increasing local government power means the growth of autonomous corrupted islands and gradually the government would be unable to control them and it is detrimental to Afghanistan. We greatly need a strong central power to be able to contain the centrifugal forces.”<sup>2</sup>

But there are some experts who believe that the government is too much centralist, more than it needs to be. According to some of these experts, the constitution ignores the local governments.<sup>3</sup> In a way it can be said that local governments are not people's representatives, but they are representatives of the

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<sup>1</sup>. Ghazal Hares

<sup>2</sup>. Mohammad Javad Sultani

<sup>3</sup>. Nizamuddin Abdullah

central government and the president.<sup>1</sup> In this system, the highest officials of a province are not elected by the residents of that province, but it is the people who should give power to them.<sup>2</sup>

Some respondents are of the view that if the local government is formed under a strong leadership in each province, it could ensure the security of the province as well.<sup>3</sup> On the contrary, a centralized government brings corruption and takes away the initiative from the local people. Then the problem goes back to the constitution. Thus, as Mohammad Rafiq Shahir, head of the Experts' Council in Herat and member of the constitutional Loya Jirga explains "Local governments have no position. Afghanistan is run on the principle of central administration and this is one of the weak points of the constitution."<sup>4</sup>

However, some other experts believe the problem is not in the constitution but it is in its implementation of it. They argue that still the required authorities and competencies have not been given to local governments per the constitution's provisions and the elected local bodies have not been yet set. "The constitution defines the status of local government[s], but it has not been enforced yet. For example, it is stated in the constitution that district councils' elections shall be held but in the past 14 years no such election has taken place. Also it is stated that the mayors shall be elected but this also has never happened."<sup>5</sup>

And finally, a small number of respondents believe that it was important for Afghanistan to have a strong central government. "Anyway, the important to take into consideration time and circumstances. At that time [when the constitution was ratified] the idea was that the country had been divided and the so-called local governments were numerous. It, therefore, was necessary to have a central government to contain local governments, and most people were in favor of such an idea."<sup>6</sup>

In response to the question to what extent the administrative system (both central and local levels) is practically compatible and consistent with the

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<sup>1</sup>. The interviewee asked to remain anonymous.

<sup>2</sup>. Ahmad Wali Massoud: Head of the Massoud Foundation and member of the constitutional Loya Jirga; (interviewer: Safiullah Taha; interview date: 3/4/2016)

<sup>3</sup>. Sayed Massoud

<sup>4</sup>. Mohammad Rafiq Shahir: Head of the Experts' Council in Herat and member of the constitutional Loya Jirga; (interviewer: Safiullah Taha; interview date: 19/3/2016)

<sup>5</sup>. Ahmad Saeedi

<sup>6</sup>. Kawun Kakar

constitution, the majority of the respondents believe that the current administrative system does not comply with the constitution.

“The current administrative system in Afghanistan is a mixed system that combines centralized and decentralized system. The local administration which is headed by the governor is to some extent consistent with the constitution. But the central government with a minister as the head of each administrative unit at the local level is so different from the content of the constitution. The government has excessively created independent administrative commissions and institutions which are not accountable to any specific minister or the parliament. It obviously threatens the principle of administrative health and its concentration on the specific administrative units which are predefined by the constitution.”<sup>1</sup> On the other hand, the elected bodies of local government have not completely been established and the required competencies and authorities have not been granted to local government. Thus, according to more than half of the interviewees, the country’s administrative system is practically a centralized system (even excessively more than prescribed by the constitution). They believe it should be decentralized.

Habiba Sarabi, former governor of Bamyan province, member of the High Peace Council, and member of the constitutional Loya Jirga commented “Unfortunately, our system is too centralized and local governments have not been granted the kind of authority they need. Hence the central government should give directions on every matter... gradually we should go toward decentralizing which means giving more authority to local administrations. As we saw in the case of Helmand, because of this centralization the (deputy) governor of Helmand, who could not make anyone to hear his call for help at the time of danger, had to write his problem on his *Facebook* page and then got fired. Whereas they should have the authority to decide and act accordingly, when they call for help, they are fired by the government.”<sup>2</sup>

Despite the fact the administrative system of the country is a decentralized system it has not been implemented and practiced. “Local offices in Afghanistan, which are predefined in the constitution, have the base of decentralization. Long term reforms are needed to move toward devaluation of

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<sup>1</sup>. Abdullah Shafayi

<sup>2</sup>. Habiba Sarabi: Former governor of Bamyan, member of the High Peace Council, and member of the constitutional Loya Jirga; (interviewer: Mohammad Erfani; interview date: 15/3/2016)

power. The ground for these reforms exists in the constitution. But it was not practiced, especially in relation to local government.”<sup>1</sup>

Another group of interviewees believe that the administrative system is completely consistent with the constitution, but the constitution itself is the problem. “The administrative system is consistent with the constitution but here the power is centralized and a centralized power leads to corruption and a weak administration and it also takes away initiatives from the people in provinces. In such a situation, the role of experts and government employees in determining strategies and implementing them is very small which causes problems. We must prevent excessive concentration of power so that people can have a better and effective role to play in governing themselves.”<sup>2</sup>

The respondents’ views about the people’s participation in local government

Figure 14 shows responses to the question to what extent the constitution provides the ground for the people to participate in local governments. The majority of respondents reply by saying the constitution provides little ground for people’s participation (22.2% “very low” and 31.6% “low”). The percentage of the respondents who believe this opportunity has been provided in a “high” level is more than 26% while less than 6% choose option “very high” in the questionnaire. Nine percent of the respondents think that there is no ground for people’s participation in local government in the constitution.

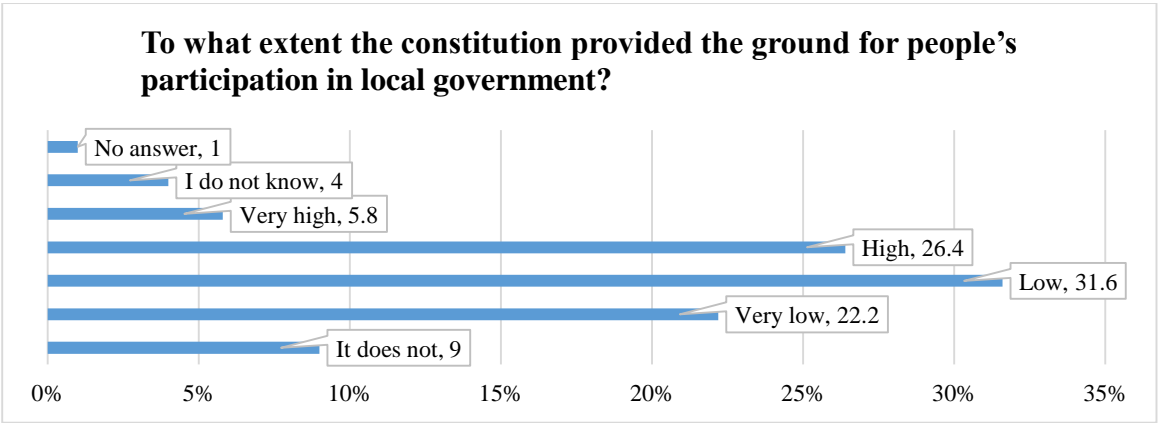


Figure 14: The constitution and the ground for people’s participation in local government.

<sup>1</sup>. Ali Reza Rohani  
<sup>2</sup> Mohammad Rafiq Shahir

The following figure shows the answer to the question as to what kind of administrative system and power distribution system between center and provinces is better. More than 40% of the respondents demanded that more decision-making power must be given to provinces and that local officials must be elected by the people. Almost 40% of the respondents believe that provinces should be subjected to the decision-making from the government and local officials must be determined by the central government. Less than 20% of the respondents think that the power should be divided between the center and provinces (federal system).

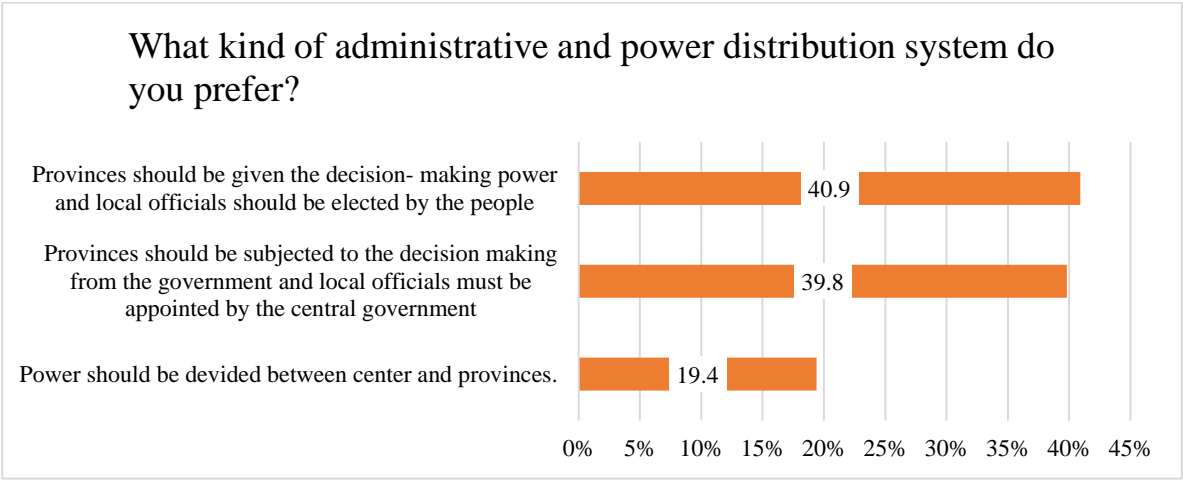


Figure 15: The respondents’ views about the type of power distribution between center and provinces.

### Balancing participation of ethnic groups

The issue of a balanced ethnic groups’ participation is another controversial issue about the political system of the country. Almost half of the respondents believe the issue is highly important for the government and is enshrined in the constitution.

“Based on the constitution of Afghanistan I believe that Afghan identity consists of all the people of Afghanistan as all ethnic groups are listed in the constitution, which is an achievement itself. In order to ensure participation of all ethnic groups and protect different identities in Afghanistan, it is the first time we have this in the constitution.”<sup>1</sup> On this same issue, some other interviewees believe that “referring to all citizens of Afghanistan as Afghan” can be a source of confusion and ambiguity for the national identity and it must be stipulated that the word “Afghan” is only a legal definition not an ethnic one. Therefore, no group oversees others. According to Ali Amiri, this confusion and ambiguity

<sup>1</sup> Farid Hamidi

arises when a group protests and call for “*Afghaniat*”, which indicates that Afghan word refers to only a specific ethnic group: i.e. the Pashtun. So, it is important to resolve this confusion.<sup>1</sup> However, most of the respondents believe that taking any position in the government must be based on meritocracy rather than ethnic affiliation. “Based on the provisions of the law, we are against ethnic divisions. We must live as a nation. Merit must be *the* factor not ethnicity.”<sup>2</sup>

Some respondents criticize the focus on balanced participation from two aspects: *First*, because the division of governmental posts and positions into various levels undermine the principle of meritocracy and the administration will not be healthy. *Second*, because this view tends to give citizens political weight and credibility based on number, influence and status of their ethnic groups. So, citizens would be categorized as first, second, and third class citizens according to their ethnic affiliations, and members of the second and third class practically are prevented to have the highest position in the system or even in an organization.<sup>3</sup>

But others believe ensuring a balanced participation at the level of senior officials from the political to policy-making sections and macro management is important because it can provide the ground for the minimum participation of the vulnerable ethnic groups and qualified citizens who are related to these ethnic groups. In fact, according to these experts, in the current circumstances, emphasizing on the ethnic participation in the highest levels is the only way to prevent elimination of vulnerable ethnic groups and their qualified members. “Normally, everyone should enjoy equal rights. But when it is not possible, policymakers of the country should provide the ground that gives all ethnic groups a political stake so they can develop themselves. My experience is a living example.”<sup>4</sup>

Based on this view, ensuring the balanced participation, at the minimum level, is to provide justice for ethnic groups and citizens who historically have been subject to annihilation and discrimination; it is not the creation of another kind of division and discord according to which every citizen enjoy an uneven level of citizenship rights based on their ethnicity which they are not able to surpass

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<sup>1</sup>. Ali Amiri

<sup>2</sup>. Mohammad Sediq Patman

<sup>3</sup>. Mohyeddin Mahdi and Sayed Massoud

<sup>4</sup>. Habiba Sarabi

it, or to distribute power in all areas, exactly based on the percentage of the ethnic groups' population.

In response to the question as to whether the division of the administrative units should be based on the cultural and historical correlations, an overwhelming majority disagree with such a statement, because they think it activates and widens the ethnic gaps. According to Mohammad Javad Sultani "if we seek to keep Afghanistan in its entirety or at least as a unitary country, first, we should not base the administrative system and local government on political interests and wills, but it must be done solely on the basis of bureaucratic rationality. Second, we should avoid making all this process about the culture. Because drawing these lines can increase and widen the existing gaps."<sup>1</sup>

Most respondents, both ethnic participation and local government, had alternative recommendations as a way forward for equal ethnic participation, which include taking into consideration capacities and competencies and making the government inclusive (central and local): "One alternative is to cling to the traditional thought and belief that the largest ethnic group should be at the top, followed by other groups in terms of size (and obviously this will divide citizens to first and second class citizens). The second method is to involve all groups in decision-making... you need to contain power by using ethnic composition, for example by giving presidency to one specific ethnic group, the post of prime minister to the next, judiciary to another, and so on. By this method, it is possible to ensure a stake in power to all groups and put up a specific pattern at the top level, then at the down level, to form the cabinet merely based on meritocracy. When we have a cabinet of experts and all ethnic groups involved in decision makings, it can also be considered as a possible model. Now, this pattern of ethnic composition can also be implemented in the provinces. By the way, we need to draw on a model in accordance to our own circumstances."<sup>2</sup>

### **Study findings about the Ethnicity and the constitution**

Figure 16 shows responses to the question as "to what extent do you think the balanced participation of ethnic groups in power is important." The results are categorized based on the ethnicity of the respondents. The majority of the people, who believe a balanced participation of ethnic groups is not important,

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<sup>1</sup> ibid

<sup>2</sup> Ahmad Wali Massoud

are from Pashtun ethnicity. The people, who think this issue is very important, are less than 30% and are from Hazara ethnicity.

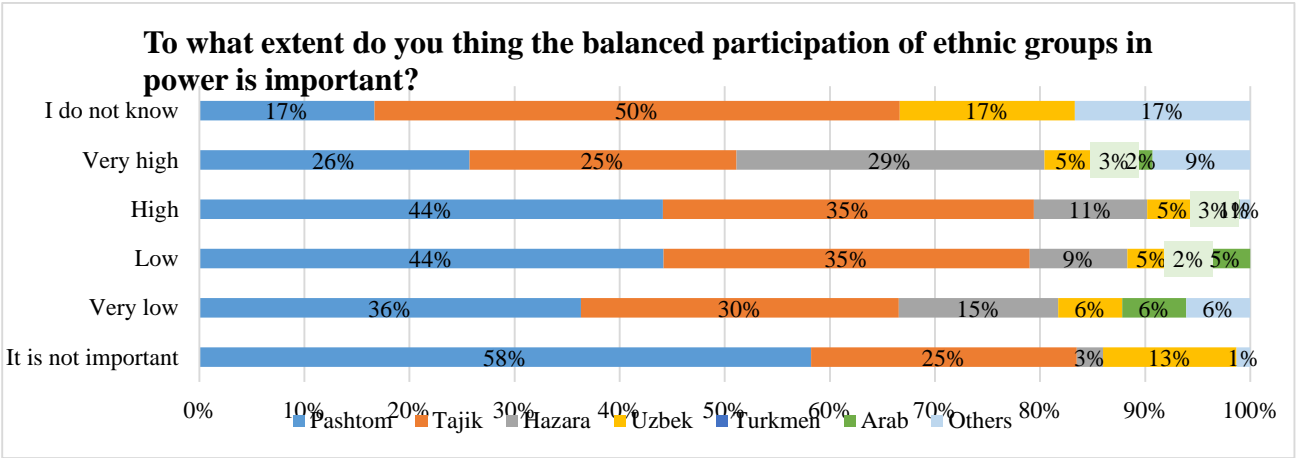


Figure 16: The importance of a balanced participation of ethnic groups in power.

Figure 17 shows responses to second part of the previous question which is: To what extent the constitution ensures a balanced participation of ethnic groups in power? The respondents views are as follow: (18%: very low) (22%: high) (16%: very high) (11%: it does not).

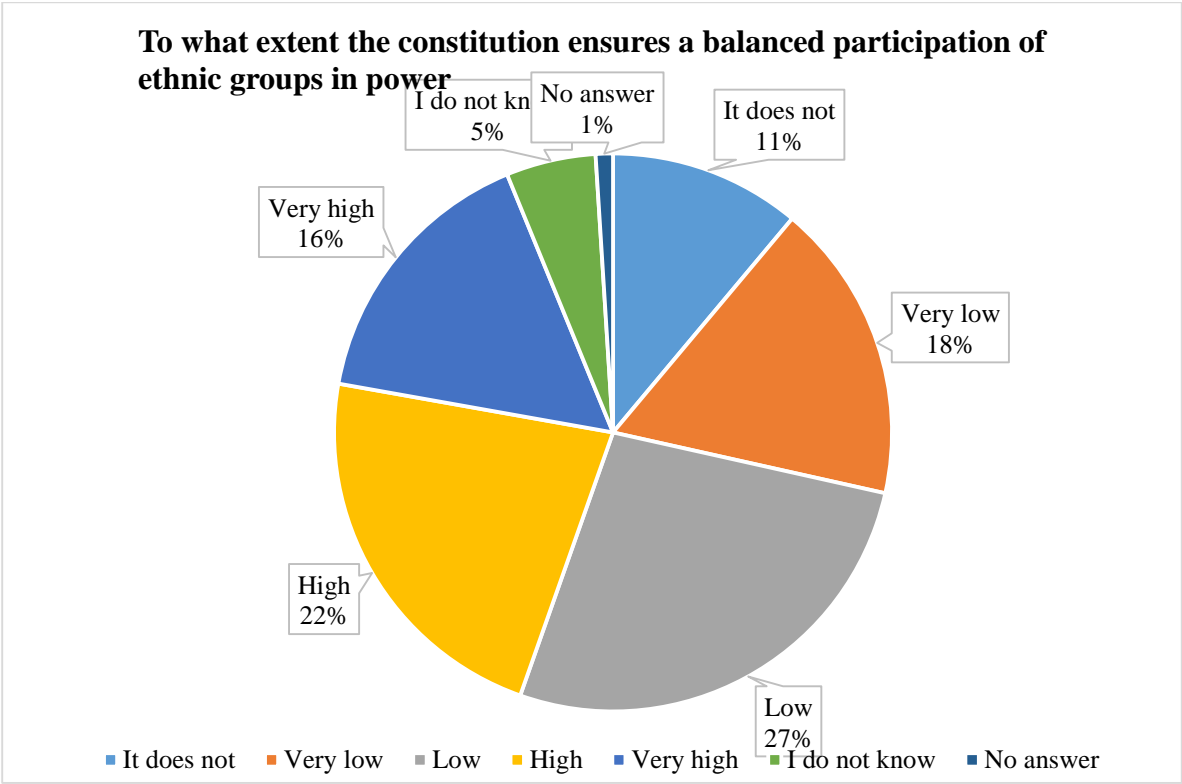


Figure 17: The role of the constitution to ensure a balanced participation of ethnic groups in power.

Article 35 of the constitution states: “Formation and functioning of a party based on ethnicity, language, Islamic school of thought (*mazhab-i fiqhi*) and region is not permissible.” The respondents were asked to give their opinion about this article. An absolute majority (83.4%) agree with it, less than 10% disagree, and more than 5% of the respondents say it is not important for them. (Figure 18)

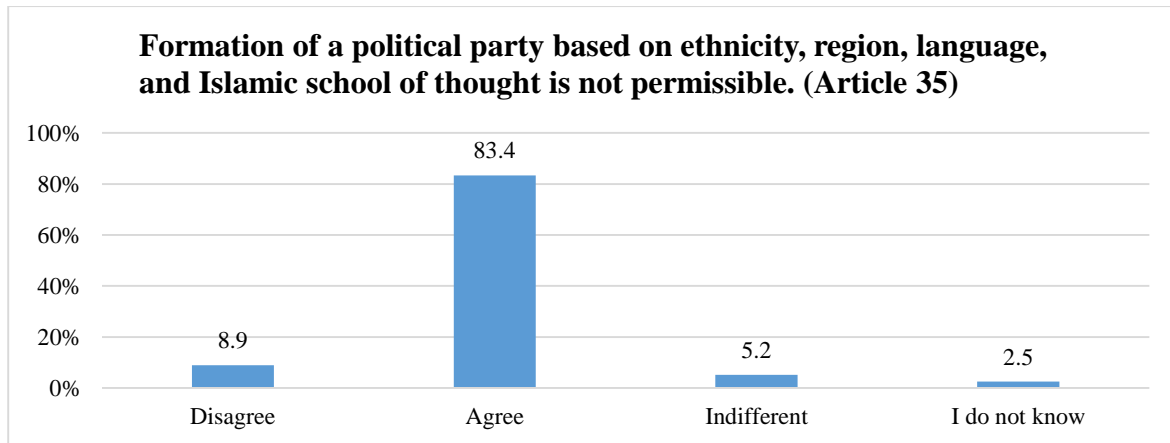


Figure 18: Article 35 of the constitution

### Views on the political system

Regarding the political system and president’s powers enshrined in the constitution, almost one-third of the respondents believe that president has too much power. Per some experts, these powers led to division of power based on ethnicity. When a president belonging to a specific ethnic origin takes power, the power changes its true national nature. They, therefore, believe that president’s powers should be modified.

“Afghanistan’s political system is extreme. It gives too much power to the president which could lead to corruption. Today, we have the National Unity Government [NUG] which supposedly divides power on 50-50 basis. This division is about offices, but not about power or competencies.... The strongest point of this system is that for the first time in Afghanistan’s history we have a national unity government, but it should be implemented accurately as it is planned, while it has not yet. The NUG should have implemented all its components and objectives in its framework, while it has not yet.”<sup>1</sup> Another group of respondents believe that the president’s powers in the political system enshrined in the constitution, is congenial, but it must be used correctly.

<sup>1</sup>. Ahmad Wali Massoud

To assess compatibility of the current behaviors regarding the relationship between the government, the president and the legislature, most of the respondents criticized the three branches of the government of non-compliance with the law. “Unfortunately the legislature is weak. Karzai did not respect parliament’s decisions. Parliament cannot play a strong role. It is just a government’s tool. The power of the parliament must be consolidated. It needs to recognize its position to be able to exercise its jurisdiction. The constitution regulates the relation the three branches of the state and also it needs to determine their limitations, obligations, powers and jurisdictions and specify the powers of these branches vis-à-vis each other. The president is the head of the executive branch but he also controls the legislative branch and does not trust the judiciary’s decisions, so he diminishes them.”<sup>1</sup>

In response to the question about the most suitable form of political system (government) in Afghanistan, more than half of the respondents expressed their favor for parliamentary system (with a prime minister who is appointed by the parliament who has executive powers, beside a president with symbolic authorities) and a system of prime minister (with a president and a prime minister, akin to French model of government). However, there are some disagreements on the method of implementing these systems.

“In the current situation, we need a parliamentary system, a system with a prime minister and a president, but not a symbolic prime minister though. Still we do not have powerful political parties a precondition for a parliamentary system, where the president is symbolic and the prime minister (premier) has all the power. There are differences between these two. But for now, we need a political system like French political system that the prime minister is appointed by the Lower House of the parliament. In this system the prime minister and the president both have their shares of power and their jurisdiction are specified by the law. The parliamentary system which exists in Britain, is not working for us now [due to the lack of powerful political parties].”<sup>2</sup>

In fact, this group of the respondents give a two-optioned proposal as an alternative to the current presidential system: first, a parliamentary system where the executive powers are in the hands of the parliament and the prime minister, or, second, a combined system of the president and the prime minister,

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<sup>1</sup>. Mohammad Rafiq Shahir

<sup>2</sup>. Abdul Hafiz Mansoor

akin to the system in France, which was similar to the system during the regime of Najibullah in Afghanistan in 1980s, where the state and executive powers are divided between the president and the prime minister.

One-third of the interviewees are of view that a presidential system or a semi-presidential system is better suited for Afghanistan and they can provide the badly needed political stability. Khalil Parsa, head of the Afghan network of civil society says “I see the presidential system as an appropriate one. We are now in a state of transition. We need more time in achieving a democratic system, increasing awareness and further strengthening the system. There are problems toward these objectives... The people who argue for improvement of the system need to show more seriousness. They need to confront the issues much more firmly. They need to stop being conservative in implementation of the constitution.”<sup>1</sup> Some of the interviewees consider the mixed system as totally unfitting for Afghanistan. For example, from among them Mohammad Sediq Patman, advocates either for the absolute presidential or absolute parliamentary system, suggesting that one of these systems must be implemented.<sup>2</sup>

Another group of the respondents believe that the form of the political system on its own is not important, because the main problem lies in the non-implementation of the law, not in the political system. Then, the law must be implemented.

“I think right now the problem in Afghanistan is not the rules, but the problems lie in implementing the rules.”<sup>3</sup> But one has to accept that there good and bad rules.

As we saw the second suggestion was a semi-presidential system with a president and prime minister. Among the people who are in favor of this system is Ahmad Wali Massoud. He believes such a system is an effective approach to control power.

Also the third proposal was a parliamentary system. In the opinion of Sima Samar, this kind of system leads to the division of power, and so it decreases conflict as well as it is better than only one person doing almost everything. She

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<sup>1</sup>.Khalil Parsa: Head of the Afghan network of civil society, Herat; (interviewer: Safiullah Taha; interview date: 23/3/2016)

<sup>2</sup>. Mohammad Sediq Patman

<sup>3</sup>. Mohammad Javad Salehi

thinks the parliamentary system prevents despotism, monopoly of power and dictatorship.<sup>1</sup> As stated by Mohammad Sediq Patman, the parliamentary system is good for the growth of political parties and if such a type of political system is in place, there is no need for the people to elect the president directly. Instead a competent president would be chosen by the national assembly and such a position is befitting for the head of the states, who possesses powers of declaring war and peace and also has the position of the as commander-in-chief of the armed forces.

Today, the issue of determining the position of chief executive officer in addition to the president is the main topic of the talks in the NUG in the framework of the looming constitutional amendment. More than half of the respondents recommend the creation of the position of a prime minister with specific authorities. However, there are disagreements about the process of appointing and dismissing the prime minister (i.e. whether the prime minister must be a member of the parliament and elected by them, or instead the president should propose the prime minister to the parliament for a vote). Some experts believe that the conditions for appointing a prime minister should be very complex to avoid instability.

“In no country of the world, the president appoints the prime minister. The prime minister, in fact, is elected by the parliament from among the political party which has the majority vote. So, it is obvious when the prime minister loses the majority, the parliament can dismiss him/her... the dismissal conditions must be complex like the dismissal of the president to avoid instability. We all have heard and read that under the reign of the former monarch of Afghanistan, Mohammed Zahir Shah [1933-1973], a prime minister one day would win the votes and the next day be dismissed, and such an arrangement could lead to political instability.”<sup>2</sup>

In the meantime, some of the respondents believe that the NUG was formed due to a political inevitability and hence there is no need to create the position of a prime minister besides the president to determine and consolidate the position of chief executive. Instead the powers of the president can be contained by dividing its authorities between the president and vice-presidents and by further

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<sup>1</sup>. Sima Samar

<sup>2</sup>. Fawzia Koofi

increasing the number of vice-presidents from currently two to three. In this way, power polarization and ethnic based politics could be avoided.

“I believe that the [NUG] agreement was signed out of desperation, so no [constitutional] change can solve the problem. The idea is that the parliamentary system might have fewer problems, but I do not think so. If we consider the four large ethnic groups [Pashtun, Tajik, Hazara and Uzbek], the president can come from one of them, and the president then can have three deputies from the each of the rest of the groups. Maybe it can solve some of the problems. But the main problem is not any of these issues, but is the implementation [of the law].”<sup>1</sup>

### **Views on the Electoral System**

In response to the question—whether the components of the electoral system envisaged in the constitution is enough, or the constitution must also specify further details of it—there are two major views. One group believes that specifying the details of it in the constitution is unnecessary: “Only on topic of dealing with electoral complaints, more clarity would we be better. It is better to mention which organization has the authority to investigate the complaints... another issue which needs more transparency is if the election was not held on time, what are the conditions for extending responsibility of the person in tenure or an institution.... We can include the details of an electoral system, like the electoral procedure, and the extent of the voting district and so on, in the electoral law. But for the constitution, it is important that it guarantees that elections for these institutions must be held. But functionality can be guaranteed by the electoral law [or bylaws].”<sup>2</sup>

Another view which advocates for more details about the electoral system in the constitution emphasizes was the following changes: changing voting system (from the current single non-transferable vote, or SNTV, to considering proportional representation, or PR, system), considering meaningful role for the political parties in the election, defining the voting districts (constituencies), and finally the level of people representation:

“I suggest adding of an extra chapter under the title of ‘electoral system in Afghanistan’ to the constitution. It must explain the form of the political system, whether it is presidential or parliamentary. So, the electoral system and constituencies be defined based on the political system. If it is parliamentary,

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<sup>1</sup>. Mohammad Javad Salehi

<sup>2</sup>. Ahmad Zia Rafaat

the voting districts (constituencies) should be predefined so that the people's representatives (members of the *Wolesi Jirga*) be elected and form the government. If it is a presidential system then every province should be a single constituency.”<sup>1</sup>

Regarding the proposal to avoid going to a runoff in presidential election, by choosing one-round system of election, an overwhelming majority of the respondents were of the view that if the president was to be elected by two-round system, it will help the legitimacy and authority of the elected president. Gul Ahmad Madadzai, deputy head of the Afghanistan's lawyers' union commented “There is no legal logic to avoid the second round of the election. It is a requirement for the president to have an absolute majority. The president obtains legal legitimacy by winning the majority vote and this is common across the world.”<sup>2</sup>

Meanwhile, there is also a relatively reasonable view as how to circumvent runoffs in presidential election, without risking president's election with a weak majority. It is presented by experts of the Electoral Reforms Commission, or ERC. In fact, the advocates of this view believe that it is possible to define a procedure for the presidential election under which the president is elected by first round of election and has the absolute majority as well.<sup>3</sup>

### **Monitoring the executive branch**

Oversight of the executive branch is the responsibility of the parliament of Afghanistan. In this part, the parliament's mechanisms for monitoring the executive branch is studied and the respondents were asked to give their opinions about the weaknesses of the national assembly and their recommendations for making this pillar of the state responsible and accountable. Most the respondents believe that the mechanism is enshrined in the constitution but it is not implemented properly.

“If we consider the competencies of the *Wolesi Jirga*, we find out that the representatives have many authorities, but the president intentionally makes them busy with other issues so they cannot pay enough attention to what their

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<sup>1</sup>. Mohammad Sediq Patman

<sup>2</sup>. Gul Ahmad Madadzai: Deputy head of the Afghanistan's lawyers' union; (interviewer: Mohammad Erfani; interview date: 7/3/2016)

<sup>3</sup>. The respondent did not want to reveal the name.

actual job is. The parliament has enough powers if it wants to use them properly.”<sup>1</sup>

Among the respondents, there are two former and two current members of the parliament who believe that the parliament must have more powers for overseeing the executive branch. “If we go by comparison, for now the national assembly, as a largest center of democracy in the country, does not have much power. It cannot make any decision contrary to that of the president’s. And it also cannot make any decision regarding the judiciary [second pillar of the state], but criticisms. So, I believe the parliament should be granted more powers, such as appointing the prime minister from among the members of the parliament... the (parliament of) Afghanistan must be able to decide about the highest officials in the country, whether it is the president or the prime minister.”<sup>2</sup>

In response to the question about the probability of making the parliament’s representatives more accountable by modifying the constitution, there are various views. Almost half of the respondents believe that to have responsible representatives, it is better to define better qualifications for electing the most qualified individuals based on merit, in the constitution. Adding the condition of having higher education degree is one suggestion which most of the respondents agreed to.

“Of course, there are some substantial flaws in the law which allows the entrance of some incapable individuals into the parliament. They do not have the required qualifications. Unfortunately, the law itself opens the way for them. For example, there is no condition for being educated [in the law]. This is good and even necessary to have this criterion [enshrined in the law].”<sup>3</sup>

Some respondents believe defining some boundaries on the lawmakers can make them more accountable. “The parliamentarians enjoy too much freedom. Nobody can ask them where they are, or why they did not participate in the meetings, for example. A representative has 90 days off in a year, in total, but this time is not spent with clients. I believe there must be some limitations. For most of the representatives, parliament is a part-time job as they mainly are busy with their personal businesses or leading their own political interests. It should

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<sup>1</sup>. Abdul Hafiz Mansour

<sup>2</sup>. Naqibullah Faye

<sup>3</sup>. Mohyeddin Mahdi

be mentioned (in the constitution) that representatives are required to be available at their place of work as people's representatives.”<sup>1</sup>

There is also a group of respondents who believe more accountability for the parliamentarians is not possible by the constitutional amendment, but by rising people's awareness and commitment of those representatives themselves. Another notable view emphasizes the role of political parties in the management of the parliament.

### **The bicameral national council**

Most of the interviewees agree that a bicameral national council (*Wolesi Jirga* or “House of People” and *Meshrano Jirga* or “House of Elders”) is desirable, but the philosophy and convenience of having such a council should be considered in practice. “The existence of both houses is useful and since I am a member of the *Wolesi Jirga*, if we do anything wrong, then the *Meshrano Jirga* would adjust it. But there is a point. In all countries with bicameral national assembly, the nature of having it is to appoint experts in the upper house (*Meshrano Jirga*) so they can adjust the mistakes of the lower house (*Wolesi Jirga*) which includes common people. Therefore, the president misuses the power for appointing one third of the members in the house of elders.”<sup>2</sup>

However, there are some reforming views about the *Meshrano Jirga*, which includes the criteria for the appointment of the members and delimitation of their powers. “In my view, if we have a second house [of the parliament] the powers of this second house should be obvious. Today it is all consultative. In my view if we want to have a more effective and powerful parliament in the future, there should be a clarification about the powers of both houses and a separation of authority between these two, as we can see in other presidential system. United States is one example, where they have a complete separation between the duties and powers of two houses.”<sup>3</sup>

There are also a small number of the respondents who believe the national assembly should consist of only one house, and the *Meshrano Jirga* should be removed.

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<sup>1</sup>. Naqibullah Faye

<sup>2</sup>. Abdul Hafiz Mansour

<sup>3</sup>. Ghazal Hares

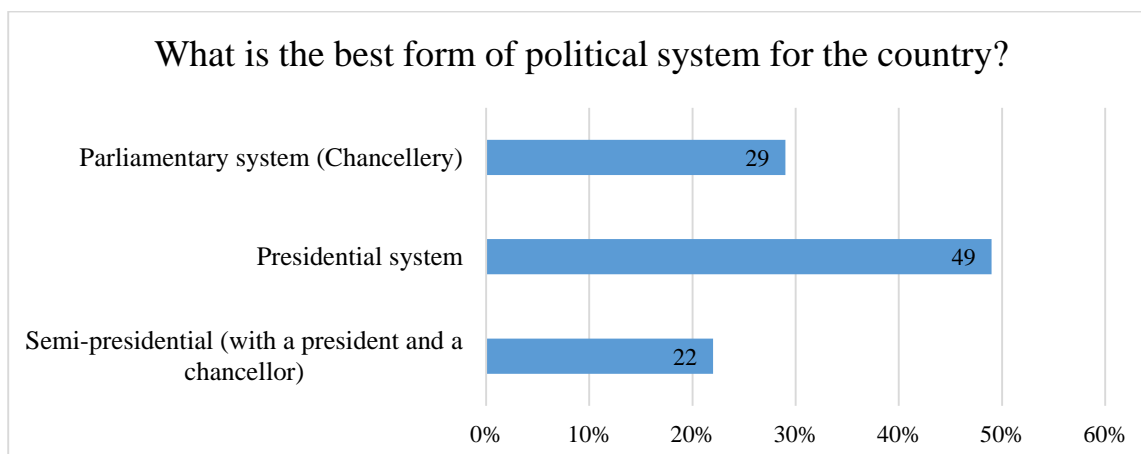


Figure 19: The suitable political system for the country

## Findings of the study

### Political system

The figure above shows the responses to the question about the best form of political system for the country. Less than half of the respondents (49%) are in favor of the presidential system and less than 30% choose the parliamentary system, while 22% of the respondents believe the semi-presidential system is suitable for the country.

It was asked from the respondents whose choice was the semi-presidential system to reply “agree/disagree” to some questions. The percentages of the answers to the question “Do you agree that the president has the authority to dismiss the prime minister?” are as follows: An absolute majority (62.4%) disagrees and 31% agree. About the question “Do you agree that a political party or a group of political parties should nominate the prime minister and the presidents approve it?” almost the majority (48.9%) disagrees and less than 45% agree (figure 20).

The answers to the question “Do you agree that the president nominates the prime minister and *Wolesi Jirga* gives the confidence vote?” are following: an absolute majority (68.5%) agrees and less than 25% disagrees. In response to the question of “Do you agree that the president nominate the prime minister and the parliament has the authority to dismiss the prime minister?” almost the majority (49.4%) agrees and less than 45% disagrees. And finally almost the majority of respondents (47.8%) agree and less than 45% disagrees with the question “Do you agree that each of two officials (president and prime minister)

has two deputies?” Also about 8% answered “I do not know” to the same question.

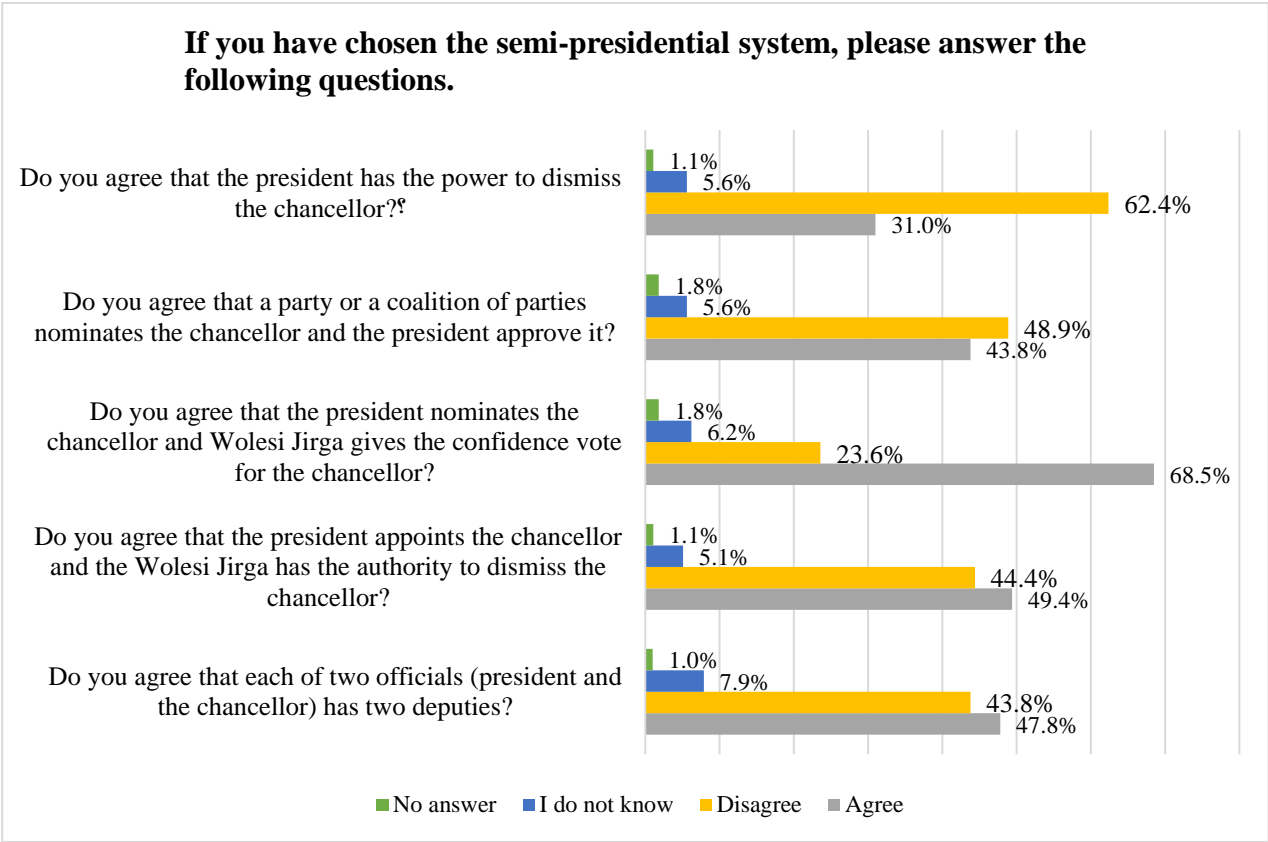


Figure 20: Adjustments required for semi-presidential system

The following figure shows the answers to the question of “What do you think about the modification of the president’s powers and authorities?” The majority (50.4%) agrees and 33.1% disagrees with putting limitations to presidential powers. In the meantime, 9% believe it should be increased.

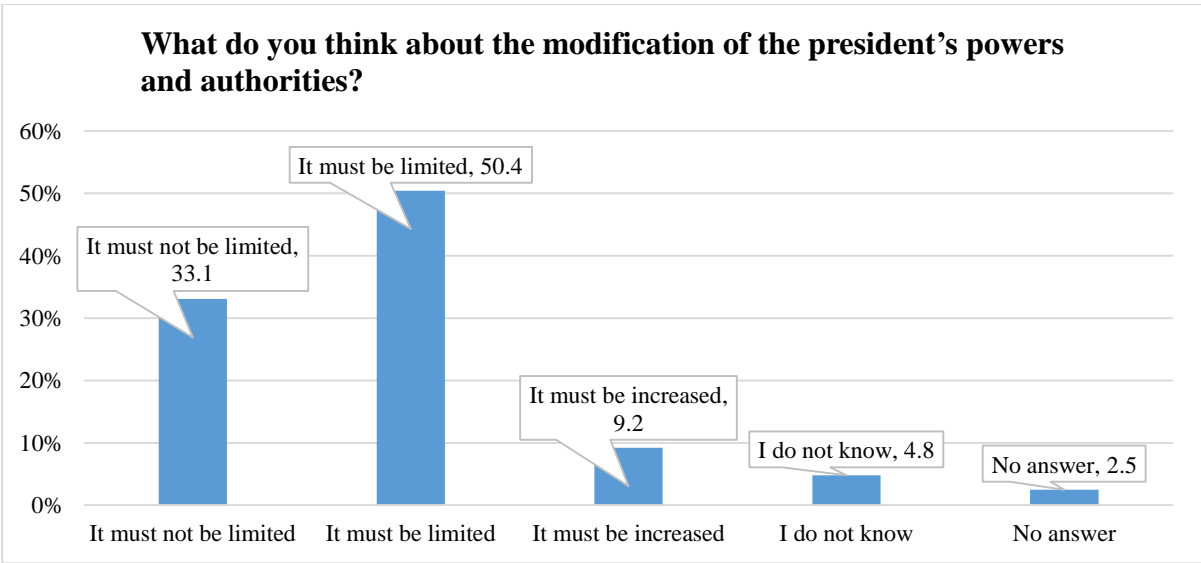


Figure 21: Modifying the president’s powers and authorities

## **Oversight of Implementation of the Constitution**

Overseeing the implementation of constitution is a very important part of good governance. In this regard, an effective mechanism for overseeing and guaranteeing the implementation of the constitution has been studied. The respondents were asked if there is going to be a constitutional court, what issues should be considered under its jurisdiction. Most of the interviewees agree that a constitutional court must be created to oversee the implementation of the constitution. They believe the court should have the jurisdiction of interpretation of the constitution, investigating violation of the constitution and resolving the disputes between the three branches of the state (executive, legislature and judiciary). “The constitutional court should be created. It should be given the required authority to invalidate and revoke the measures and laws contrary to the constitution. It is necessary that the court has the authority to interpret the constitution in the case of ambiguity or contradictions between the articles of the constitution at the request of the state branches. And it should be able to resolve disputes between government branches and agencies about the implementation of the constitution.”\

A number of the respondents believe that the Independent Commission for Overseeing the Implementation of Constitution can be a viable system for overseeing, in condition that it should be the only competent authority for this matter with enough independence. “Now we have a commission for overseeing the implementation of the constitution. In order for this organization to properly do the monitoring and all its duties, it should act independently, because its independence is very important. The law should be above everything and it should not let any agency to violate the law or interpret the law to its liking or misinterpret it.”<sup>2</sup>

The study findings about the overseeing the implementation of the constitution

The following table shows the responses to the question about the current level of monitoring of the implementation of the constitution. 36% of the respondents believe there is a “very low” level of monitoring and less than 30% believe it is

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\. Abdullah Shafayi

\. Ahmad Wali Massoud

“low”. The percentage of the respondents who think the monitoring is “very high” level is less than 3%, and 21% think there is no oversight.

In your view how much monitoring is being done on the implementation of the constitution?

<b>In your idea how much monitoring is being done on the implementation of the constitution?</b>							
Institutions	No monitoring	Very low	Low	High	Very high	I do not know	No answer
Representatives of political parties at the provincial level and national unions	18%	47%	24%	4%	2%	5%	0%
Public and private higher education institutions (teachers and students)	19%	26%	36%	14%	4%		1%
Cultural and social associations (human rights and women’s rights organizations, journalists, the media, civil society organizations, etc.)	23%	41%	27%	4%	1%	5%	0%
Trade unions (taxi drivers, tailors, jewelers, etc.)	16%	30%	28%	12%	6%	8%	0%
Private companies	23%	39%	23%	3%	8%	4%	0%
Representatives of popular councils (National and provincial councils, and District Development Assembly)	14%	37%	37%	7%	2%	2%	0%
Government officials (provincial offices and directorates and other governmental institutions’ employees)	19%	34%	31%	15%	2%		0%
Religious institutions	28%	35%	21%	1%	0%	13%	3%
<b>Total</b>	<b>21%</b>	<b>36%</b>	<b>28%</b>	<b>7%</b>	<b>3%</b>	<b>5%</b>	<b>1%</b>

Table 1: The level of monitoring the implementation of the constitution

The following figure shows the total responses to the question about the level of monitoring on the implementation of the constitution. The majority believe the monitoring level is very low (36% “very low” and 28% “low”). 21% think there is no monitoring, while 3% believe the oversight level is “very high” and 7% chose the option “high”.

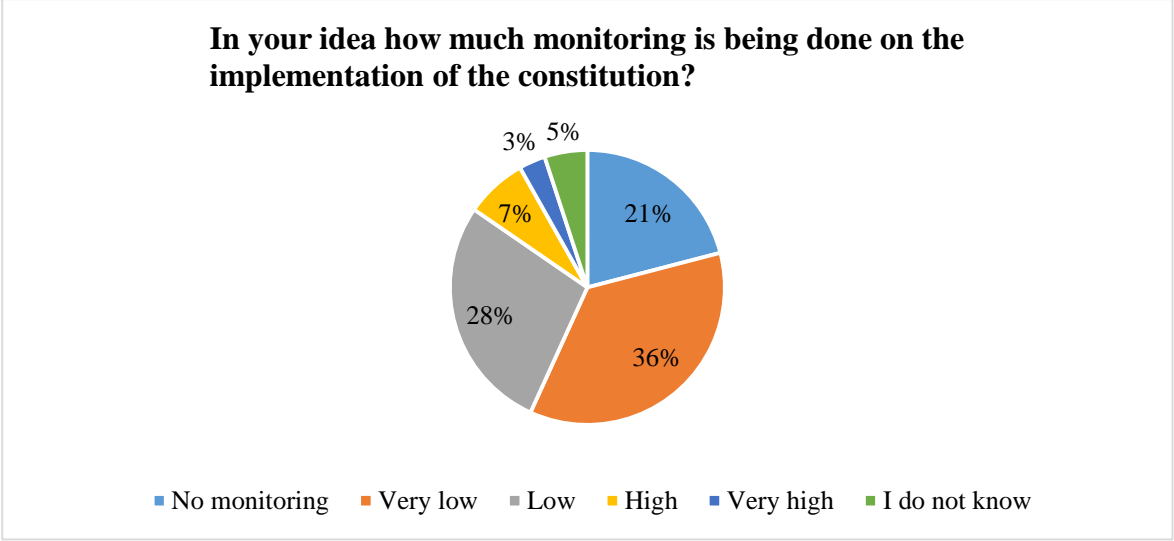


Figure 22: The level of monitoring on the implementation of the constitution

The following table shows the answer to the question “what is the best way for oversight and protection of the constitution”. The percentage of the respondents who believe the best option would be the constitutional court is almost 35% and around 31% think the best option is the Independent Commission for Overseeing the Implementation of the Constitution. More than 11% believe the president is the best option and less than 5% responded they do not know.

What is the best way for monitoring and protecting the constitution?						
Institutions	The court of constitution	Supreme Court	Independent Commission for Overseeing the Implementation of the Constitution	President	I do not know	No answer
Representatives of political parties at the provincial level and national unions	46.0%	16.0%	24.0%	11.0%	3.0%	
Public and private higher education institutions (teachers and students)	34.8%	17.7%	34.0%	9.2%	3.5%	0.7%

Cultural and social associations (human rights and women's rights organizations, Journalists, the media, civil society organizations, etc.)	24.5%	16.8%	42.0%	14.0%	2.8%	
Trade unions (Taxi drivers, tailors, jewelers, etc.)	26.5%	17.3%	27.6%	18.4%	9.2%	1.0%
Private companies	34.4%	18.8%	29.2%	11.5%	6.2%	
Representatives of popular councils (National and Provincial councils, and District Development Assembly)	39.5%	18.6%	32.6%	4.7%	2.3%	2.3%
Government officials (provincial offices and directories and other governmental institutions' employees)	28.8%	23.7%	33.9%	11.9%	1.7%	
Religious institutions	46.6%	22.0%	18.6%	5.9%	5.1%	1.7%
Total	34.9%	18.5%	30.5%	11.1%	4.4%	0.6%

Table 2: best ways for monitoring and protecting the constitution

Figure 23 shows the graph of the total responses to the previous question. The average of the respondents who believe the constitutional court is the best option for monitoring and protection the constitution is almost 35%. And around 31% believe the best option is the Independent Commission for Overseeing the Implementation of the Constitution.

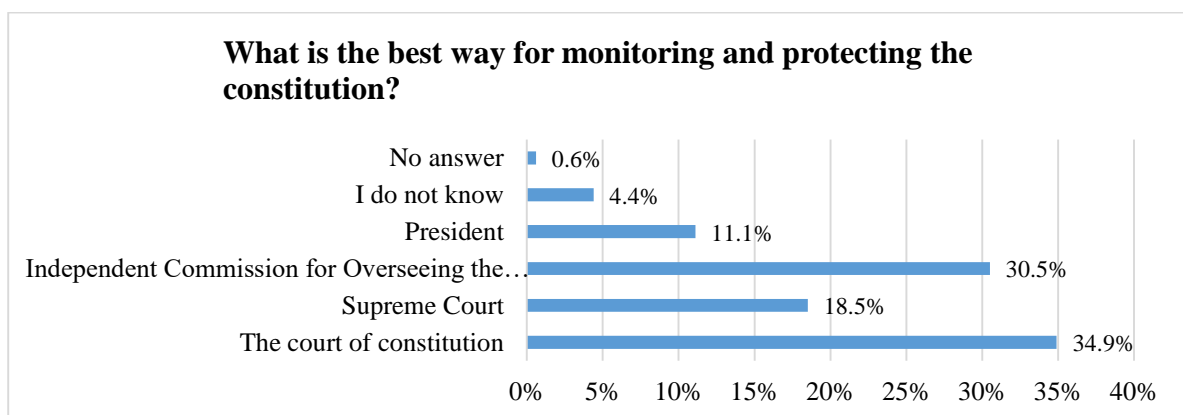


Figure 23: Best ways for monitoring and protecting the constitution

### **Constitutional amendment mechanism**

With regard to the current mechanism for the constitutional amendment, there are various opinions. More than half of the respondents believe the existing mechanism is viable and should be preserved. “The mechanism of the constitutional amendment is enshrined in the constitution itself. So, if there is the political will and the constitutional *Loya Jirga* is held, it can work. But there is a problem and that is the composition of the *Loya Jirga* which consists of the members of the *Wolesi Jirga*, *Meshrano Jirga*, provincial council and district council representatives, but yet the district council election has never been held.”

The other half of the respondents prefers the existing mechanism of the constitutional amendment to be changed. To increase public participation and to make the mechanism less rigid are two major arguments put forward by this group. “The predefined mechanism of constitutional amendment should change, because for the time being, the president has too much power. The constitution should enshrine a mechanism in which people are more involved. For example, part of the president’s powers should be divided between experts, civil society, and others.”

### **The study findings about the constitutional amendment**

Another question from the respondents was: Is the constitutional amendment necessary given to the current situation? The responses to this question are categorized according to the education level of the respondents. About 50.1% of the respondents’ answer is “yes, in a few cases”. The education level for majority of this particular group is higher than the secondary school. The answer of less than 30% is “yes, in many cases”. And less than 20% believe that there is no need for the constitutional amendment. (Figure 24)

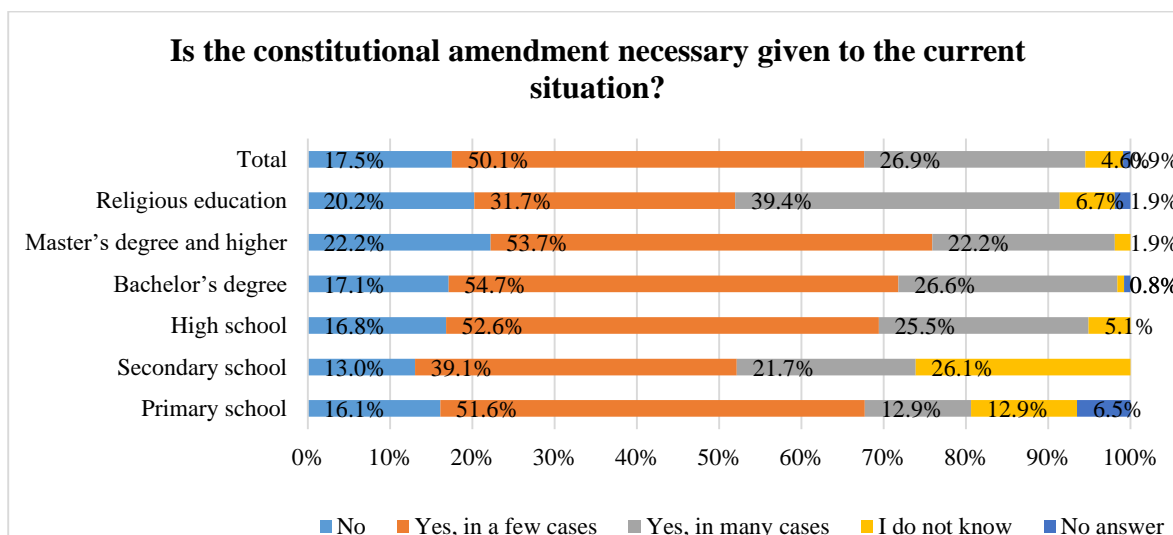


Figure 24: The necessity of the constitutional amendment in current situation

In response to the question “Do you think the amendment of the constitution by the *Loya Jirga* is an appropriate method or should be changed?” the majority of the respondents (52%) believes the current way for the constitutional amendment is good, and 42% believes it should be changed. (Figure 25)

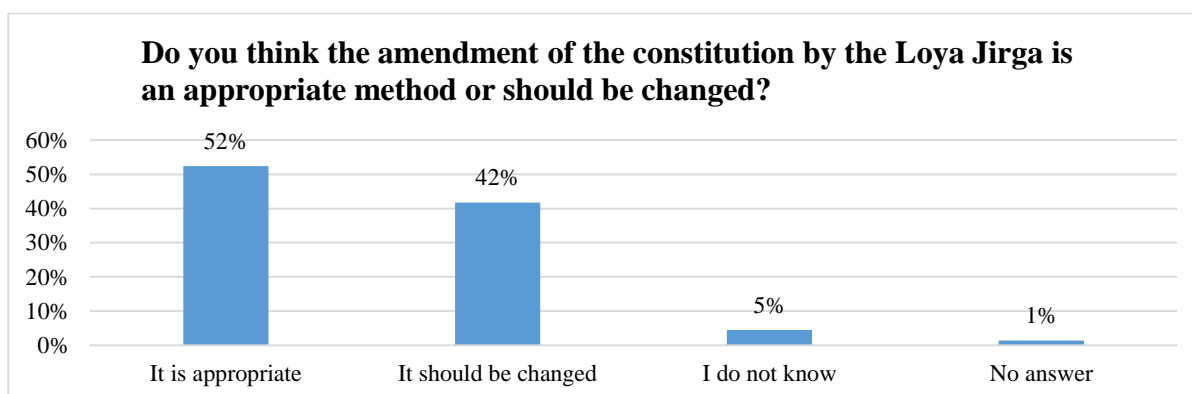


Figure 25: The constitutional amendment by the Loya Jirga

In response to the question “to what extent do you think the amendment is necessary for each of the following topics”, the respondents were asked to score each of the following topics from one (lowest) to five (highest). The topics which are given the highest score (almost 4) are “the articles of the constitution should be clarified”, “Ethnic participation in power should be balanced”, and “The governors and district governors [chiefs] should be elected by the people”. The topics with the score more than 3, are “the form of the administrative system should be changed”, “the court of constitution should be created”, “women’s rights should be protected more”. And the topics of “the form of political system should be changed” and “the president’s powers should be decreased” are given almost 3 scores. (Figure 26)

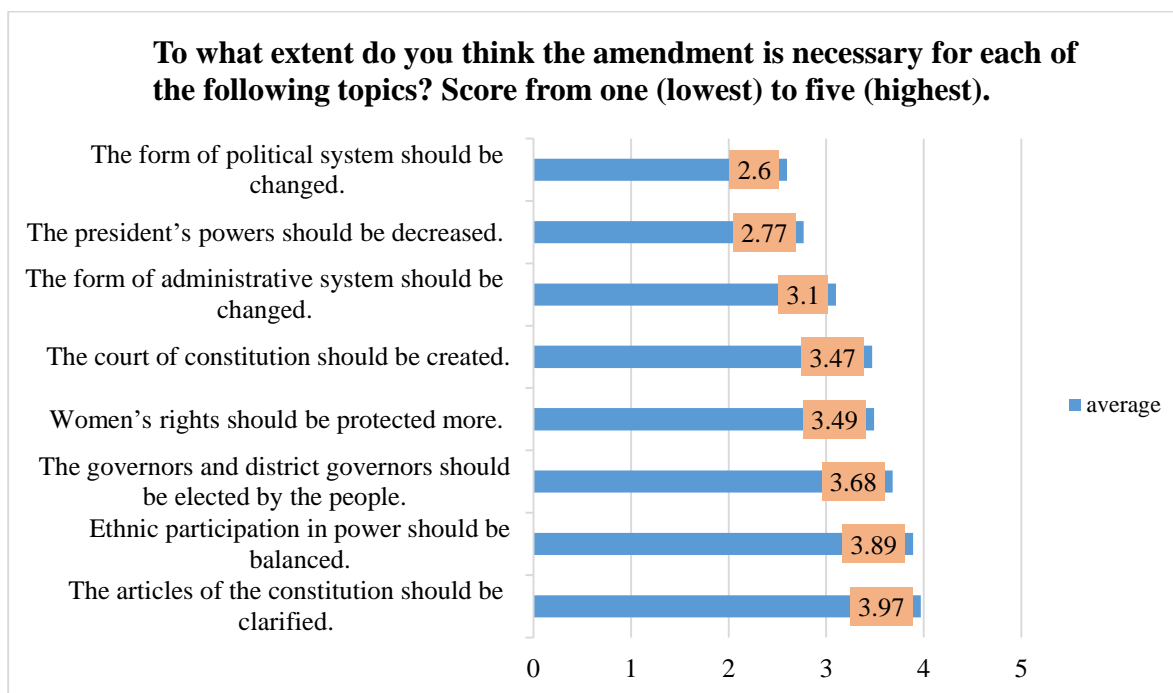


Figure 26: The scores to the topics for the constitutional amendment

The following figure illustrates the responses to the question: Which kind of the administrative system and power distribution system between the center and provinces do you prefer?

More than 40% of the respondents believe more power should be given to provinces from the center; they should have the decision-making power and local officials should be elected by the people. In the meantime, almost 40% of the respondents believe that provinces should be subordinate to the center and the center appoints the local officials. Less than 20% believe the power should be divided between center and provinces (federalism).

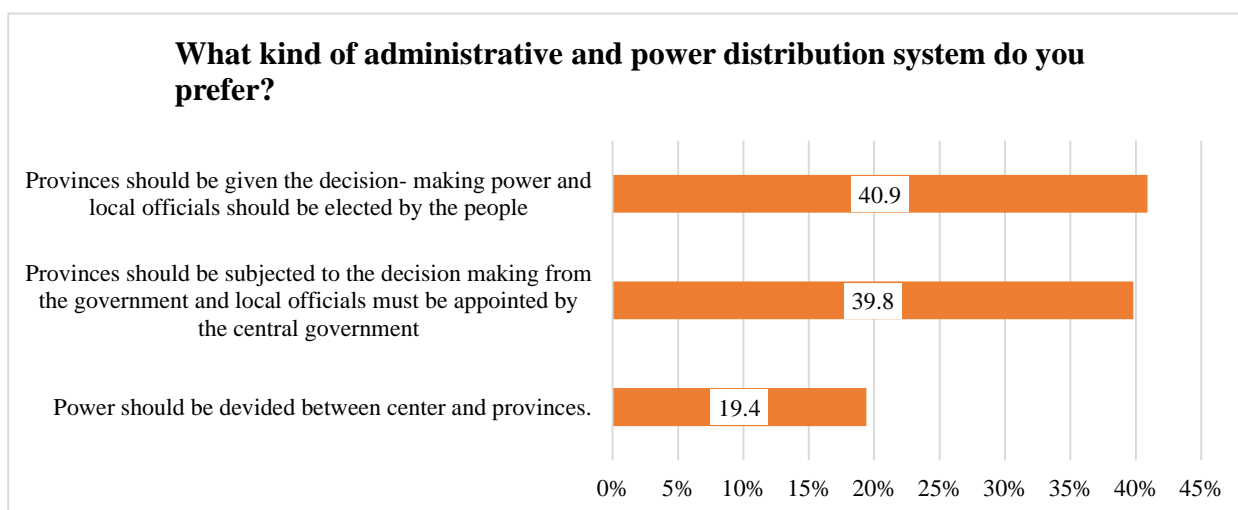


Figure 27: Forms of administrative system and power distribution system between center and provinces.

The following figure shows the answers to this question: What do you think about the modification of the president's powers and authorities?

The majority (50.4%) of the respondents believe president's powers should be limited, less than 35% believe they should not be limited and less than 10% believe more power should be given to the president.

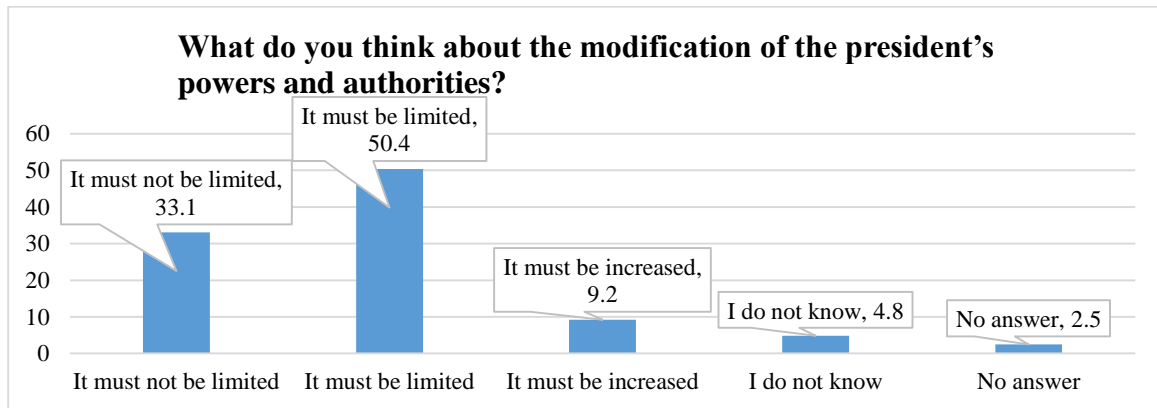


Figure 28: Modification of the president's powers and authorities

## National Anthem

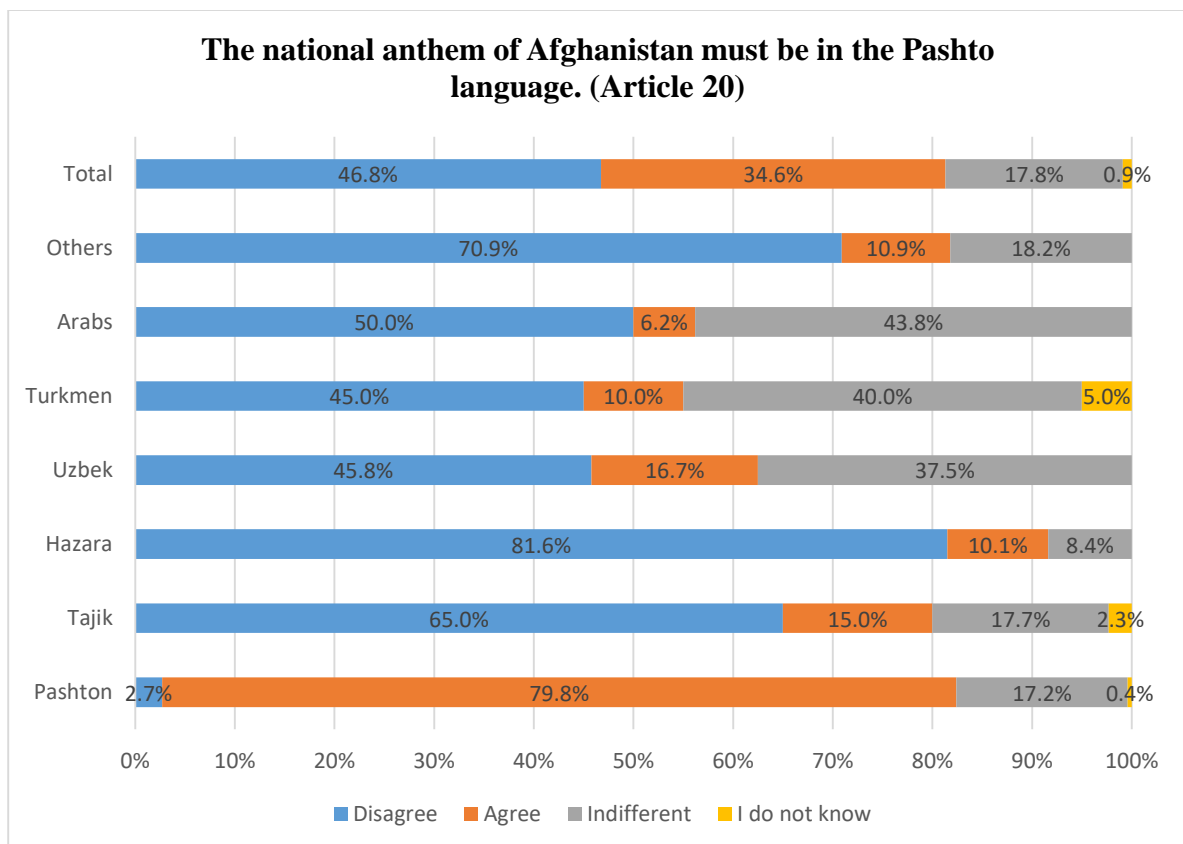


Figure 29: Article 20 of the constitution

The respondents were asked about Article 20 of the constitution which says: The national anthem of Afghanistan must be in Pashto language. Almost the majority of the respondents disagree with the article. 81.6% of Hazaras, 65% of Tajiks, 50% of Arabs, about 46% of Uzbeks, and around 71% of other ethnic communities disagree that the language of the national anthem must be in Pashto. The total percentage of the people who agree with the article is almost 35% with the majority of Pashtuns (80%). The average response of 18% is “indifferent”. (Figure 29)

Wolesi Jirga’s authority for impeachment and removal of officials

Based on Article 92 of the constitution, the House of Representatives (*Wolesi Jirga*) has the authority for impeachment and removal of officials. The respondents were asked whether these authorities should be increased. An absolute majority (63.8) agrees with the increase, and almost 19% disagree. Meanwhile, 11.1% of the respondents feel “indifferent” about the issue. (Figure 30)

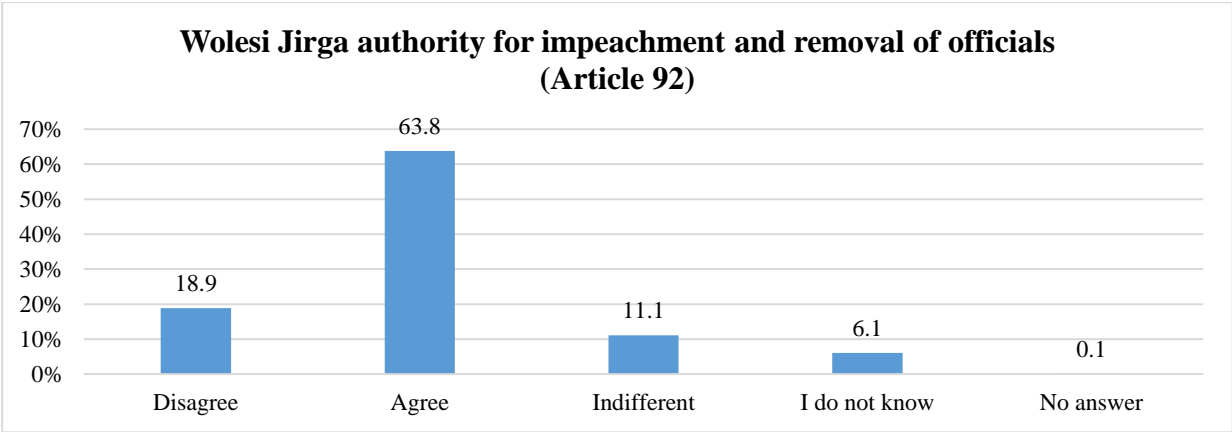


Figure 30: Wolesi Jirga authority for impeachment and removal of officials (Article 92)

**Proposals for the constitutional amendment by the interviewees**

In general, most of the interviewees demand reforms of the presidential system, strengthening local government, formation of the constitutional court, strengthening of the mechanism for supervision and overseeing of the implementation of the constitution, adjustment of market economy, strengthening of the political parties, making constitutional amendment less rigid and improving equal citizenship rights. Their views will be explained in details in the chapter 3 (conclusion). Also there are some other suggestions, such as to clear ambiguities of the constitution and an explicit statement of what specific parts of the international human rights conventions are not mandatory

for the government of Afghanistan due to their contradiction to Islam. But technical proposal despite the Article 3 of the constitution should be considered based on the logic that nobody can specifically claims on behalf of all Muslim scholars and jurisprudents that a particular part of the human rights convention is in contradiction to Islam, and any such suggestion does not have any strong and stable weight. Also, the number of people who suggested otherwise is not more than two or three.

## CHAPTER THREE: CONCLUSION

### The process of drafting and approving the constitution

People's views about the drafting and ratification process of the constitution shows some degree of its legitimacy in the public opinion. The main topic the questions were arranged in such a way as to reveal the interviewees' opinions about the factors which can legitimize a constitution in the process of its drafting and approval. Questions were mainly centered around the commissions for drafting and codification and the constitutional *Loya Jirga* and how much consideration was provided to a proper ethnic composition, freedom of action, independence, and free debates as well as to what extent the process was representing the opinions and demands of various parts of society, and also to what extent those opinions and demands were considered in the final process of drafting and approval of the constitution. Another question was to what extent the constitutional *Loya Jirga* can be considered as a representative body?

The majority of elites and experts do not have a serious criticism on the process of the drafting and ratification of the constitution, but they believe it was a healthy and satisfactory process, given to the situation of Afghanistan. A substantial minority of interviewees, while not consider the process faulty and illegitimate, but are skeptical about some specific issues such as presidential system, elimination of the constitutional court, the intervention of the ruling team, lack of accurate consideration of the public survey, and some distortions. But less than 5% of the interviewees, who mainly are figures with the political and cultural experience of life under the rule of the Democratic Party of Khalq and Watan, see the process as a project resulted from foreign presence and believe that it was led under their wills and leaderships. In other words, they consider foreign actors as active and local actors as passive who acquiesced without any disagreements accepted and aligned themselves with it.

In regard to the constitutional *Loya Jirga* and the question of to what extent it was based on a democratic procedure, views are less similar. A relative majority of the interviewees think the method used in determining the members the *Loya Jirga* was democratic according to the country's situation at that time. There is another group who does not consider the whole procedure so democratic, thinking it was little better than previous *Loya Jirgas*. But some of respondents believe the *Loya Jirga* is basically a traditional method and is fundamentally undemocratic. Although the latter two views about the constitutional *Loya Jirga* is partly based on lack of accurate information about the methods of

electing members and formation of the *Loya Jirga*. The accurate information about the *Loya Jirga* shows that members were selected by a three-stage process on a pyramid shape. They were selected from among the people in provinces who previously were selected in a two-round free election. The main basis of such *Loya Jirgas* is in fact local *Jirgas*. The constitutional *Loya Jirga* used this pattern for the first stage of election which was held at the local level and within the framework of a free local assembly. The selected representatives of these assemblies went on to the second and third round and finally the members of the *Loya Jirga* were selected. All these stages were done free from the interference of the government at the time. Of course, as it is claimed by an interviewee, it is likely that the members' selection was under the influence of tribal and local leaders. However, as it was explained, this form of *Loya Jirga*, as a relatively new type of organization, has the capacity at the time of collapse and lack of a functional administration to be used by an impartial and preferably international institution to form a system, namely for drafting and ratifying the constitution.

In general, the above analysis of the interviewees' views indicates that the method for the constitution drafting and approving was not a flawed process according to scholars and elites' view or at least its flaws were not to the extent that bring its legitimacy into question.

### **The importance and necessity of the constitution**

According to responses and analyzes provided by experts, there is a general consensus among people about the importance of constitution and a constitution-based system. Essentially, according to an overwhelming majority of the interviewees, the importance of the constitution is considered as an indisputable fact. The questions and findings of the survey about the issues seem very rational and meaningful. An absolute majority of the respondents acknowledge the importance of the constitution and emphasize on the necessity of the constitutional-based system on areas such as rights, freedoms, litigation based on the constitution, public participation in politics and power, freedom of the media, etc. and finally, they prefer the constitutional-based system over any alternative systems such as Islamic Emirate.

### **Islam and the constitution**

Islam is the main source of many common values in Afghanistan's society and rebellions against the state have, partly, been justified based on Islam. Now it

should be asked if in the views of elites and people, the constitution is facing a crisis of contradiction with Islam. In both parts of experts which includes religious scholars as well, and public survey, the results show that the current constitution is not considered as contrary to Islam. Some experts believe that the religious aspect of the constitution is even highlighted. But others believe that putting the same emphasis on the importance of Islam and human rights in the constitution has proven to be contradictory in some cases. Nevertheless, these considerations are not to the extent that make the constitution contrary to Islam. Therefore, in general, the constitution is not seen as contrary to Islam in public views and so, it does not face a crisis of legitimacy caused by the opposition with Islam as a shared value in the society of Afghanistan.

### **Fundamental rights and freedoms**

The results of the survey with the people and interviews with scholar and politicians included three main points. First, an overwhelming majority considers rights and freedoms, such as women's rights, very important. It shows the importance and necessity of rights and freedoms in public opinion. People of Afghanistan enjoyed the experience of a Free State and rights and freedoms. Most of all they found out the importance and necessity of freedom of the media in a tangible form. Second, they believe these rights and freedoms are enshrined in the constitution. And third, some religious scholars while stressing and admitting the importance of rights and freedoms do not agree to the freedom of converting from Islam, for followers of Islam, to other religions, which is forbidden by the religious rules (i.e. no freedom of conscience). Although the number of this group of experts is not much, but given to the status of Islam in public view, this kind of concern is an important challenge for individual rights and freedoms and even in some cases could create a crisis.

At the same time, some experts, interviewed in this study, while admitting equal rights and freedoms, based on the concept of citizenship, is granted to everyone, but also believe that first these legal and formal rights and equalities destroyed the ground for equal development of languages by a one-sided emphasis on ethnic values, and secondly with an emphasis on ethnicity and granting some cultural privileges to some ethnic groups creates the ground for nepotism and, as a result, individuals obtain the chance of promotion to high levels of power based on their ethnic affiliations.

This situation has caused the citizens to be divided into first and second class citizens on the basis of their ethnic affiliation. Although only two experts raised

this criticism, but in terms of content it is strong and has the capacity to turn into a public debate which can bring the claim of equality for everyone into question.

### **Women's rights**

The study findings and the interviews about women's rights show two points. First, women's achievements in the area of rights and privileges in the constitution have been dramatic and unprecedented. Women themselves believe these achievements are partly the result of their effective lobbying in the constitutional *Loya Jirga*. Second, there is no strong opposition to women's achievements in public opinion.

### **Local government**

The main shared view obtained by the survey is that the current administrative system is highly centralized and it should be decentralized. But some of interviewees believe that the current constitution itself defines the system as decentralized, and they demand for its implementation. But the majority asks for reforms in the current system in the constitution and demands an elected and qualified local government which would lead to the realization of local democracy which is considered to be effective to ensure the security. This demand, given to its social origin, is a demand focused on the distribution of power between the center and provinces. In this way, the power-sharing in ethnic and regional levels is more probable and it prevents centralization of power in one agency and thus the nepotism. Although, the establishment of a federal system is not the majority's will, but the average demand of the people who advocate for federalism and a more decentralized system compared to the existing system predefined in the constitution shows that the majority are in favor of decentralization which could lead to a kind of local democracy.

### **Political system**

However the study's findings about political system indicate some disagreements, but the majority demand reforms and refinement of this system as 42 -43% are in favor of the current presidential system (with even no reduction in president's powers and authorities) and also believe that Afghanistan needs a strong leader and it is possible by the current system. But the majority is asking for reforms. There are three suggestions in this regard. The first option is the reduction of the president's powers. No specific question

was asked in the survey to clarify this option, but one question can help: “Do you agree with appointing two deputies for both president and prime minister?” and 47% disagree while 45% agree to the idea. It can be derived from the result that the majority agree with the appointment of two or three deputies with specific authorities and believe it can reduce the powers of the president. Increasing the local government authorities and more democratization is majority’s will, because this can limit the powers of the president as well. The second option is reviving the position of prime minister alongside the president. This idea has 22% support in the survey. But the advocates of this option also support the suggestion that both of president and prime minister should have two deputies by 47%. The third option, parliamentary system, has 29% of the respondents support. In fact, advocates for change of the presidential system to other alternatives, are 51% against 49% (advocates of presidential system).

But the result of the qualitative interviews is that according to one-third of the interviewees, the president’s powers is extremely high and this causes nepotism in system, corruption in the administration, centralization of power and ineffectiveness. Their criticism of these powers is so hard and severe. Unlike the poll results, the majority of interviewees (17 out of 34) demand the revival of the prime minister position alongside the president. Among the advocates of the presidential system it is also suggested that the number of deputies should increase to three with the specific authorities for each of them. Some experts believe the only viable option to replace the presidential system, is the parliamentary system.

The reason and intention for each proposal is clear. The basic problem in Afghanistan still is power distribution, and hence the need to prevent power monopoly based on ethnicity and possibility of gaining a higher privileged political position based on a sense of ethnic group.

The first option with the concentration of power in the central government is mainly supported with an idea that the real power structure in the country, especially in the current situation, requires a Pashtun president should be in the office. A president with strong authorities and a centralized government is the reproduction of the ethnic power. This idea for some means the maintenance and continuation of power; so it has a great appeal for them (of course in addition to this theory, some of Pashtun elites have thought the parliamentary system with a president elected by the parliament with limited power as an appropriate and acceptable alternative). But the same theory and the situation

resulting from it leads to the reproduction of ethnic concentration of power, which in view of the majority is the root cause of national crisis, discrimination, inequality, and distinction of people as first and second class citizens. But all three options for reform are based on the intention of making power at the highest level to become cross-ethnic, but with an ethnic composition. However, the concern about the first option (strong presidential system) is that it causes the continuation of the power division based on ethnicity and prevents the equality of citizens. Unless the ruling team beside ensuring the minimum participation of vulnerable groups, act completely on cross-ethnic principle based on citizenship rights in other parts of power structure and do not distribute the offices on the basis of the hierarchy of ethnicities. The second option (semi-presidential system) alternative intends distribution of power e based on ethnic composition, but the concern is the probability of monopoly of power and possibility of conflict between two parts of the government based on ethnicity. The third option (parliamentary system) is more suitable, but it requires national political parties to be strong and effective. If this situation is analyzed with prioritizing the efficiency at top and putting political concerns such as having the satisfaction of ethnic groups at the second level, it could be said that in the current situation with the lack of strong political parties, the presidential system with a number of deputies, enhanced cabinet's authorities, reform of administrative system from centralized to decentralized and increased supervisory competence of National Council is more suitable. And also a five-year transitional period for change from presidential to parliamentary system should be enshrined in the constitution and its requirement should be to strengthen political parties.

### **Protecting and monitoring the implementation of the constitution**

The survey's findings about this issue can be explained in two parts. First is the monitoring and implementation of the constitution, which the majority consider as necessary. And second, conducting the monitoring through the constitutional court, which is supported by a relative majority of 35% and also as the option "formation of the constitutional court" in the section questioning some desired cases for constitutional amendment acquired the average score of 3.47 (from 1 to 5). 31% believe the Independent Commission for Overseeing the Implementation of Constitution is the best option for its monitoring. In fact, as it was mentioned, both views emphasized on the need for a body that is independent from the three branches of the state and has the authority to oversees the implementation of the constitution. In the meantime, monitoring

through Supreme Court acquired low percentage of support. Therefore, conducting an oversight by the ordinary courts is an unpopular option. In another word, it is regarded as useless and ineffective. The majority ask for an independent organization. According to experts, the existing mechanism cannot ensure the implementation of the constitution in an effective way, so it is necessary to create a constitutional court. However, some experts believe the Independent Commission for Overseeing the Implementation of Constitution can be effective and viable if it is granted more authorities.

### **Economic system**

The poll's findings show that the majority of people have accurate information about the type of economic system predefined in the constitution, which is the market economy and did not essentially oppose the system. In fact, an absolute majority is demanding the continuation of the free market economy, but they believe besides having such a system, it is necessary for the government to support the low-income groups. This view is compatible with the current constitution, because it requires the government to support low-income and vulnerable groups. The government should ensure the minimum prosperity for all, besides creating wealth through the market. However, in qualitative interviewees, the majority are in favor of a mixed system. They demand for a market which can provide the distributive justice. Guaranteeing the justice is not necessarily done by the mixed market economy, but it also requires the establishment of the welfare state which is accountable for ensuring justice and prosperity for all citizen which is also possible by the market economy.

### **The method of constitutional amendment**

In relation to the issue of the necessity of adjustment in the mechanism of constitutional amendment, the majority (52%) believe the existing method is practicable which means public is not demanding for change of the existing procedure. There is consensus about the necessity of the constitutional amendment. But there are disagreements about the cases which need modification. The poll shows that the majority are asking for the amendment of the following issues: first, adjustment of the political system with the change of the current political system but with the narrow majority (it acquired 2.6 score for the question about the change of political system, slightly more than average), reduction of the president's authorities, reform of administrative system towards more decentralization by making the highest officials of local government elective or through the establishment of a federal system. Anyways,

in this section, the majority asks for the reinforcement of the local democracy. The creation of the constitutional court has acquired 3.47 score. Another topic is the clarification of some articles of the constitution, but it is not specific which articles. A balanced participation of ethnic groups in power is one of these issues. The majority demands reduction of the president's power. But to answer about how it should be done, a relative majority of 41% believe more decision-making power should be given to provinces from the center and local officials should be elected by the people. Second, specifying the source for interpretation of the constitution and creating an institution as the constitutional court. Third is the disambiguation of the ambiguous articles of the constitution. And forth is the adjustment of the administrative system.

## **CHAPTER FOUR: RECOMMENDATIONS**

In this study, on the one hand, it becomes clear that public opinion is in favor of continuation of a constitutional-based system, and the fundamental rights and freedoms derived from such a system. It is interesting that an absolute majority of the respondents agree with the market economy. But they also mostly demand for the government's support of low-income groups, which is predefined in the current constitution. Therefore, the constitution enjoys a strong support of the populous in its important parts and its backbone. But, on the other hand, there are demands and some weaknesses have been identified that cannot be dealt with without amendment of the constitution. According to this study it seems that the following topics can be suggested for amendment purposes. As it will be explained, these adjustments, which are based on address various demands, as will be explained, would help in establishment of just institutions as well as ensuring an equitable access to resources and power distribution. They will assist to arrive at a point of overlapping and equilibrium and hence make it inevitable to reach an equitable framework that guarantees the protection of citizens' rights and a lasting peace.

### **1: Emphasis on the equal citizenship rights and negation of supremacy**

Rightly some experts have indicated two flaws in the current procedure. *First*, few articles in the constitution have granted more importance and higher status to one particular language as well as to some symbols which are historically a shell carrying values of that particular ethnic community. This issue, based on a wide interpretation regarding the status of this particular language and its concomitant symbols, has become an obstacle to the development of other languages and exclusion of other symbols. In other words, the constitution does allow pluralism. At the same time, in an informal and unwritten way, it has stratified the political symbol of a particular ethnic groups and its status in the hierarchy of power. Second, the above mentioned interpretation of stratification of ethnic groups in the hierarchy of power, has caused and understanding of an imbalanced participation of ethnic groups in power and political behaviors accordingly. This interpretation and political participation and the resulting political behavior of actors has caused citizenship rights, especially when it come to the issue of access to high-level offices, be limited to individual's ethnic affiliation. In other words, to the extent the political weight of an ethnic group of an individual is heavy in power hierarchy; the individual can better excel to the higher level of power, for example as head of the judiciary branch. This fact has practically divided citizens of the country to stratified citizenship and the

power has found an ethnic centric structure. To adjust this situation, it is necessary to reaffirm the principle of citizens' equality and negation of any ethnic dominance, and it should be clarified that no principle or concept in the constitution can be in contradiction to this principle; and it must be clearly stated that there is no ethnic hierarchy in the country. In this regard, the last part of Article 16, which has been questioned by the majority of experts, should be removed. The people of Afghanistan will not unify but based on justice and fairness as well as common values and respect to different values. It might be said that the Articles 6 and 22 of the current constitution, have decreed on the equality of all ethnic groups and tribes and denounce any kind of discrimination, therefore, there is no need for such an adjustment. But it is important to say that the declaration of rights in the countries, which are plagued by discrimination, gradually lose its effectiveness to guarantee equality for all, under the influence of political and real power structure and as a result some holes, even some small one, could justify the discrimination. Therefore, it is necessary that in constitutional amendment there must be reaffirmation on the equality of citizens and negation of any discrimination and by using proper and explicit terms in addition to the existing ones; block any chances of loopholes for justifying discrimination.

## **2: Reinforcement of local democracy within the framework of equal citizenship rights for all citizens**

Strengthening of local democracy and reform of the administrative system are the reasonable demand of experts and the majority of the respondents. The method that they suggested was making local official position elected. For realization of this demand, the strengthening of local democracy, there are other middle ground solutions as well, such as granting more authority to the provincial councils and other local institutions enshrined in the constitution and respecting historical and cultural correlations, beside other factors in formation of a provincial and administrative units. In relation to historical and cultural solidarity, it should be clarified that sometimes, in the formation of an administrative unit, a specific geographic territory that belongs to people who historically and culturally are part of one group, has been divided to a number of different administrative units without any justified reason. As a result, their power of choice and their influence on politics, government, and major public decision-making weakens. In fact, this type of administrative divisions is not an equitable way for the distribution of resources for them and does not provide them with the possibility of equal effectiveness. Precisely to avoid such a

situation, in Article 136 of the current constitution, which stipulates under what criteria and factors an administrative unit should be established, among other things it mentions that “social condition” should also be considered as a condition. But the term “social status” is not so explicit and therefore, it needs further interpretation, and the Independent Commission for Oversight of the Implementation of Constitution stipulated in its interpretive theory dated 25/6/1391 that the intent of “social condition” here is social and historical solidarity. But practically speaking, it did not convince the relevant institutions, such as legislature branch, to be convinced to create the mentioned situation through legislative process. Therefore, this issue should find a fair solution by the constitutional amendment process by inclusion of a specific condition. It should be noted that taking into consideration historical and cultural solidarity must only be seen as a preventive component, or in other words, a defensive formula which would ensure that the government is not allowed to divide a geographic territory with historical and cultural solidarity to several unit which would be politically damaging. This interpretation of the issue is to collective human rights and their solidarity of humans, which are enshrined in international conventions and allocated as human rights issue. But the exercise of this right clearly does not mean *racism* or *xenophobia*, thereby different groups who live in a city or region, are separated to different administrative units and are segregated, in order to keep the ethnic and racial purity of each region and city and categorize the citizens by their social origins. Such measures are contrary to international conventions of human rights and also the constitution. In fact, it is the example of apartheid and racial segregation. So, this type of division and segregation should be explicitly forbidden by law.

Finally, the suggestion that local authority positions should become elected must seriously be taken into consideration. In case if the issue is considered useful and practicable from the perspective of good and effective governance, such a public demand should be conceded to, because it would help to establish the principle of popular sovereignty and democracy. According to some experts, it even could prove effective in local security and decrease the existing sensitivities in relation to the position of the president, because it can be a way for fair distribution of power between center and provinces.

But to avoid discrimination against minority groups in provinces, reinforcement of local democracy should be exercised within the framework of equal citizenship rights for all, without the considerations of social origins or ethnic affiliations. Any kind of discrimination against citizens, who come to live in a

place from all parts of country, should be forbidden. Local democracy should create the ground for effective participation of all citizens in local democracy, so that local administration and democracy do not become a source of discrimination against citizens, specially based on social origins or ethnic affiliations, and instead, it should further strengthen the cohesion and national unity.

### **3: Reform of presidential system**

Fifty-one percent of participants in this research demand a change of presidential system to semi-presidential system (president and prime minister) and 29% demand a parliamentary system. An absolute majority are asking for the reduction of president's powers and authorities. Experts also mainly emphasize an amendment and change. In addition, the commitments arising from the political agreement of the NUG and polarization of the 2014 presidential election on the basis of ethnicity must be taken seriously as real and serious problems facing the current presidential system. Solving these problems depend on the adjustment of the existing presidential system. But the question is how? The poll and interviews do not provide a consensus about the solution. But given to the type of the problem, which is mainly derived from the ethnicization of power in the country, any system other than a parliamentary one can cause the same problem all over again. In short-term basis two options are considerable for at least a five-year period. Increasing the number of vice-presidents with specific authorities (that give them a real share in exercising those authorities, so the president's power which is predicated in Article 64 of the constitution would be adjusted), and a reaffirmation of the guarantees for effective participation of vulnerable ethnic groups, which ensure prevention their marginalization. This should be followed by an emphasis that no appointments in any level (for example the head of judiciary) by the president and her/his vice-presidents should not be based on the individual's social status and their affiliation to the ethnic hierarchy. In other words, appointment on such basis should strictly be forbidden. The only criteria for these appointments should be citizenship, merit and competence. To ensure the realization of this goal, it should be conditioned that the appointments which are mentioned in parts 11 and 12 of Article 64 and Article 157 of the constitution must be according to the consensus of the president and vice presidents).

In addition to adjustment of the presidential system, other reforms such as administration reform, increase of authorities of cabinet and ministers can be a

middle ground package that covers various demands and prevents the power to be ethicized. As a result, the presidential office, government, and cabinet, would become really national institutions and existing sensitivity concerning the president's position, which leads to polarization of the society on the basis of ethnicity, would be decreased.

The second option is to revive the position of prime minister alongside the office of the president and appoint two deputies for each of them, so that through this way the power at its highest level, would attain a national composition. But this composition should guarantee protection of equal citizenship rights, as it was explained before. This would establish a real national government based on citizenship rights. In fact, the emphasize on national composition at the highest level, besides being the demand of a significant part of the survey population, can lead to ensuring justice and equity for everyone and therefore provide a fair framework for reaching a consensus. In the process of drafting and ratifying a constitution, one essential point is that the formation of constitution is not only based on reaching to a consensus but above all it should be based on a fair framework, which makes it possible for everyone to feel they are not ignored. But, after a period of at least five years, and when political parties are strengthened gaining a capacity to establish a government, the system should be changed to a fully-fledged Parliamentary system.

It seems that the above mentioned arrangements can be the average demand of public opinions obtained by the survey and interviewees. According to another view, the presidential system could be preserved, but the president powers are limited till the situation for the establishment of the parliamentary system is created. The national composition at the highest level of leadership is merely formed to avoid ethnicization of leadership as well as removal of vulnerable ethnic groups. In other instances political appointments would be based on citizenship rights. Institutions which are responsible for civil and military service should be based on meritocracy and away from discrimination, professionally. The mechanism of employment, both at civil and military institutions, is designed and exercised based on the law and the principles of merits and equal citizenship rights in national and local level with transparency and impartiality. These principles should explicitly written in the constitution and any exercise contrary to them be forbidden. This is what most experts have demanded. Of course, these rules are existed in the extant constitution, but do not have enough clarity and decisiveness.

But this suggestion is based on two assumptions. The *first* presupposition is that if a national composition at the highest level of leadership who are responsible for providing equal citizenship rights for all — namely at the office of the president and the prime minister with their deputies, is not formed on the basis of merit and qualifications, it would lead to further polarization of society, especially during the election and it would intensify ethnicization of the structure of power. This is alarming with regard to the fact that currently the president is mainly voted for on the basis of ethnic sentiments and no inclusive and national political structure has control over it.

The *second* assumption is that given now there is a lack of inclusive and national parties, a parliamentary system may cause instability in the government, especially in the executive branch of the state. Therefore, if any expert who do not admit to either one or both of these two assumptions, then they should explain their claim reasonably and prove that such scenario would not happen. If they were able to prove that the parliamentary system in the current situation would not lead to instability and serious weaknesses in executive leadership, based on the research, it can be a desirable option.

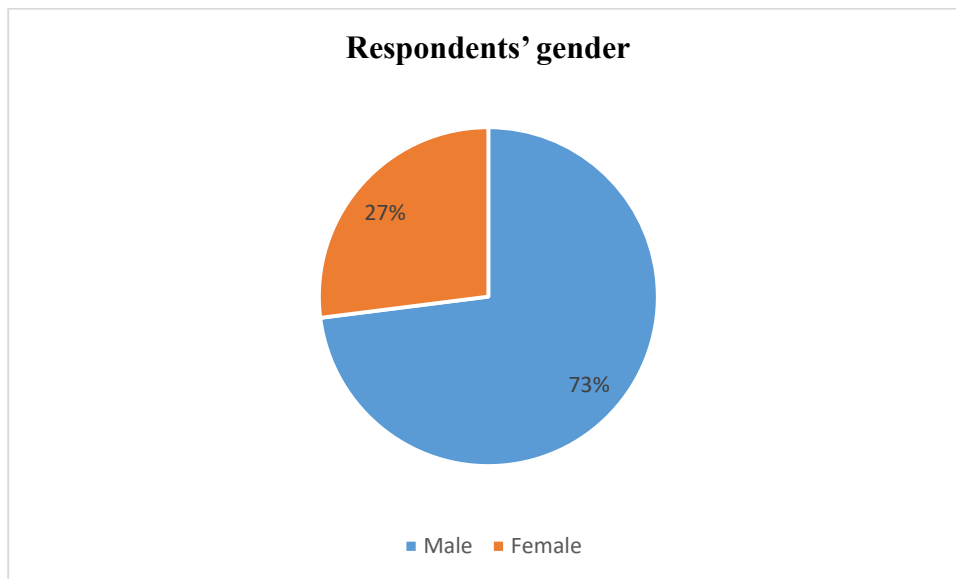
#### **4: Establishment of the constitutional court**

If a constitutional court was established with authorities such as investigation of complaints against local governments, political parties, presidential impeachment as well as that of ministers and members of Supreme Court, and investigation of individuals' complaints about the violation of their fundamental rights, it would be desirable. But the major problem in relation to this issue is lack of prominent and academic judges with the legal experience and knowledge of modern constitutionalism, which are able to exercise their powers in accordance with the principles and values of a constitutional system. Understanding of the president and national assembly is also very important in the appointment process. Due to the broad authority of this court, lack of understanding and precise knowledge or having political base in appointment of judges, would cause an irreparable damage.

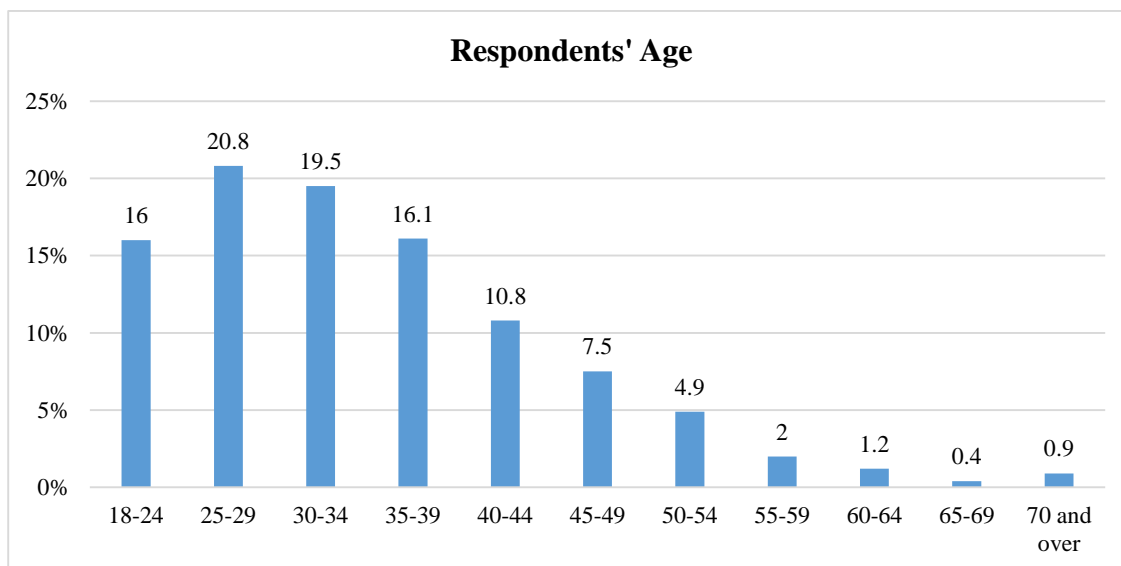
## APPENDIX

### Appendix I: Analysis of sample groups of research population

#### Gender



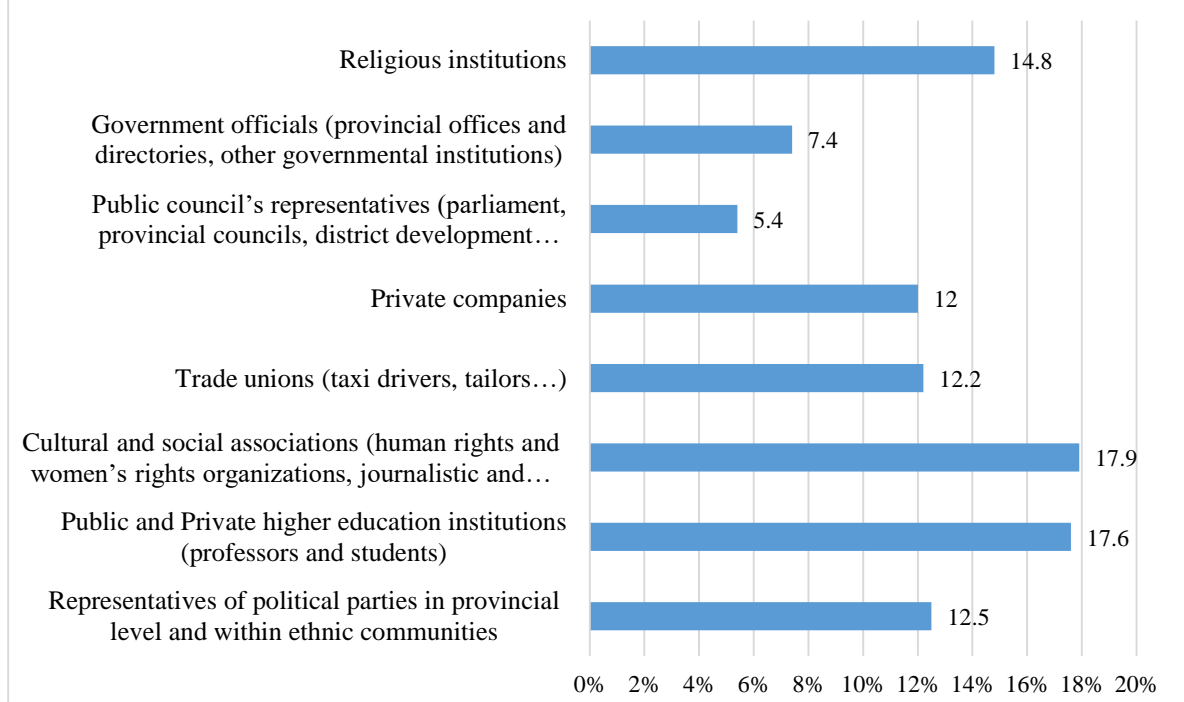
#### Age



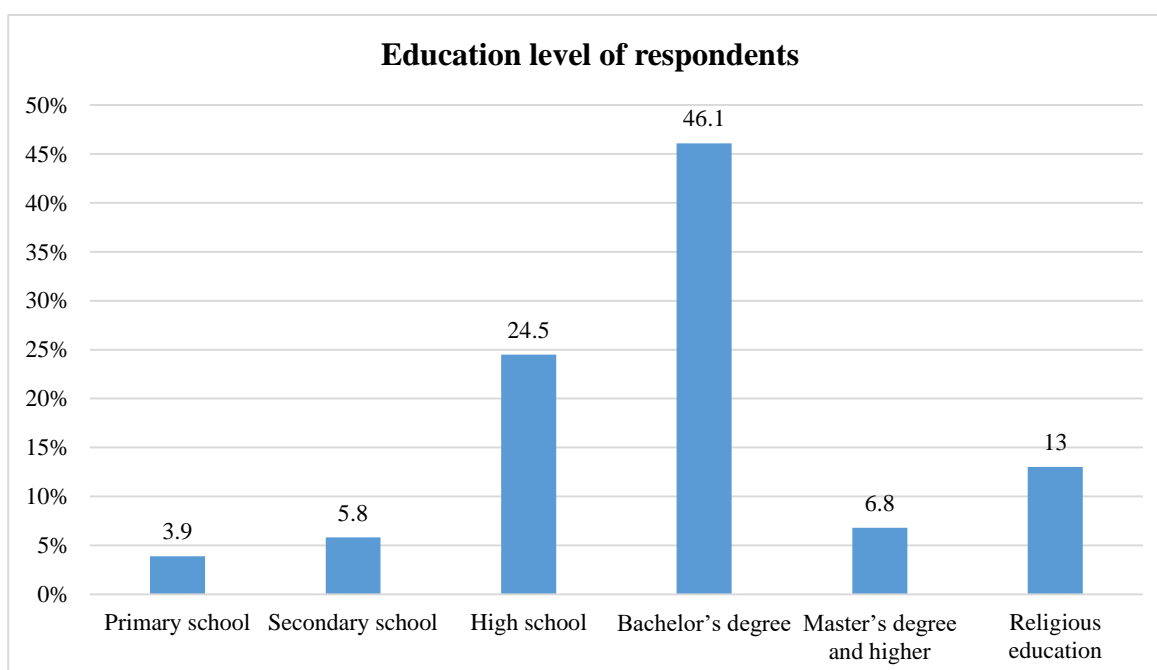
#### Relevant institutions

The respondents of this survey belong to various institutions. Almost 18% of the respondents are from different cultural and social associations. Less than 18% are from private and public higher education institutes (teachers and students). Around 15% of the respondents are from religious institutions and the smallest percentage (5.4%) includes the respondents like the representatives of public councils (national assembly, provincial councils, and district development assembly).

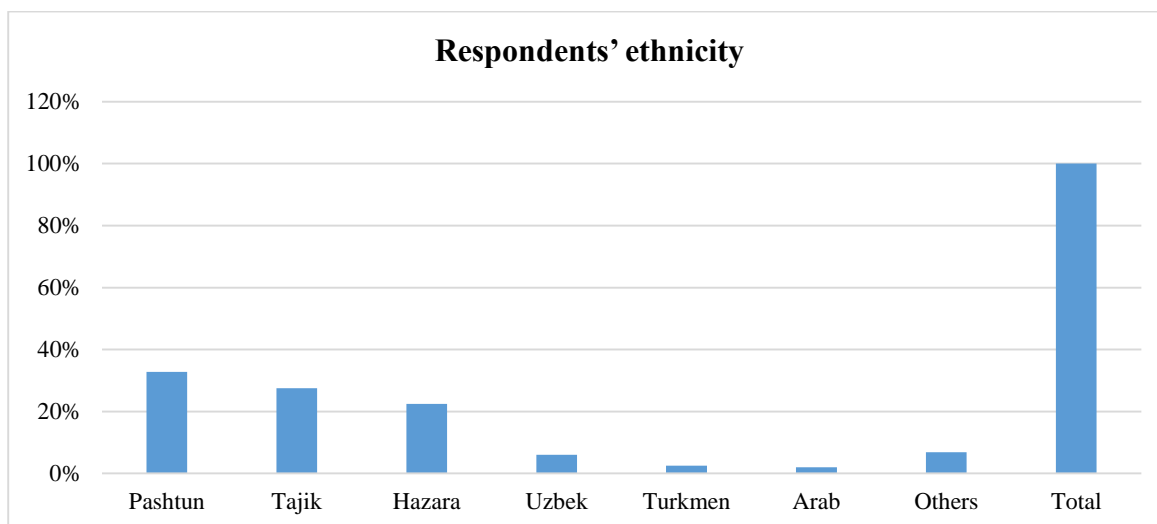
### Target groups whose opinions and comments has been collected and analyzed in this research



### Education level

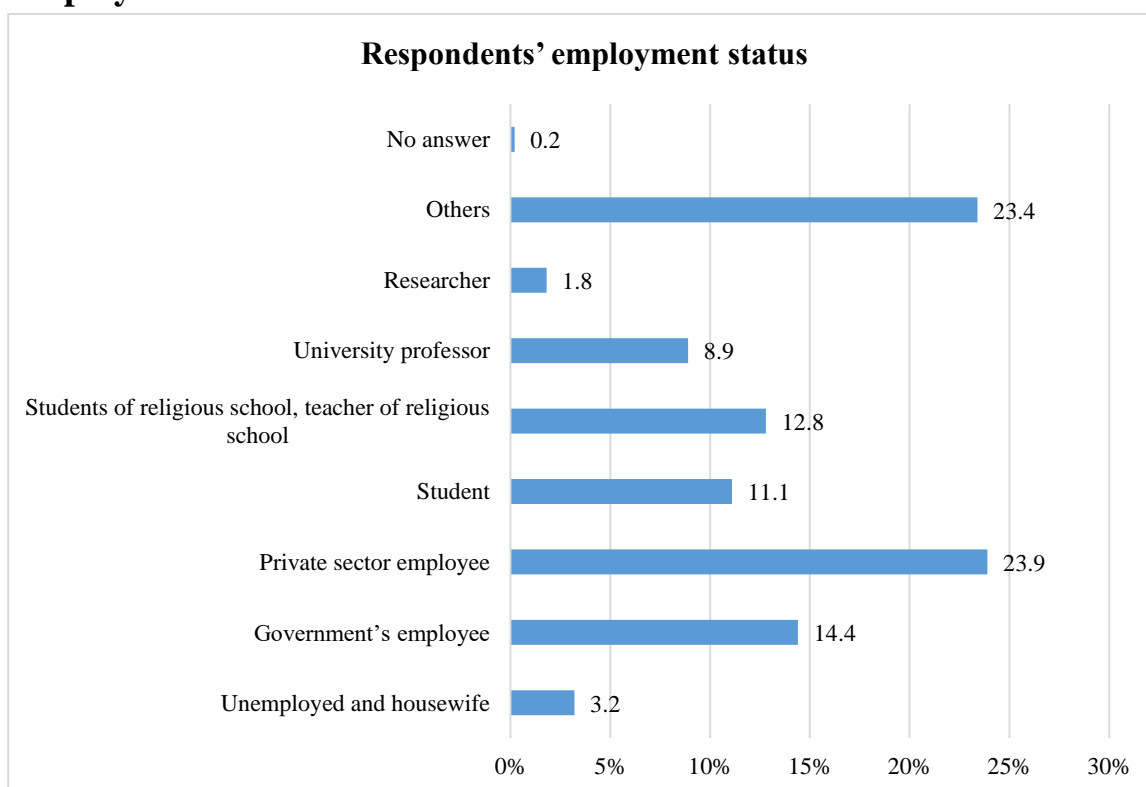


### Ethnicity



The respondents originate from various ethnicities, with 33% of Pashtuns, 27.5% of Tajiks, 22.4% of Hazaras, 6% of Uzbeks, and more than 11% of other groups.

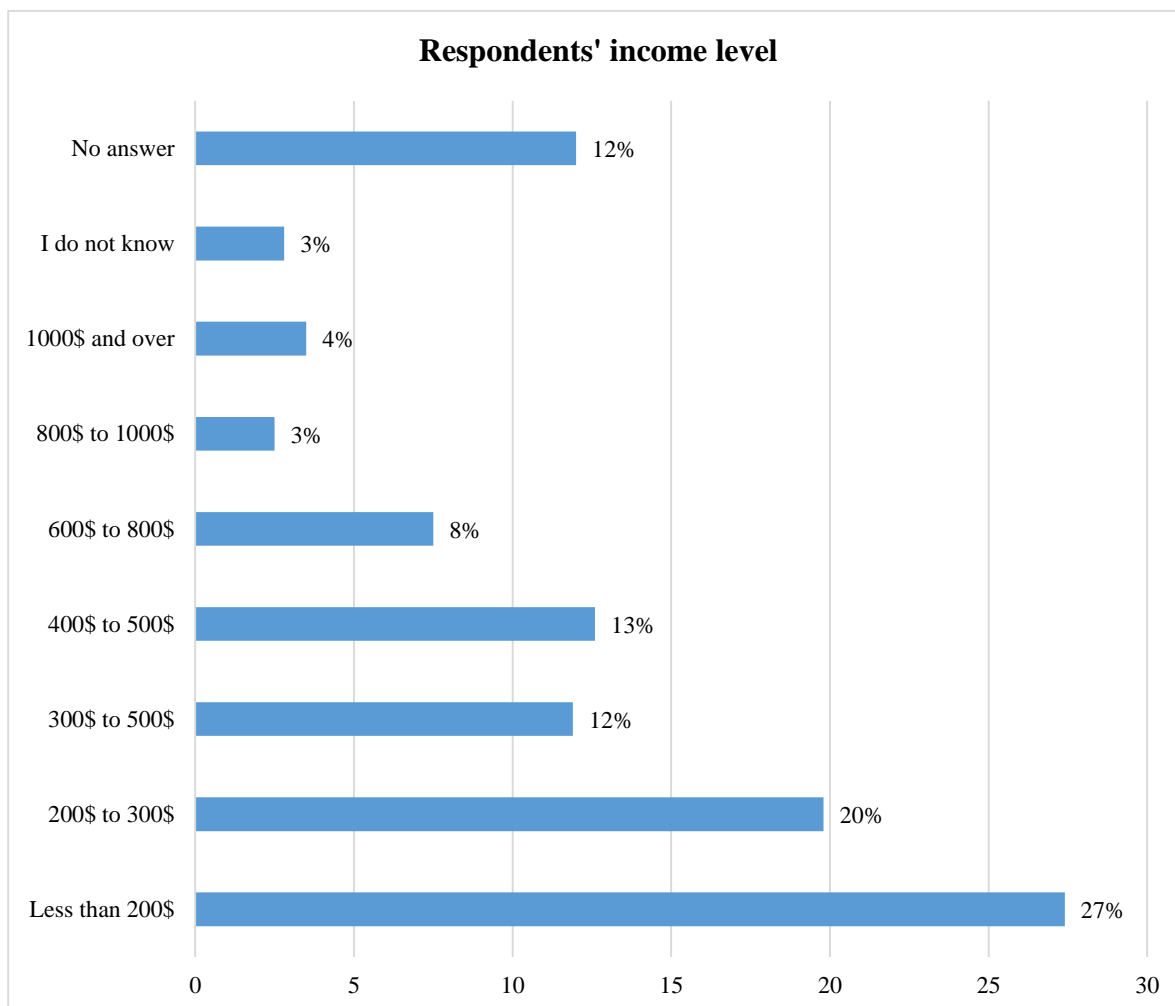
### Employment status



Almost 24% of the respondents were private sector employees; while 14.4% were government's employees; around 13% were students or teachers of religious schools; and more than 11% were students; and almost 9% were university professors.

### Income level

Respondents had different income levels. The income of the greatest number of respondents (27.4) were less than \$200 per month, and the smallest number of the respondents (2.5%) were the people whose income was between \$800 to \$1,000.



## Appendix II: A review on the history of Afghanistan's constitutions

First constitution	The constitutions
1923	Year of ratification
Nezam-Nama	Name
73 articles	Number of articles
Amanullah Khan	Head of the state
Monarchy	Type of political system
It was approved by a Loya Jirga of 872 members in Jalalabad. Another Loya Jirga was held in Paghman with 1,050 participants from military officials, religious scholars, and tribal leaders to reapprove it.	Ratification process
<p>The terms of amendment and revision of all or part of the constitution:</p> <p>Only Article 70 of this constitution is about the amendment: "If it is necessary to modify or change any articles of this Nezam-Nama, it should be presented to the king with the vote of one-third of government council and approval of the higher council of ministers, then after the approval of the king, the modification is possible."</p>	
	Amendment's terms

Second constitution	
1931	
Osul-e-Asasi	
110 articles	
Mohammad Nader Shah	
Absolute monarchy	
It was ratified in a Loya Jirga with 525 members that was held in Kabul. The members were handpicked of tribal and ethnic leaders and elders.	
The matter of the amendment and modification of the laws is not mentioned and predicated clearly in the constitution.	

Third constitution	
1964	
Afghanistan Constitution	
128 articles	
Mohammad Zahir Shah	
Constitutional monarchy	
91	A committee of seven members prepared the draft of the constitution. For more accuracy, the number of committee members increased to 28 and they worked on the draft under the name of the constitution commission. Then the draft was ratified by a Loya Jirga consisted of 454 members who mostly were the members of the commissions, representatives of governmental agencies, and people close to the king.
	<p>Articles 121, 122, and 123 were about the revision and amendment of the constitution.</p> <p>Article 121: Principles of compliance with Islamic rules, the constitutional monarchy based on this constitution, and values of Article 8 (king must be a citizen of Afghanistan, Muslim and a follower of Hanafi School) are not amendable. Other parts of the constitution can be amended by the proposal of the ministers' council or one third of either the Wolesi Jirga or Meshrano Jirga and in accordance with the content of this chapter.</p> <p>Article 122: Amendment proposal shall be read by the Loya Jirga and with the approval of the majority of its members, a committee of members shall be established to prepare the draft. This committee prepares the draft by consultant of the ministers' council and the Supreme Court and then presents it to Loya Jirga. If the Loya Jirga approves the draft by the majority, it shall be presented to the King. King dissolves the council, brings the draft to public, and announces the date for re-election. The new election would be held within four months from the date of the dissolution of the council.</p> <p>Article 123: Following the opening of the council and the establishment of the government, the Loya Jirga would be held by the King. The Loya Jirga reviews the amendment proposal and approves or rejects it. Loya Jirga approval is by the majority of two-third of the members, and after king sign the law it can be enforced.</p>

Fifth constitution	Forth constitution
1980	1976
Osul-e-Asasi	.....
68 articles	136 articles
Babrak Karmal	Sardar Mohammad Daud Khan
Republic	Republic
It was adopted temporarily, according to values of Communist party of "Parcham", and by the revolutionary council of democratic republic of Afghanistan and	After the overthrow of the monarchy, Daud Khan abolished the previous constitution and dissolved the council, then made a committee of 41 members responsible for preparing the draft of the constitution of the Republic. The committee job was accomplished by the year 1975 and the same year, another committee with 20 members revised the draft. Then, the Loya Jirga was held with 325 members, approved the draft and then it was enforced.
The conditions for the revision and amendment were not clearly indicated in this constitution.	<p>Terms and conditions for the revision and amendment of whole of part of this law:</p> <p>In this constitution, some parts of the predicated conditions for the constitutional amendment predicated in the previous constitution (1964), such as the dissolution of the council, new election, opening a new council, forming a new cabinet, and holding a new Loya Jirga were removed and the rest of steps were approved identically. But about the issues which were not amendable and the terms for proposing the amendment, Article 121 of 1976 constitution said: "The principles of compliance with the Islam, and the Republic state, according to this constitution, are not amendable. Other content of this constitution could be amended given to the requirements of the time and with the proposal from the government, the party's central committee, or one-third of the Loya Jirga members and in accordance with this law."</p>

Seventh constitution	Sixth constitution
1993	1987
Osul-e-Asasi-e-Jadid	
Osul-e-Asasi-e-Jadid	Constitution of Afghanistan
114 articles	149 articles
Burhanuddin Islamic Republic	Dr. Najibullah
Rabbani	
Islamic Republic	Democratic republic
This constitution did not reach to final ratification level, due to very fierce oppositions of political parties of that time.	By the Loya Jirga
	<p>Terms and conditions for the revision and amendment of whole or part of this law:</p> <p>The procedure of the amendment was easier in this constitution. Article 141 said:</p> <p>“Amendment of the constitution is directly done by the Loya Jirga. Also the decision about the constitutional amendment is based on the proposal of the president or one-third of national assembly members which is approved by two-third of members. In this case, the president establishes the Loya Jirga. If the Loya Jirga approves the proposal, it modifies the constitution, otherwise it reject the proposed adjustment. In the state of emergency, the amendment is not permitted.”</p>

Eighth constitution	
2004	
Constitution of Afghanistan	
162 articles	
Hamid Karzai	
Islamic republic	
It was approved in 2004 by the constitutional Loya Jirga in the Loya Jirga tent in Kabul. A team of nine members were formed to work on the draft of the constitution by the decree of the head of the transitional government in Afghanistan (Hamid Karzai). Then the codification committee was established with 35 members. And finally, the draft was ratified by the Loya Jirga that had 502 elected and appointed members.	
The procedure for the amendment is explained in articles 149 and 150 of this law. The amendment of following issues is not permitted:	
<ol style="list-style-type: none"> <li>1. The principle of adherence to the tenets of the Holy religion of Islam</li> <li>2. Islamic Republicanism</li> <li>3. Fundamental rights of the people is permitted only to improve them</li> <li>4. In the state of emergency</li> <li>5. When the first vice president is in charge of the presidency</li> </ol> <p>The steps for the amendment process in this constitution are as follows:</p> <ol style="list-style-type: none"> <li>1. Proposal for the amendment would be made by the president or approval of the majority of national assembly members.</li> <li>2. A commission comprised of members of the government, national assembly and Supreme Court shall be formed by presidential decree to prepare the draft proposal.</li> <li>3. The draft will be approved by the Loya Jirga which is convened by a presidential decree.</li> <li>4. The amendment proposal will be approved by the majority of two-third of the Loya Jirga members</li> <li>5. After the Loya Jirga approved the draft, it is enforced after the endorsement of the president. After the Loya Jirga approved the draft, it is enforced after the endorsement of the president.</li> <li>6. Amendment by the referendum is not permitted.</li> </ol>	

## Appendix III: Survey questionnaire

### First topic: General knowledge about the constitution

No	Question	Answer
1.	How important is the constitution for the country?	1. Not important 2. Very low 3. Low 4. High 5. Very high 88. I don't know 99. No answer
2.	To what extent the constitution is compatible with Islam?	1. Not at all 2. Very low 3. Low 4. High 5. Very high 88. I do not know 99. No answer

1. According to article 1, 3, 35, 45, 63, 74, 119, 130, 131, and 149: (1- Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state.) (3- No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan) (35- The manifesto and charter of political parties shall not contravene the Holy religion of Islam and principles and values enshrined in this constitution) (45- The state shall devise and implement a unified educational curriculum based on the tenets of the sacred religion of Islam, national culture as well as academic principles, and develop religious subjects in curricula for schools on the basis of existing Islamic sects in Afghanistan.) (63- Before assuming office, the President shall take, in accordance with special procedures set by law, the following oath of allegiance: "In the name of God, Most Gracious, Most Merciful, I swear by the name of God Almighty that I shall obey and protect the Holy religion of Islam, respect and supervise the implementation of the Constitution as well as other laws.") (74- Before assuming office, the Ministers shall take the following oath in the presence of the President: "In the name of God, Most Gracious, Most Merciful, I swear in the name of God Almighty that I shall protect the Holy religion of Islam, respect the Constitution and other laws of Afghanistan, safeguard the rights of citizens as well as independence, territorial integrity and the national unity of the people of Afghanistan, and, in all my deeds consider the Almighty's presence, performing the entrusted duties honestly.") (119- Members of the Supreme Court shall take the following oath of office in the presence of the President: "In the of God, Most Gracious, Most Merciful, I swear in the name of God Almighty to attain justice and righteousness in accordance with tenets of the Holy religion of Islam, provisions of this Constitution as well as other laws of Afghanistan, and to execute the judicial duty with utmost honesty, righteousness and impartiality.") (130- In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.) (131- The courts shall apply the Shia jurisprudence in cases involving personal matters of followers of the Shia sect in

3.	What kind of economic system is defined by the constitution?	1. Free market economy 2. State-controlled economy 3. Mixed economy 88. I do not know 99. No answer
4 A.	To what extent women can have equal rights and freedoms (such as access to education, rights to social and political activities, etc.) with men in accordance to the constitution?	1. Not at all 2. Very low 3. Low 4. High 5. Very high 88. I don't know  99. No answer
4 B.	Does the constitution protect these rights and freedoms for women?	1. No 2. Very low 3. Low 4. High 5. Very high 88. I do not know  99. No answer
5 A.	To what extent do you think a balanced participation of ethnic groups in power is important?	1. It is not important 2. Very low 3. Low 4. High 5. Very high 88. I do not know  99. No answer
5 B.	To what extent the constitution ensures a balanced participation of ethnic groups in power?	1. Not at all 2. Very low 3. Low 4. High 5. Very high 88. I do not know 99. No answer
6 A.	In your idea, to what extent the fundamental rights and freedoms such as freedom of expression and access to information, joining	1. Not important 2. Very low 3. Low 4. High 5. Very high

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accordance with the provisions of the law. In other cases, if no clarification in this Constitution and other laws exist, the courts shall rule according to laws of this sect.) (149- The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended.)

	political parties and access to fair trial, are important?	88. I do not know 99. No answer
6 B.	To what extent the constitution protect the fundamental rights and freedoms?	1. Not at all 2. Very low 3. Low 4. High 5. Very high 88. I do not know 99. No answer
7.	In your idea, can people litigate a lawsuit about the violation of their fundamental rights in accordance with the constitution?	1. Yes 2. To some extent 3. No 88. I do not know 99. No answer

### **Second topic: revision and amendment of the constitution**

8.	Is a system as Islamic Emirate of Taliban a viable replacement for the current constitution-based system?	1. No 2. Very low 3. Low 4. High 5. Very high 88. I do not know 99. No answer						
9.	Are Islamic laws and beliefs compatible with the Human Rights?	1. No 2. Very low 3. Low 4. High 5. Very high 88. I do not know 99. No answer						
10.	The following are some of the constitution’s achievements. Score them from Zero (lowest) to Five (highest).	Scores					I do not know	No answer
a)	Ensuring equal rights and justice for all ethnic groups, tribes and all citizens of the Afghanistan	1	2	3	4	5	88.	99.
b)	Ensuring popular sovereignty through free elections	1	2	3	4	5	88.	99.
c)	Managing the development and economic affairs	1	2	3	4	5	88.	99.

d)	Protecting the rights of women	1	2	3	4	5	88.	99.
e)	Ensuring freedom of expression	1	2	3	4	5	88.	99.
f)	Reinforcement of political parties and civil society organizations	1	2	3	4	5	88.	99.
g)	Making the government accountable to the people	1	2	3	4	5	88.	99.
11.	In your idea, how much monitoring is being done on the implementation of the constitution?	1. Not at all 2. Very low 3. Low 4. High 5. Very high 88. I do not know 99. No answer						
12.	What is the best way for monitoring and protecting the constitution?	1. The constitutional court 2. Supreme Court 3. Independent Commission for Overseeing the Implementation of the Constitution 4. President 88. I do not know 99. No answer						
13.	To what extent the constitution provided the ground for people's participation in local government?	1. Not at all 2. Very low 3. Low 4. High 5. Very high 88. I do not know 99. No answer						
14.	Is the constitutional amendment necessary given to the current situation?	1. No 2. Yes, in a few cases 3. Yes, in many cases 88. I do not know 99. No answer						
15.	Do you think the amendment of the constitution by the Loya Jirga is an	1. It is appropriate 2. It should be changed 88. I do not know 99. No answer						

\. Overseeing the implementation of the constitution included monitoring the disputes between the three branches of the government about their competencies and powers and also the mechanism of litigation about the violation of individuals' fundamental rights.

	appropriate method or should be changed <sup>1</sup> ?								
16.	To what extent do you think the amendment is necessary for each of the following topics? Score from one (lowest) to five (highest).	It is necessary					It is not necessary	I do not know	No answer
a)	The form of political system should be changed <sup>2</sup> .	1	2	3	4	5	0	88.	99.
b)	The form of administrative system should be changed <sup>3</sup> .	1	2	3	4	5	0	88.	99.
c)	The president's powers should be decreased.	1	2	3	4	5	0	88.	99.
d)	The governors and district governors should be elected by the people.	1	2	3	4	5	0	88.	99.
e)	The articles of the constitution should be clarified.	1	2	3	4	5	0	88.	99.
f)	Women's rights should be protected more.	1	2	3	4	5	0	88.	99.
g)	The court of constitution should be created.	1	2	3	4	5	0	88.	99.
h)	Ethnic participation in power should be balanced.	1	2	3	4	5	0	88.	99.

<sup>1</sup>. Article 150 of the constitution: To process the amendment proposals, a commission comprised of members of the Government, National Assembly as well as the Supreme Court shall be formed by presidential decree to prepare the draft proposal. To approve the amendment, the Loya Jirga shall be convened by a Presidential decree in accordance with the provisions of the Chapter on Loya Jirga. If the Loya Jirga approves the amendment with the majority of two thirds of its members, the President shall enforce it after endorsement.

For the amendment of the constitution there can be other methods as well; such as: through the majority vote of PMs, through the vote of two-third of PMs, through the vote of two-third of PMs and approval of three-fourth of district councils' members, through the vote of two-third of PMs and a referendum, and through referendum with the approval vote of 80% of districts.

<sup>2</sup>. Such as the change of the political system from presidential to federal of others types.

<sup>3</sup>. Such as the change of the administrative system from extensive centralized to extensive decentralized and other types.

17.	Which kind of the administrative system and power-sharing system between the center and provinces do you prefer?	1. Power should be divided between center and provinces (federalism) <sup>1</sup> . 2. Provinces should be subordinate to the center and the center appoints the local officials (extensive centralized) <sup>2</sup> . 3. Provinces should be given the decision-making power and local officials should be elected by the people (extensive decentralized) <sup>3</sup> .			
18.	What is the best form of political system for the country?	1. Parliamentary system (Chancellery) 2. Presidential system 3. Semi-presidential (with a president and a chancellor)			
19.	If you have chosen the semi-presidential system, please answer the following questions, otherwise answer question 20.				
Questions		Agree	Disagree	I do not know	No answer
a)	Do you agree that each of two officials (president and the chancellor) has two deputies?				
b)	Do you agree that the president appoints the chancellor and the Wolesi Jirga has the authority to dismiss the chancellor?				
c)	Do you agree that the president nominates the chancellor and Wolesi Jirga				

<sup>1</sup> . Federalism is a compound form of government, combining the power of central government and provinces. In this system, provinces can plan developmental programs based on their needs. The federal government has one general constitution, and each province can have their own laws. They are free in their internal matters, but they are subordinated of center's policies in international relations and foreign politics.

<sup>2</sup> . In this administrative system, all authorities and competence in various areas (political, economic, cultural, social, development, etc.) belong to central government and provinces have no power other than implementation of center's policies.

<sup>3</sup> . In this system, the government grants the rights and competence of decision-making and sometimes the required resources to local offices. All or some of officials are selected by the locals. It is probable that the decision-making power be given to the government employees in different districts from the central government, so that they can use that power to resolve local disputes and do not need to ask the central government permission.

	gives the confidence vote for the chancellor?				
d)	Do you agree that a party or a coalition of parties nominates the chancellor and the president approve it?				
e)	Do you agree that the president has the power to dismiss the chancellor?				
20.	What do you think about the modification of the president's powers and authorities?	1. It must not be limited 2. It must be limited 3. It must be increased 88. I do not know 99. No answer			
21.	Which economic system do you think is the best for the country?	1. Market economy <sup>1</sup> 2. State-controlled economy 3. Mixed economy 4. Market economy with government support of low-incomes 88. I do not know 99. No answer			

### Miscellaneous questions:

22.	The followings are some articles of the constitution. Please specify your opinion about each of them.	Agree	Disagree	Indifferent	I do not know
a)	The word Afghan shall apply to every citizen of Afghanistan. (Article 4)				
b)	The national anthem of Afghanistan shall be in Pashto. (Article 20)				
c)	Wolesi Jirga's competence for impeachment and				

<sup>1</sup>. Free market economy is a system in which the government has no role in production, sale, distribution and other sectors, and market actors (sellers and buyers) monitor them.

	dismissal of officials should be increased. (Article 92) <sup>1</sup>				
d)	Formation of a political party on the basis of tribalism, parochialism, language and religious sectarianism shall not be permitted. (Article 35)				
e)	Healthcare should be provided for free (Article 52); or social security system, including health insurance, replaces it.	Free healthcare		Social security	

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<sup>1</sup> . According to article 92, "The House of People, on the proposal of twenty percent of all its members, shall make inquiries from each Minister. If the explanations given are not satisfactory, the House of People shall consider the issue of a no- confidence vote."

#### **Appendix IV: The list and profiles of the interviewees**

1. Ahmad Saeedi: Lecturer, political analyst, and member of the constitutional Loya Jirga; (interviewer: Mohammad Erfani; interview date: 10/4/2016)
2. Ahmad Zia Rafat: lecturer of Journalism at Kabul University and former spokesman for the Independent Election Commission; (interviewer: Mohammad Erfani; interview date: 12/3/2016)
3. Ahmad Wali Massoud: Head of the Massoud Foundation and member of the constitutional Loya Jirga; (interviewer: Safiullah Taha; interview date: 3/4/2016)
4. Sayed Massoud: Lecturer at the university of Kabul and member of the constitutional Loya Jirga (interviewer: Safiullah Taha, interview date: 12/4/2016)
5. Ashraf Rasooli: Senior legislative advisor at the ministry of justice and member of the constitution drafting commission; (interviewer: Mohammad Erfani; interview date: 26/3/2016)
6. Palwasha Hassan: Head of Afghan women's education center and member of the constitutional Loya Jirga; (interviewer: Mohammad Erfani; interview date: 3/4/2016)
7. Mohammad Javad Sultani: Lecturer at Ibn-e-Sina University (interviewers: Mohammad Erfani and Safiullah Taha; interview date: 8/3/2016)
8. Habiba Sarabi: Former governor of Bamyan, member of the High Peace Council, and member of the constitutional Loya Jirga; (interviewer: Mohammad Erfani; interview date: 15/3/2016)
9. Hamdullah Fayeque: Teacher at the faculty of Sharia and Law of the Salam institute of higher education; (interviewer: Safiullah Taha; interview date: 5/5/2016)
10. Khalil Parsa: Head of Afghan network of civil society, Herat; (interviewer: Safiullah Taha; interview date: 23/3/2016)
11. Saifurrahman Stanikzai: Deputy of the Afghanistan Academy of Science; (interviewer: Safiullah Taha; interview date: 13/3/2016)
12. Sima Samar: Head of Independent Human Rights Commission; (interviewer: Safiullah Taha; interview date: 10/4/2016)
13. Sima Ghani: Executive director of the People's Movement Against Corruption ;(interviewers: Mohammad Erfani; interview date: 6/3/2016)

14. Shah Mahmood Miakhel: Country director of the United States Institute of Peace and member of the constitutional Loya Jirga; (interviewer: Safiullah Taha,; interview date: 7/5/2016)
15. Mohammad Sediq Patman: Member of the constitution codification commission and member of the New National front; (interviewer: Safiullah Taha; interview date: 30/4/2016)
16. Abdul Hafiz Mansoor: Lawmaker and member of the constitutional Loya Jirga (interviewer: Safiullah Taha; interview date: 31/3/2016)
17. Abdul Ghayoor Ghayoor: Head of the union of Afghanistan lawyers; (interviewer: Mohammad Erfani; interview date: 16/3/2016)
18. Abdullah Shafayi: Member of the Independent commission for overseeing the implementation of constitution; (interviewer: Mohammad Erfani; interview date: 25/4/2016)
19. Ali Amiri: Lecturer at Ibn-e-Sina University (interviewers: Mohammad Erfani and Safiullah Taha; interview date: 9/3/2016)
20. Ali Reza Rohani: Member of Independent Human Rights Commission and lecturer at the University of Ibn-e-Sina; (interviewer: Mohammad Erfani; interview date: 27/3/2016)
21. Ghazal Hares: Lecturer at American University of Afghanistan (Interviewer: Mohammad Erfani; interview date: 13/4/2016)
22. Farid Hamidi: attorney general of Afghanistan (Interviewer: Mohammad Erfani; interview date: 19/4/2016)
23. Fawzia Koofi: Member of the Wolesi Jirga from Badakhshan; (interviewer: Mohammad Erfani; interview date: 23.3.2016)
24. Kawun Kakar: Member of the electoral reform commission, UNAMA employee during the process of the constitution ratification, and a member of constitutional Loya Jirga, (interviewer: Mohammad Erfani; interview date: 3/5/2016)
25. Karamatullah Sediq: Head of Islamic studies department at the ministry of Haj and Islamic affairs; (interviewer: Safiullah Taha; interview date: 7/5/2016)
26. Gul Ahmad Madadzai: Deputy head of Afghanistan's Lawyers' Union; (interviewer: Mohammad Erfani; interview date: 7/3/2016)
27. Dr. Mohammad Javad Salehi: Head of Goharshad Institute of Higher Education; (interviewer: Mohammad Erfani; interview date: 12/3/2016)
28. Mohammad Rafiq Shahir: Head of the Experts' Council in Herat, and member of the constitutional Loya Jirga; (interviewer: Safiullah Taha; interview date: 19/3/2016)

29. Mohammad Zia Farahmand: Head of Information and Public Relations Department of the Independent Commission for Overseeing the Implementation of Constitution; (interviewer: Mohammad Erfani and Safiullah Taha; interview date: 6/3/2016)
30. Mohammad Ghasem Hashemzai: Head of the Independent Commission for Overseeing the Implementation of Constitution; (interviewer: Safiullah Taha; interview date: 12/3/2016)
31. Mohyeddin Mahdi: Member of Wolesi Jirga from Baghlan, and member of the constitutional Loya Jirga; (interviewer: Mohammad Erfani; interview date: 3/4/2016)
32. Nizamuddin Abdullah: Senior advisor of Independent Administrative Reforms and Civil Services Commission; (interviewer: Safiullah Taha; interview date: 12/3/2016)
33. Naqibullah Fayeque lecturer at the faculty of Sharia and law of the Salam institute of higher education; (interviewer: Mohammad Erfani; interview date: 12/3/2016)
34. Anonymous