

Afghanistan has had six constitutions from 1924 to 2004, and each provided for varying degrees of fundamental rights protection. The 1931 and 1964 constitutions marked high points for the inclusion of strong fundamental rights. However, a strong political class never supported these progressive gains. Instead, the reform efforts were top-down and largely engineered by a liberal-minded ruler. Thus, in the case of the 1931 and 1964 constitutions the progressive gains were defeated by the very people who were supposed to benefit from them. The 2004 constitution, similarly born out of an elite-driven, top-down process, is a landmark for Afghanistan's legal history and also stands out as one of the most progressive constitutions in the entire Muslim world. It provides for not only civil and political rights but also for social, economic and cultural rights in line with international human rights treaties. Over the past decade a number of textual ambiguities have impacted the implementation of fundamental rights; for example, relating to the applicability of Islamic law, as well as obstacles relating to the developmental and security challenges. However, despite these challenges, the 2004 constitution has endured for over a decade and has made important inroads into the protection of fundamental rights in Afghanistan.

History of fundamental rights under Afghan Constitutions

Among Afghanistan's six constitutions, the 1931, 1964 and 2004 constitutions are important landmarks for the evolution of fundamental rights in the country. The discourse surrounding the drafting processes of the 1931 and 1964 constitutions did not reflect an awareness of the philosophical origins of fundamental rights or an existence of a civic culture of fundamental rights. Rather, in the case of the 1931 and 1964 constitutions the inclusion of fundamental rights was the direct result of rulers who had western orientations and in particular favoured technological innovation. In this regard certain continuities can be seen with the 2004 constitution, where the inclusion of strong fundamental rights provisions was the result of both the involvement of the international community and the presence of western-educated Afghan elites in the constitution drafting process.

Afghanistan's first constitution was adopted under King Amanullah. The adoption of a constitution itself was a major milestone for Afghanistan's legal and political history. The 1924 constitution recognised Islam as the state religion and required Hindus and Jews to wear distinctive clothing, as well as pay a special tax. However, the 1924 constitution also for the first time codified a range of fundamental rights, including freedom from arbitrary arrest and the abolition of slavery. The 1964 constitution was another important landmark for the evolution of constitutionalism in Afghanistan as well as for the inclusion of fundamental rights. Chapter 3 of the 1964 constitution adopted 16 provisions related to fundamental rights, including the right to equality and non-discrimination, prohibition of torture, freedom of movement, freedom of expression, freedom and security of tenure and housing, and the right to political participation.

However, in between these progressive moments Afghanistan also adopted a number of constitutions that represented a step back for fundamental rights. Following the fall of King Amanullah, in 1931 Nader Shah adopted Afghanistan's second constitution, which included 15 articles related to fundamental rights. However, during this same period the state was responsible for widespread and systematic fundamental rights abuses. The 1977 and 1980 constitutions further marked a significant step back for fundamental rights, as both constitutions sought to legalise a totalitarian state and prohibited political opposition.

The 2004 constitution: theory and practice

The 2004 constitution provides for a range of fundamental rights, a National Human Rights Institution and a number of avenues for enforcing fundamental rights. Article 6 of the constitution provides that the state is obliged to create a progressive society based on inter alia social justice, protection of human dignity and protection of human rights. In terms of substantive rights, the constitution follows the modern trend in constitutional drafting toward providing for a range of detailed fundamental rights. The provision of social, economic and cultural rights in the constitution is a marked feature, as it goes beyond previous constitutions and provides for the right to health care, education and culture.

In the context of Afghanistan, given the country's legal and political history, certain basic provisions relating to fundamental rights such as Article 22—which provides for equality before law for all citizens, expressly referencing equality between men and women—were considered a major step forward. This was especially the case as under Taliban rule formal legal equality for women had been severely eroded. Article 7 provides that Afghanistan shall observe international treaties it has joined and expressly refers to the Universal Declaration of Human Rights (UDHR). At present Afghanistan is a party to a number of major human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention Against Torture (CAT), Elimination of all Forms of Racial Discrimination (CERD), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Thus, under the 2004 constitution, in addition to committing to uphold the specific fundamental rights identified in Chapter Two, the Afghan state also commits to uphold the rights contained in these key international human rights treaties.

Despite these very progressive provisions, the 2004 constitution is not without textual ambiguities. A key point of controversy in the 2004 constitution is the apparent tension between articles 3 and 7. Article 3 provides that no law shall contravene the holy religion of Islam. Article 7, as noted above, provides that Afghanistan shall respect international treaties it accedes to, and makes express reference to the UDHR. A number of constitutions in the Muslim world, including in Egypt, Iran and Sudan, require that domestic laws conform to Shariah. However, Afghanistan's constitution is unique as it also makes explicit reference to the state's obligation to comply with the UDHR and other international human rights treaties. Some Afghan lawyers and clerics, including the Ulama Council of Afghanistan, argue that Afghanistan's obligations under international treaties and the UDHR contravene the tenets of Islam and therefore are not applicable. Others argue that the tenets of Islam and international obligations do not contradict each other. Over the last decade there has been a significant debate over how to resolve the apparent tensions between the two articles.

There have been a number of instances both in the judicial sphere and in the legislature where these two articles have conflicted. For example, an issue that has attracted much attention is the ambit of the freedom of religion provision. Certain readings of Islamic law deem capital punishment as an appropriate punishment for apostasy. In the case of Abdul Rahman, who had converted to Christianity, he was sentenced to death by an Afghan court. In another instance a journalist, Parwiz Kambaksh, was also sentenced to death for having been caught disseminating atheistic materials. In both instances, owing to significant international pressure both individuals were ultimately granted passage out of Afghanistan.

On the eve of the 2009 presidential campaign, faced with strong demands from civil society groups, former President Hamid Karzai passed the Elimination of Violence Against Women Law (EVAW Law) via a presidential decree. Specific provisions of the EVAW Law provided for a range of protections, including prohibitions on child marriage, forced marriage, and domestic violence, that were well in line with fundamental rights under the constitution as well as Afghanistan's international obligations. Conservative elements within Parliament, media and religious institutions objected to these and other provisions in the law, and insisted that the law be amended through a broader participatory process incorporating the views of civil society and religious institutions. Under Article 79, a decree passed by the President comes automatically into effect. However, it must also be tabled before Parliament within a required time frame. Unless amended by Parliament, the law continues to stay in force. At the time there was a fear that if the law was tabled before Parliament, then conservative members would water down its protections. Thus, in a questionable constitutional and legal manoeuvre, civil society groups and Parliamentarians who supported the EVAW Law acted to keep the Law out of Parliament's agenda.

Former member and sometime Chair of the Constitutional Review Commission, Dr Hashim Kamali, argues that a solution to the tensions between Islamic law and fundamental and human rights depends on how one interprets Shariah. Dr Kamali references examples from other Islamic countries where Shariah is applicable; for example in Syria and Morocco, where they have succeeded in making significant advancements in Islamic family law reform without undermining the equality of women. These Muslim jurisdictions engaged in robust debates about interpretation of Islamic legal principles, and succeeded in adopting novel but widely accepted interpretations of the Quran.¹ Thus, in order to resolve the apparent contradictions between articles 3 and 7, Afghanistan must similarly engage in a domestic debate about the interpretation and applicability of traditional interpretations of Shariah.

It's important to note that in addition to these textual ambiguities, the implementation of fundamental rights under the 2004 constitution has met with a number of practical and structural challenges. Significant developmental and security challenges have prevented the government from protecting a range of civil and political and especially economic and social rights. The lack of an independent and professionalised

¹ Dr Hashim Kamali, "Afghanistan's Constitution Ten Years On: What are the Issues?" (Kabul: Afghanistan Research and Evaluation Unit, 2014).

judiciary and law enforcement agencies have also posed a challenge to the protection of basic fundamental rights. In many instances law enforcement agencies in the course of their professional duties have committed violations of fundamental rights of individuals. In his capacity as former National Security Advisor, Dr Spanta received numerous reports alleging instances of abuse and torture committed by law enforcement officials.² Dr Spanta notes that despite efforts to address these allegations and initiate reform within these institutions, challenges still remain. Additionally, the low levels of awareness and understanding as well as the lack of civic culture relating to fundamental rights have also impeded the promotion and protection of rights.

Enforceability

Under the 2004 constitution there are limited avenues provided for individuals to enforce their fundamental rights. Citizens can go before the courts or the Afghanistan Independent Human Rights Commission (AIHRC) to present a complaint. A direct means of raising a complaint is available under Article 51, which provides that an individual suffering damage from an administration can appeal to a court for damages.³ Additionally, under Article 121 of the constitution, the Supreme Court can only review constitutional matters when a lower court or the government submits them to the Court.⁴ Thus, an individual has limited standing to bring a constitutional claim related to the violation of their fundamental rights.

Given the many challenges faced by the Afghan judiciary, the drafters of the constitution provided for an alternative and arguably more accessible means of enforcing their fundamental rights. Article 58 provides that every person in case of violation of their human rights can submit a complaint to the Afghanistan Independent Human Rights Commission (AIHRC).⁵ The AIHRC can refer cases of violation of human rights to the courts and provide assistance to the complainant. It's important to highlight that Article 58 affords standing to all individuals, expanding the range of individuals covered beyond citizens. Additionally, unlike most other constitutions, Article 58 appears to disregard the difference between 'human rights' and 'constitutional rights'. Traditionally, in order for human rights to be enforceable before national courts, a country needs to have acceded to an international treaty as well as enacted a domestic statute. However, under Article 58, individuals in Afghanistan can raise complaints relating to the violation of both human rights and fundamental rights before the AIHRC, and potentially the courts.

AIHRC has attempted in the past to broaden the scope of fundamental rights cases it can bring before the courts. In 2009 AIHRC brought a claim before the Supreme Court on behalf of a minor who had been wrongfully extradited to Guantanamo Bay prison on charges related to participating in the conduct of hostilities.⁶ The minor had been captured in Afghanistan and had been tortured by the Afghan police before being handed over to US authorities. Several years later, the minor was found to be innocent, his charges were dropped and he was returned to Afghanistan. AIHRC attempted to bring a case against the Afghan government on the grounds of the violation of the minor's fundamental rights. However, the Supreme Court declined jurisdiction for the case, arguing that as the minor was not present, the AIHRC cannot bring a claim on behalf of a litigant.

Conclusion

Afghanistan has made significant inroads into the protection of fundamental rights under the 2004 constitution. The existence of a strong legal framework in itself has been a major achievement. For example in the field of women's rights, in addition to the strong legal protection afforded under Article 22, women have enjoyed greater social and political rights over the last decade. Ambiguities and gaps in the constitutional and legal framework can certainly be strengthened. For example, a future reform process should consider expanding the standing afforded to individuals to bring a claim for violation of their human or fundamental rights directly before lower courts. However, it is important to keep in mind that the merely legal solutions of amending the constitution and strengthening the legal framework are insufficient. Systematic efforts are required to increase education and awareness relating to fundamental rights throughout out all parts of the country. The lack of a civic culture relating to fundamental rights, and particularly the lack of awareness of their rights among citizens, poses a key challenge for the promotion and protection of fundamental rights.

² Dr Rangin Spanta, "An Overview of Citizens' Fundamental Rights: Challenges and Opportunities" (Kabul: Afghanistan Research and Evaluation Unit, 2014).

³ Constitution of Afghanistan, Article 51.

⁴ Constitution of Afghanistan, Article 121.

⁵ Constitution of Afghanistan, Article 58.

⁶ Nader Nadery, (Former Commissioner, Afghanistan Independent Human Rights Commission), pers.comm., 26 January 2015.

Recommendations

- The government of Afghanistan should make increased efforts to facilitate social and economic rights, particularly in the fields of education and health care.
- The government of Afghanistan should increase the capacity of law enforcement agencies to promote and comply with fundamental rights, particularly civil and political rights.
- The government, civil society and international actors should increase efforts to raise education and awareness of fundamental rights. In particular, fundamental rights education should be included at all levels, including in primary schools.
- Under the constitution the government is required to enforce international legal obligations; thus a number of domestic laws need to be reformed to ensure their compliance with international human rights obligations. Civil society and international actors should specifically strengthen the capacity of Parliamentarians to initiate and review such law reform efforts.
- Increase the capacity of law enforcement agencies so that a culture of impunity is addressed.
- Government and international actors should strengthen the capacity of the AIHRC to process complaints relating to the violation of fundamental rights.

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