

Judicial Review in Afghanistan: A Flawed Practice

Ghizaal Haress
August 2017



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Afghanistan Research and Evaluation Unit

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About the Afghanistan Research and Evaluation Unit

The Afghanistan Research and Evaluation Unit (AREU) is an independent research institute based in Kabul. AREU's mission is to inform and influence policy and practice by conducting high-quality, policy-relevant research and actively disseminating the results, and by promoting a culture of research and learning. To achieve its mission AREU engages with policymakers, civil society, researchers and students to promote their use of AREU's research and its library, to strengthen their research capacity, and to create opportunities for analysis, reflection, and debate.

AREU was established in 2002 by the assistance community in Afghanistan and has a Board of Directors comprised of representatives from donor organisations, the United Nations and other multilateral agencies, and non-governmental organisations.

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About the United States Institute of Peace

The U.S. Institute of Peace works with the Afghan government and civil society organizations to address underlying causes of instability by strengthening the rule of law, countering violent extremism, expanding peace education, and promoting better governance and anti-corruption efforts. USIP also supports policy-relevant research on current causes of conflict in Afghanistan.

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Nonetheless, the responsibility for any shortcomings in the paper is mine.

Ghizaal Haress

June 2017

Disclaimer

This paper is a work of research and presents findings from credible academic sources, and inputs from key informant interviews. Although a Commissioner at the ICOIC, I have spared no efforts in my attempt to write this paper objectively, impartially, and without prejudice; I express regret if I have inadvertently failed to do so in any part.

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Research Methodology

This research was conducted through desk review and primary data collection through expert interviews. The desk review was conducted through books, academic articles, conference reports, and other academic resources related to constitutional law in general, and the case of Afghanistan in particular. Expert interviews included: Members and staff of the Supreme Court, Members of the ICOIC, academics, judges, and legal scholars and professionals.

The paper is a combination of theoretical study of judicial review, its purpose, and the practice in other countries, and empirical study of judicial review in the constitutional history of Afghanistan, as well as the practice of judicial review under the Constitution of 2004.

Executive Summary

Judicial review is the power of a court, or a similar institution, to review and decide on the constitutionality of laws and public acts. Though *Marbury v. Madison* marks the beginning of this practice in the US, the scope of judicial review expanded in Europe in the aftermath of the Second World War and since then the practice has grown rapidly in all parts of the world. Today, almost all constitutions recognise judicial review as a key element of constitutionalism and rule of law, therefore judicial review has become an inevitable component of modern constitutions.

Elements of judicial review have appeared in many of the 20th century constitutions of Afghanistan however no constitution, with the exception of the constitution of 1987, incorporated judicial review or entrusted an institution with that power. Constitutional review was embraced by Afghanistan's post-conflict Constitution of 2004, and the Supreme Court and the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) were empowered to ensure the constitutionality of legislation and public actions respectively. In the early years of implementing the Constitution no difficulty was witnessed and the provisions were acclaimed as a strong measure of checks and balances. In only a few years, the frailty in the text of articles 121 and 157 made them two of the most disputed articles in the Constitution of Afghanistan. Judicial review not only remained broad and imprecise in the text of the Constitution, it also proved a difficult practice to institutionalise, as neither institution granted these new powers had ever exercised judicial review.

A number of case studies demonstrate the Supreme Court's inconsistency while conducting judicial review. In most of the decisions made, the Court's inclination was toward political rather than legal reasoning. The examples also indicate that the pattern in which judicial review was conducted made it a dangerous tool for advancing executive interests. Furthermore, the manner in which judicial review has been practiced in Afghanistan has not made it an effective tool for the protection of the fundamental rights of citizens.

The ICOIC has also not played an effective role in upholding constitutional values and principles and protecting them from violation by state institutions. From its inception, the ICOIC suffered from a power battle between the three institution, the Executive, the Legislature and the Judiciary, and although it had a constitutional power of oversight, and a disputed power of interpretation of the Constitution, the ICOIC mostly exercised the latter, without much effort to promote constitutionalism and rule of law through the former, as its principal mandate.

Recommendations

The 12 years of constitutional implementation have not provided any helpful solutions to the problem of judicial review in Afghanistan. Therefore, through a constitutional amendment, Afghanistan should regain the lost opportunity by taking the followings steps to strengthen the practice of judicial review and constitutional oversight in Afghanistan:

In the long term:

The State should establish a Constitutional Court to maintain the constitutional achievements of the last decade. An independent court should bring an end to the competing interpretive authority between two institutions, and be empowered to respond with binding and final decisions to questions of judicial review, interpretation, constitutional oversight, and other missing pieces of judicial review, and should actively support the emergence of a strong constitutional regime in Afghanistan.

In the immediate future:

1. The Supreme Court, in complying with the article 121 of the Constitution, should take immediate action to draft the law defining the scope and procedure for judicial review, and present it to the National Assembly for approval.
2. The Supreme Court should ensure that judges at all levels of the judiciary are trained on the concept and theoretical aspects of judicial review, and on the referral guidelines and procedures for constitutional questions.

3. The judiciary's legal reasoning in all cases, and in particular in the cases of judicial review must be strengthened and be based on legal reasoning, not political motives. The Supreme Court must ensure that judicial decisions are well reasoned, consistent, and publicly available.
4. The Judiciary must make additional efforts to enhance judicial independence, and its internal capacity and integrity. The Supreme Court must take measures to ensure the court's impartiality, in particular with the judicial review cases, to ensure this is a mechanism to check, and not a means to advance executive interests.
5. The Supreme Court and the ICOIC should conduct greater collaboration and coordination so as to ensure they uphold the supremacy of the Constitution and contribute to rule of law in Afghanistan. Negative competition between the two institutions only serves to weaken the constitutional order. The two institutions should formally agree on the powers of the Supreme Court regarding constitutional interpretations and constitutional review.
6. The ICOIC should present amendments to the statute that defines its mandate so as to better define the scope of its powers. The Executive, Legislative and Judicial branches must reach a mutual agreement on the powers of the ICOIC.
7. The ICOIC must create more effective mechanisms to oversee the implementation of the Constitution, or its violation thereof. The ICOIC must act more proactively on constitutional violations and regularly communicate with state institutions to ensure better constitutional implementation.

Introduction

Judicial review is the power of a court, or a similar institution, to review and decide on the constitutionality of laws and public acts. Though *Marbury v. Madison* marks the beginning of this practice in the US, the scope of judicial review expanded in Europe in the aftermath of the Second World War and since then the practice has grown rapidly in all parts of the world. Today, almost all constitutions recognise judicial review as a key element of constitutionalism and rule of law, and judicial review has become an entrenched component of modern constitutions.

Elements of judicial review have appeared in many of the 20th century constitutions of Afghanistan however only the constitution of 1987 incorporated judicial review or entrusted an institution with that power. Constitutional review was embraced by Afghanistan's post-conflict Constitution of 2004, and the Supreme Court and the ICOIC were empowered to ensure constitutionality of legislation and public actions respectively. In the early years of implementing the Constitution, no difficulty was witnessed, and the provisions were acclaimed as a strong measure for checks and balances. In only a few years, the frailty in the text of the provisions related to judicial review made them the most disputed articles in the Constitution of Afghanistan. Judicial review not only remained broad and imprecise in the text of the Constitution, but also proved to be a difficult practice to be institutionalised; neither institution had previously exercised judicial review.

A number of case studies demonstrate the Supreme Court's inconsistency while conducting judicial review. In most of the decisions made, the Court's inclination has been towards political, as compared to legal, reasoning. The examples also indicate that the pattern in which judicial review was conducted made it a dangerous tool for the executive branch of the government to advancing its interests. Furthermore, the manner in which judicial review has been practiced in Afghanistan has not made it an effective tool for the protection of fundamental rights of the citizens. These circumstances reveal the weaknesses of the judiciary as an institution for upholding human rights.

The ICOIC has also not played an effective role in upholding constitutional values and principles, and protecting them from violation by state institutions. The ICOIC from its inception, suffered from a power battle between the Executive, Legislative and Judicial branches of the State. Although it had an unequivocal power: *constitutional oversight*, and a disputed power: *constitutional interpretation*, the Commission mostly exercised the latter, without much effort to promote constitutionalism and rule of law through the former, as its principal mandate.

Therefore, this paper argues that judicial review in Afghanistan has been marred with various challenges in the last 12 years of enforcing the constitution, mainly owing to lack of experience of such an institution in Afghanistan, further augmented by textual vagueness in the 2004 Constitution, insufficient legal framework, and lack of interest by the Judiciary for advancement of this practice. Consequently, this has hindered the development and practice of constitutional review, and the emergence of a meaningful system of constitutional checks and balances. The current constitutional mechanisms are not responsive to what has become an escalating crisis over this issue.

This paper, in part one, presents a brief overview of judicial review in the US and Europe, followed in part two by a historical account of judicial review in Afghanistan. Part three analyses the exercise of judicial review under the current constitution and the impact of the dispute over constitutional interpretation on growth and development of judicial review, and the role and effectiveness of ICOIC's constitutional oversight. The final part of the paper presents, in view of Afghanistan's recent constitutional experiences and some comparative examples, recommendations for better practice of judicial review.

PART ONE: JUDICIAL REVIEW

1. What is Judicial Review

Judicial review, also referred to as constitutional review,¹ is the power of a court or an institution of similar authority² to determine the validity of legislation or examine a government's actions by the terms of a written constitution.³ In other words, constitutional review is an oversight mechanism for the legislative and executive branches to observe the limits of their power as prescribed by the Constitution.⁴

Judicial review became most prominent in the US when the Supreme Court in *Marbury v. Madison* (1803) held that it had the authority to limit Congressional power by declaring legislation unconstitutional.⁵ Since then, judicial review has become an integral power of the US judiciary, and is practiced in a *decentralised* fashion by courts. The tradition of judicial review, however, was transformed in Europe where this power was concentrated in one *centralised* institution: a constitutional court. The model, largely devised by Hans Kelsen, first appeared in the Constitution of 1920 in Austria,⁶ which was then embraced by Germany, Italy and France after the Second World War, and many other European states at a later stage;⁷ varying in form and competencies.

There are three types of judicial review: abstract, concrete, and individual constitutional complaints. In an *abstract review*, the constitutionality of the legislation is reviewed in the absence of litigation. In a *concrete review*, the constitutionality of the legislation is challenged in an on-going controversy or litigation in a court. In *individual constitutional complaints*, citizens complain about the violation of their constitutional rights by a public act or official.⁸

In the US, judicial review is considered a core function of the judiciary, with the condition that the constitutional challenge is presented to the court as litigation. This is “*concrete*” judicial review. No court in the US can decide on the constitutionality of a statute in the absence of litigation. Thus, there is no distinction between the constitutional and ordinary litigations, or a court's procedure for adjudicating the two types of disputes.⁹ Presenting constitutional issues as litigation allows the courts to review and adjudicate the issues in the “factual context in which they arise, rather than adjudicating them abstractly.”¹⁰

1 The terms “constitutional review” and “judicial review” are used interchangeably in this paper.

2 The Constitutional Council of France is a famous example. For a detailed discussion on the juridical nature of the French Constitutional Council, see Michael H. Davis, “The Law/Politics Distinction, the French Conseil Constitutionnel, and the U. S. Supreme Court,” *The American Journal of Comparative Law* 34, no. 1 (1986).

3 Mark Tushnet, “New Forms of Judicial Review and the Persistence of Rights - And Democracy-Based Worries,” *Wake Forest Law Review* 38 (2003): 813–14; and Tom Ginsburg, “Comparative Constitutional Review,” *United States Institute for Peace - Position Paper*, 2011, <http://www.usip.org>.

4 Mohammad Hashim Kamali, *Afghanistan's Constitution Ten Years On: What Are the Issues?* (Kabul: Afghanistan Research and Evaluation Unit, 2014), p. 4.

5 Part of the decision of the Supreme Court read: “It is emphatically the province and duty of the Judicial Department to say what the law is. ... So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case... the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.” *Marbury v. Madison*, 5 U.S. 137 (1803).

6 Alec Stone Sweet, “Why Europe Rejected American Judicial Review - and Why It May Not Matter,” *Michigan Law Review* 101 (2002-3), 2765-69.

7 “Such courts have been established in Austria (1945), Italy (1948), the Federal Republic of Germany (1949), France (1958), Portugal (1976), Spain (1978), Belgium (1985) and, after 1989, in the post-Communist Czech Republic, Hungary, Poland, Romania, Russia, Slovakia, the Baltics, and in several states of the former Yugoslavia.” Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford; New York: Oxford University Press, 2000), 31.

8 *Ibid.* 44-45.

9 Gustavo Fernandes de Andrade, “Comparative Constitutional Law: Judicial Review,” *Journal of Constitutional Law* 3, no. 3 (2001), p 979.

10 Donald L. Horowitz, “Constitutional Courts: Opportunities and Pitfalls” (ConstitutionNet, 2003), <http://www.constitutionnet.org/files/Horowitz,%20D.%20Constitutional%20Courts%20in%20Afghanistan.pdf>.

The variation in the European¹¹ model of judicial review is mainly due to the civil law tradition that categorises litigations into civil, criminal, commercial and administrative cases. The division based on subject matter jurisdiction makes conventional cases different from constitutional cases, and requires specialised courts with specific procedures.¹² Because constitutional courts are independent, and do not deal with ordinary litigation, the European model is more open to *abstract* review. Furthermore, the establishment of these courts in Europe gave a wider horizon for the constitutional courts with regards to their powers. Constitutional courts exercise a number of additional powers not seen in the courts in the US. These include reviewing the actions of state institutions, resolving disputes between the branches of the government, deciding on the validity of elections, vetting the constitutionality of the political parties, and many other powers.¹³

Judicial review of legislation may be exercised before the legislation takes effect, that is, *a priori* review, or after the law has come into force, that is, *a posteriori* review.¹⁴ The former, practiced in *abstract* review cases, was known to be practiced in France until 2008, and countries following a similar constitutional model; while the latter, practiced as a part of *concrete* judicial review, is known to be the case in the US and many of the countries following the same constitutional tradition.¹⁵

Once a law is found unconstitutional, its validity will vary in different jurisdictions. First, in some countries, the US being one example, the law is not pronounced void. However, based on the principle of *stare decisis* or precedent followed by common law tradition, the rule on the previous case will be applied on similar upcoming cases. Second, in countries with a strong sense of parliamentary supremacy, France being one example, courts may not nullify the law, but rather may make recommendations to the parliament to repeal or amend the law. Third, in other jurisdictions, mainly European, the courts may immediately nullify the law, or those parts of it found unconstitutional.¹⁶ This could be the case both in abstract and concrete review for the latter mainly due to the fact that the principle of *stare decisis* is not as strictly followed in civil law jurisdictions.

11 The paper mainly focuses on the Western Europe models of judicial review.

12 Andrade, "Comparative Constitutional Law: Judicial Review."

13 Donald L. Horowitz, "Constitutional Courts: A Primer for Decision Makers," *Journal of Democracy* 17, no. 4 (2006), 128.

14 Ran Hirschl, "The Judicialization of Politics," in *The Oxford Handbook of Political Science*, ed. Robert E. Goodin (Oxford: Oxford University Press, 2011), 264.

15 Kamali, *Afghanistan's Constitution Ten Years On: What Are the Issues?* p. 4.

16 Ginsburg, "Comparative Constitutional Review," 4-5.

PART TWO: JUDICIAL REVIEW IN AFGHANISTAN

2. Judicial review in the constitutional history of Afghanistan

Elements of judicial review – the constitutional compliance clauses, the interpretation clauses, and the repugnancy clauses – have appeared in many of the 20th century constitutions of Afghanistan; however, no constitution embraced these elements together. As a result of these inconsistencies, judicial review never became a recurring practice in the constitutional history of Afghanistan.

The first constitution of Afghanistan in 1923 created a State Council – supposedly the legislative branch – composed equally of elected and appointed members,¹⁷ and granted it the powers to scrutinise the draft laws, interpret the Constitution, and refer complaints from the citizens to the executive agencies.¹⁸ It has been argued that the genesis of the constitutional review can be traced to this Constitution.¹⁹ Nevertheless, a closer look at it proves otherwise. Firstly, the Council served as an advisory legislative body to the cabinet and the King. The Council’s law-making powers (and other powers mentioned above) were conditional on the approval of the Cabinet and the assent of the King. Hence, the Council could not make independent decisions and was lower in status than the executive. This also meant that scrutiny (*tadqeeq* in Dari)²⁰ was required of the draft laws, as an *a priori* review, and that the Council had no control over the approved legislation. Second, the constitutional text was very general. It only required scrutiny of the draft laws, but lacked clarity on whether the scrutiny should be carried out for the compliance of the laws with the constitution.

The Constitutions of 1931 and 1964 similarly introduced diverse elements of judicial review. The former required any resolution passed by the parliament to be in compliance with the principles of Islam as well as the general policies of the State.²¹ The latter, retaining the repugnancy clause, required conformity of the laws with values embodied in the Constitution. It also considered all past laws enforced prior to the proclamation of the Constitution effective, provided that they were not in contradiction with it.²² While both constitutions emphasised conformity and compliance, they both failed to introduce an authority to conduct review for such conformity or lack thereof.

The constitutions discussed above, tacitly obligated the parliament to ensure compliance of the laws with Islam and state policies, rather than trying to vest this power in the judiciary or another independent body. This might be partly justifiable for the first two constitutions, which did not recognize judicial independence and thus the courts remained part of the executive branch, and under direct control of the King. However, the Constitution of 1964 introduced an independent judiciary, yet, it did not grant it the power to review the conformity of the laws with the Constitution. Despite the fact that the Constitution of 1964 followed certain constitutional

17 “Constitution of Afghanistan,” § 6 (1923). article 41.

18 *Ibid*, articles 46, 71, 42 and 45 respectively.

19 Kamali, *Afghanistan’s Constitution Ten Years On: What Are the Issues?*, 5.

20 Within the legal system in Afghanistan, “*tadqeeq*” describes the power of an institution to conduct “scrutiny” of draft laws. According to the Regulation on Preparing and Processing Legislative Documents, draft laws are referred to the legislative department of the Ministry of Justice (MoJ), to ensure that they fit with existing legal documents of the country, the constitution, and, at times, with Sharia. However, modifications brought as a result of scrutiny are not binding, and are subject to the approval of the Parliament. Thus, scrutiny happens when legislation is at the draft stage, and “review”, according to article 121 of the Constitution of Afghanistan, is done of laws and legislative decrees.

21 “Constitution of Afghanistan” (1931). article 65.

22 “Constitution of Afghanistan,” Official Gazette 1109 § (1964). article 128.

norms from the French Constitution,²³ there were no provisions for judicial review. Hence, the first three constitutions lacked any mechanism that would confirm the supremacy of the Constitution by reviewing statutory laws for compliance.

Constitutional review, entrusted to a designated Council, was first introduced in 1987. The Council was empowered to review the conformity of laws, legislative decrees and international treaties with the Constitution, and advise the President on all constitutional issues. The Council was also tasked to study legislative documents presented for presidential endorsement, for their conformity with the Constitution.²⁴ Thus, the Council had both *a priori* and *a posteriori* review powers. The Council worked as an active institution and responded to a number of questions on constitutional matters, although mainly referred to them by the Executive. The council also reviewed all the decisions of the Council of Ministers before they were enforced to ensure their conformity with the constitution. All their opinions, as required by the Law on Council, were published in the Official Gazette.²⁵ Nevertheless, the Council did not present the desired model of review for two reasons. First, the President directly appointed the members of the Council. Second, its members were accountable to the President,²⁶ thus making the Council a political body within the executive branch, rather than an independent constitutional body.

The Taliban never introduced a written constitution, nor validated any past constitution. Oddly though, they reintroduced the law on the Constitutional Council from the Communist period,²⁷ enforced under the Constitution of 1987, with minor amendments requiring the conformity of all laws, legislative decrees, and international treaties with the “rulings of Shari’a and law.”²⁸ Nonetheless, the term “law” remained undefined within the statute. Additionally, a decree by the Taliban leader vested the power of Islamic review of laws to a committee of religious scholars under the Supreme Court of Afghanistan.²⁹ The decree created a parallel body and lacked clarity on whether review should be conducted of the existing or new laws.

Other constitutions of Afghanistan, aside from the ones mentioned above, did not include any provisions for judicial review, nor did they introduce a body to determine such conformity. Furthermore, even though some elements of judicial review have been seen in some of the constitutions, very few records are available to analyse how the powers were practiced.

23 Rainer Grote, “Separation of Powers in the New Afghan Constitution,” *ZaöRV* 64 (2004), 897-915.

24 “The Constitution of Afghanistan” (1987). articles 123 and 124.

25 The opinions of the Council have been published in different volumes of the Official Gazette, available at the Ministry of Justice website.

26 *The Constitution of Afghanistan*. articles 125 and 126 and article 2, “Law on Constitutional Council,” Official Gazette no. 682 § (1988).

27 “Law on Constitutional Council (Taliban Regime),” Official Gazette no. 797 § (2001).

28 *Ibid*, article 8.

29 “Decree of the Head of the Islamic Emirates of Afghanistan on Review of Laws by the [Religious] Scholars of the Supreme Court,” Official Gazette no. 788 § (1999).

3. Judicial Review in the Constitution of 2004

The historical nonuniformity in the practice of judicial review did not give the drafters of the 2004 Constitution a good precedent to assess the effectiveness of the practice or its challenges. Despite lack of sufficient experience on judicial review, the drafters in the Constitutional Drafting Commission (CDC) emphasised establishing a Constitutional Court, with judicial review as its principal power. The CDC considered a rigorous appointment process for the members and listed its authorities, in addition to judicial review, to include adjudicating electoral complaints, and registering the wealth of high government officials before and after holding office.³⁰

The Constitutional Review Commission (CRC) built on the opinion of the CDC and designated a seven-article chapter for the Constitutional Court in the draft constitution. The chapter on the Constitutional Court had foreseen a progressive court, with the type of competencies that are found in modern constitutional courts. The chapter included the following articles:

Chapter Eight – Draft Constitution of Afghanistan - 2003¹

Article 141: *The Supreme Constitutional Court of Islamic Republic of Afghanistan, in accordance with the provisions of this chapter, shall supervise the compliance of laws with the Constitution.*

Article 142: *The Supreme Constitutional Court shall consist of 6 members, appointed by the President and approved by Mishrano Jirga [the Upper House] for one term of 9 years. The President shall appoint one member as the Head. The organization and authorities of the Supreme Constitutional Court shall be regulated by law.*

Article 143: *Member of the Supreme Constitutional Court shall have the following qualifications:*

1. *Be a citizen of Afghanistan, and shall not hold citizenship of another country.*
2. *Shall have higher education in law or [Islamic] jurisprudence.*
3. *Shall have minimum ten years of legal, judicial, or legislative experience.*
4. *Shall have completed 40 years of age.*
5. *Shall not have been convicted of crimes against humanity, felony, or deprivation of civil rights.*

Article 144: *The Supreme Constitutional Court shall have the following authorities:*

1. *Review of laws, legislative decrees, inter-state treaties, and international covenants for their compliance with the constitution.*
2. *Interpretation of the Constitution, laws, and legislative decrees.*

Article 145: *In considering a case, if one of the courts ascertains that the provision of the law applicable to the case, is contrary to the Constitution, the court shall suspend the case and refer the matter to the Supreme Constitutional Court.*

This provision is also applicable if one of the parties to the case claims such contradictions, provided that it is approved by the court.

In case the Human Rights Commission of Afghanistan finds a provision of the law incompatible with the fundamental rights enshrined in this constitution, it can refer the matter to the Supreme Constitutional Court.

Article 146: *Legislative documents found contrary to the Constitution, by the Supreme Constitutional Court, are void. The ruling of the Supreme Constitutional Court is final and not subject to review, [and] is enforced once published in the official gazette.*

1. Ibid. 296-7

³⁰ Sarwar Danish, *Huqoq Asasi Afghanistan (Afghanistan Constitutional Law)*, 3rd Edition (Kabul: Ibn-e-Sina Institute of Higher Education, 2015), 289.

The chapter introduced a very strong court, with a wide range of powers to ensure supremacy of the Constitution and to protect fundamental rights. It did not limit the parties that could refer the cases to the court, and allowed ordinary citizens (as parties to a litigation), and the Human Rights Commission to challenge the constitutionality of the laws that breached fundamental rights. The clarity on the faith of the law once reviewed, and the finality of the decisions of the court, made the court the final body to arbitrate constitutional matters.

According to Sarwar Danish, a prominent member of the CDC and CRC, although the CRC had drafted the articles by common consent, the government argued that this may create problems between the three branches of the government in the future.³¹ Some argued that the then Transitional Administration feared that the Court would turn into an institution like the Council of Guardians of Iran, and would obstruct the development of the political system.³² Hence, the Transitional Administration decided to completely omit the Constitutional Court from the draft constitution.

The powers envisioned for the Constitutional Court in seven articles were summarised into one article and transferred to the Supreme Court. The draft was then presented to the Constitutional Loya Jirga for approval.

Reinstituting the omitted chapter on the Supreme Constitutional Court was one of the main demands of all 10 working committees in the Constitutional Loya Jirga and one of the main areas of contention. However, a compromise was reached to vest the power of judicial review in the Supreme Court, and to establish a commission for overseeing the implementation of the Constitution instead of the Constitutional Court.

Ultimately, article 121 of the constitution of Afghanistan was born, giving the Supreme Court, for the first time in the constitutional history of Afghanistan, the power to examine laws for constitutionality:

Article 121: Review of conformity of laws, legislative decrees, inter-state treaties, and international covenants, with the Constitution, and their interpretation, at the request of government or courts, in accordance with the provisions of the law, shall be the authority of the Supreme Court.

Furthermore, article 157 of the Constitution created the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC):

Article 157: The Independent Commission for supervision of the implementation of the Constitution shall be established in accordance with the provisions of the law. Members of this Commission shall be appointed by the President with the endorsement of the House of People.

The ICOIC was foreseen as a body to ensure orderly implementation of the new Constitution.³³ Furthermore, although the text of the Constitution did not say much about the powers of the ICOIC, the name infers the power of the ICOIC to check the constitutionality of actions of the state institutions and actors.

2.1 What types of Judicial Review are practiced in Afghanistan?

The wording of article 121 suggests that the Constitution of Afghanistan allows both “concrete” and “abstract” judicial review of laws, legislative decrees, international treaties, and international covenants. Based on this article, concrete judicial review is exercised when the lower courts request review of constitutionality for legislation applicable on the case under consideration. Abstract judicial review, however, can be conducted only at the request of the government.

³¹ Ibid. 297.

³² See John Dempsey and J. Alexander Thier, “Resolving the Crisis over Constitutional Interpretation in Afghanistan” (United States Institute of Peace, March 2009), and Barnett R. Rubin, “Crafting a Constitution for Afghanistan,” *Journal of Democracy* 15, no. 3 (2004), 15.

³³ Mohammad Hashim Kamali, “Afghanistan’s Constitution 2004 : An Islamic Perspective on Interpretation,” *United States Institute for Peace*, 2009.

Moreover, the article only allows for *a posteriori* judicial review. The article requires review of laws and legislative decrees, among others, and the definition of both under the constitution refers to the enforced legislation. However, on *a priori* review, the Ministry of Justice under the Regulation on Preparing and Processing Legislative Documents, conducts a similar model to *a priori* review of the law. Article 37 of the Regulation requires all draft laws to be *scrutinised* by the Legislative Drafting Institute, for its compliance, *inter alia*, with the constitution.³⁴

On international treaties and covenants, however, there is no clarity as to how and at what stage they could be reviewed by the Court. In principle, because both must comply with the Constitution, the review should be *a priori*, and before the government signs the treaty or covenant, so as to allow for setting reservations in case of contradictions. Alternatively, such conformity could also be checked while Parliament ratifies the treaties. However, the limitations under article 121 on the power of Parliament to ask for such a review, and the understanding of the Parliament that under article 90, it only has the power to accept or reject the treaty as a whole³⁵ makes it impossible for the Parliament to request this.

2.2 Divided rules, uncertainties and missing pieces in judicial review

The Constitution of 2004 embodied more mechanisms of checks and balances between the branches of the government, as compared to earlier constitutions. Among others, article 121 upheld the supremacy of the Constitution, and presented strong measure for judicial check of the powers of the two other branches of the government. The ICOIC was not established until 2009; nonetheless, article 157 introduced constitutional oversight provision that would ensure orderly implementation, and step-by-step supervision of implementation of the Constitution.³⁶

In the early years of the Constitution, there were no difficulty in implementation of articles 121 and 157, nor any vagueness in their meaning. However, in a highly politicized setting, following the impeachment of then Foreign Minister Spanta, the two articles became a subject of continual disagreement between the branches of the government. As a result, notwithstanding the ground-breaking progress on paper, the political friction, coupled with the ambiguity in the text of article 121 and the generality of article 157, made them two of the most disputed provisions in the Constitution of Afghanistan and raised serious questions as to the scope of authorities, and even more so, to the balance of powers in the country.

Moreover, as judicial review became more prominent in the Afghan legal community, other gaps, ambiguities and missing pieces became prominent in the relevant constitutional provisions. The scattered fashion in which judicial review provisions appeared in the Constitution, has divided this power between different institutions, or has left out matters that would ideally be inherent to judicial review power. The followings are some examples from the Constitution:

1. Review of Government Actions:

While the core of judicial review is to check the conformity of laws with the Constitution, many countries with Constitutional Courts empower these courts to examine government actions. These powers, among others, include: adjudication of violation of constitutional rights by state institutions or officials, resolving disputes within vertical and horizontal state institutions for enhanced accountability, resolving electoral disputes, certifying electoral results, conducting impeachments for senior public officials or validating such impeachments and adjudicating issues related to political parties.

³⁴ Article 2(15) of the Regulation on Preparing and Processing Legislative Documents defines *scrutiny* as: “a meticulous examination of words, terminologies, sentences and phrases in the initial draft, both from a form and substance point of view, for their compliance with the rules of the Islamic Sharia, Constitution, [and] other enforced laws, in observation of treaties and international covenants to which Afghanistan has acceded, and the sound customs of the society.” See, “Regulation on Preparing and Processing Legislative Documents,” 1081 Official Gazette § (2012).

³⁵ Personal communication: Mr. Khuda e Nazar Nasrat, Secretary General for Wolesi Jirga, Mr. Ghulam Hassan Gran, former Secretary General for Wolesi Jirga, and Mr. Timor Shah Qaweem, Deputy Secretary General for Mishrano Jirga.

³⁶ Kamali, “Afghanistan’s Constitution 2004 : An Islamic Perspective on Interpretation.”

Under the Constitution of 2004, the power of constitutional review for a public institution's actions is granted to the ICOIC under article 157. The provision allows the ICOIC to supervise the enforcement of all provisions of the Constitution, and the actions of all those who have a mandate under it. To elaborate, according to this article, the ICOIC is responsible for examining whether state institutions or public office holders implement the Constitution correctly and whether their actions are in compliance with the Constitution. The Commission's law adopted in 2009 also emphasises its power to "oversee observance and implementation of the provisions of the Constitution by the President, government, National Assembly, Judiciary, Administrations, governmental and non-governmental organisations and institutions."³⁷

While many constitutions have combined these two powers and entrusted them to one institution, the Afghan Constitution has dispersed them between two institutions: the judiciary, to check compliance of the laws, and the ICOIC, as inferred from the text of article 157, to check compliance of actions with the Constitution. The main reason appears to be the judiciary's explicit purview to hear and resolve controversies in the form of litigations, and its limitation to abstractly oversee and review the constitutionality of state institutions' acts. In any case, this is one example of constitutional review being divided between two different institutions.

2. *Repugnancy clause:*

Many of the constitutions of Afghanistan have contained a repugnancy clause; however, they have failed to provide any criteria. The Constitution of 2004, similarly, requires conformity of the laws with Islam, in addition to the Constitution. Article 3 of the Constitution reads:

In Afghanistan, there shall be no law repugnant to the beliefs and ordinances of the sacred religion of Islam.

The article does not elaborate on what precisely beliefs and ordinances include, nor does it provide any mechanisms and procedures for review of such compliance. Furthermore, it does not empower any institution to determine such compatibility. What is seen in practice is that the Parliament has inferred that this is one of their powers, and they have used it to strike down laws that they find conflicting with Islam. Discussing a similar article in the Constitution of 1964, Mohammad Hashim Kamali has noted:

Experience has shown...that people tend to exaggerate and declare instances even of minor divergence with Islamic rules as contravention of major proportions. Instances of this can be found in some of the parliamentary debates in the late 1960s in reference to such issues, for instance, child marriage and polygamy. When the more conservative deputies wanted to oppose reform proposals tabled by government on these issues, they dismissed them as being in conflict with the principles of Islam. In fact, the suggested reforms were often founded in a rationale of their own and violation of the principles of Islam was not at issue.³⁸

An example of a similar approach by Parliament in the recent years is the law on Elimination of Violence against Women (EVAW) that was labelled as anti-Islamic. The parliamentarians had fiercely contended that for the law to be passed "early marriage and forced marriage should not be considered crimes, shelters [used by women who are victims of domestic violence] had to be abolished, women who wanted to work needed their husbands' approval and the conditions for multiple marriages had to be got rid of."³⁹

On that account, the Constitution should have vested the power of review of laws for their conformity with the Sharia in a technical institution with Islamic law expertise, ideally under the Supreme Court, so as to allow for objective review of laws, and avoid political interferences and vague interpretations. Vesting this power in to a separate institution will also create a strong mechanism of checks and balances between the branches of the state.

³⁷ Although there was a dispute between the Parliament and Supreme Court on certain powers of the Commission, the power of oversight was not one of those. See, article 8 (2), "Law on Independent Commission on Overseeing the Implementation of the Constitution," Official Gazette no. 986 § (2009).

³⁸ Mohammad Hashim Kamali, "References to Islam and Women in the Afghan Constitution," *Arab Law Quarterly* 22 (2008), 287.

³⁹ Christine Roehrs, "Damage Avoided, for Now? The Very Short Debate about the EVAW Law," *Afghanistan Analysts Network*, 18 May 2013, available at: <https://www.afghanistan-analysts.org/damage-avoided-for-now-the-very-short-debate-about-the-evaw-law/>. Last accessed October 20, 2016.

3. *Review of Regulations:*

Government agencies are delegated powers by the Constitution or Parliament to issue administrative rules, commonly known as regulations. Regulations are not laws, but rather secondary legislation. However, they have the force of law, can be applied by the courts and may include penalties for violations or non-compliance. The general view is that every regulation must find its origin in some principal legislation. Hence the government can only issue regulations when there is an explicit provision in a statute allowing the government to do so. Further, the courts can invalidate a regulation if found inconsistent with the principal law.⁴⁰

The Constitution of Afghanistan vests the law-making power in the National Assembly of Afghanistan. Nevertheless, it also delegates power to the executive branch to issue and approve regulations. According to article 76 of the Constitution:

To implement the fundamental lines of the policy of the country and regulate its duties, the government shall devise and approve regulations. Such regulations shall not be contrary to the body or spirit of any law.

The Regulation on Preparing and Processing Legislative Documents presents a narrower definition of the regulations as: “a set of rules issued by the government in order to implement fundamental lines of policy of the state, better execute the provisions of the [statutory] law and organise the duties of ministries and government institutions.”⁴¹ As per this definition, regulations may define procedures for better application and enforcement of a law, or may present independent rules to define mechanisms for execution of mandate. An example of the former is the Regulation on the Establishment and Registration of Political Parties, and of the latter, the Regulation on Assessment of Educational Documents.⁴²

The Constitution prohibits any contradiction of the regulations with the law; nonetheless, it fails to empower any institution to review the conformity of regulations with law. Although passed by the government, a regulation derives its legitimacy from Parliament, in case it is an offspring of a statutory legislation, while, as an independent set of rules, a regulation gets its legitimacy from the government, despite the fact that it sets rules for its institutions. Ideally, an independent body should conduct review of regulations.⁴³ However review of such regulations, in particular with regard to the fundamental rights of the citizens, is missing from the Constitution of Afghanistan.

4. *Finality of the decisions of Supreme Court on the judicial review cases:*

Another important element missing from the Constitution pertains to the finality of the decisions of judicial review. Although it could be argued that article 121 implies that judicial review decisions are final, there have been instances that indicate its equivocality. Due to this lack of explicitness, Parliament has disregarded the Supreme Court’s judicial review decision. The refusal of the Court’s decision on the unconstitutionality of certain provisions of the ICOIC law by the Parliament can be cited as a major example. On the other hand, Parliament did not give the ICOIC the power to issue binding decisions under article 157. Articles 8 and 9 of the ICOIC’s Law allows the ICOIC to only provide “Legal Opinion” and “Legal Advice.” Therefore, although review and oversight may take place, the possibility of rejection or lack of acceptance is high. On certain occasions the Parliament itself has disregarded the ICOIC’s Legal Opinion. For instance, the Parliament had asked the ICOIC for its opinion on whether providing oversight powers to the Provincial Councils be contrary to the relevant provisions of the Constitution. The ICOIC held that providing such powers to the Provincial Councils would not violate constitutional provisions. However, the Parliament disregarded the opinion and deprived the Councils from the oversight power on grounds of unconstitutionality.

40 Edward Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (Oxford - Portland: Hart Publications, 2001).

41 *Regulation on Preparing and Processing Legislative Documents*, article 2(5).

42 “Regulation on Establishment and Registration of Political Parties,” Official Gazette no. 1026 § (2010). and “Regulation on Assessment of Educational Documents,” Official Gazette no. 1066 § (2011).

43 In France, for instance, the power of review of regulations for conformity with laws and the constitution is vested in the supreme administrative court: Conseil d’Etat.

2.3 Power of interpreting the Constitution

There is general agreement that constitutional provisions are not always very clear, and require interpretation. As Chemerinsky noted: “[if] all provisions of the Constitution were unambiguous, constitutional interpretation would pose no difficulty... The problem of constitutional interpretation arises because a number of key clauses are vague and open-ended... The Constitution is replete with [ambiguous] phrases... As a result, the central questions in constitutional law are who should give meaning to these provisions and how should this be done.”⁴⁴

On Chemerinsky’s two questions -- who should interpret the constitution, and what methods of interpretation be used? -- while there could be disagreements on the methods of interpretation in order to best interpret the constitutions, there are no examples that show conflict over “who” should do the interpretation. Unfortunately, Afghanistan still struggles with this very basic question on which of the two institutions has the authority to interpret the Constitution. At the early stages of the implementation of the Constitution, interpretation was regarded as an implied power of the Supreme Court and was not disputed.⁴⁵ However, in the landmark case of impeachment of cabinet minister Rangin Dadfar Spanta in 2007 by Parliament,⁴⁶ the President’s rejection of the decision for lack of convincing reasons, followed by the endorsement of the President’s refusal by the Supreme Court, highlighted two major constitutional issues:

1. Does the Supreme Court have the power to interpret the Constitution?
2. Which institution has the power to resolve inter-branch disputes under the Constitution of Afghanistan?

The following section will briefly respond to the questions raised.

Does the Supreme Court have the power to interpret the constitution?

As discussed above, the provisions for the Supreme Constitutional Court were removed from the draft constitution; subsequently, the powers were divided between the Supreme Court and the ICOIC. The root of the problem was in the drafting process, in particular at the Constitutional Loya Jirga, where members rephrased article 121, resulting in ambiguity on the authority to interpret the Constitution. One of the authors of the Constitution notes: “A certain ambiguity ... exists in the wording of Article (121) ... Those who believe that constitutional interpretation is from the jurisdiction of the Supreme Court argue that the pronoun ‘their’—aanha, in Dari—in the text of the Article includes the Constitution as well. Grammatically speaking, it would be just a little short of forced interpretation to say that ‘their’ in Article (121) also includes the Constitution.”⁴⁷

Following the case of Spanta, this lack of explicitness gave rise to different opinions, first, by the Supreme Court and Executive that the Court by default has the power of interpretation, because “their interpretation” in the article refers to the Constitution among other legal documents. Second, by the Parliament, that the Constitution is silent about interpretation, and therefore, the Supreme Court cannot claim this power.⁴⁸ A third, later understanding by the ICOIC argued that when the Constitution requires the ICOIC to be established based on statutory law, and the approval of such laws is the power of the Parliament, then the Parliament has full authority to vest any powers to the ICOIC, particularly when they are not granted to any other institution.⁴⁹ No

⁴⁴ Erwin Chemerinsky, “The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review,” *Texas Law Review* 62 (1983 1984), 1211.

⁴⁵ Mohammad Hashim Kamali, “The Relationship Between Executive and Parliament and the Problem of Constitutional Interpretation and Adjudication During the Karzai Years,” ed. Tilmann J. Röder and Sayed Hameed Zia, *Hamida Barmaki Organization for Rule of Law - Working Papers*, no. 01 (2015).

⁴⁶ For details and background of the case, see: Farid Hamidi and Aruni Jayakody, *Separation of Powers under the Afghan Constitution: A Case Study* (Kabul: Afghanistan Research and Evaluation Unit, 2015), 31-35.

⁴⁷ Kamali, *Afghanistan’s Constitution Ten Years On: What Are the Issues?* 12.

⁴⁸ Ibid. 12.

⁴⁹ Mohammad Amin Ahmadi, “The Authority of Constitutional Interpretation in Afghanistan,” *Independent Commission on Overseeing the Implementation of the Constitution*, n.d., available at <http://www.icoic.gov.af>.

institution's speculations were accepted by the other, and there was no consensus, as is the case today, on which has, or should have, the power of interpretation of the Constitution. As such, this ambiguity has become an issue of continuing disagreement between the three branches of the State.

It is important to note that if many institutions have to follow and implement the Constitution, then the same ones are likely to interpret it. Therefore, there is no exclusivity in interpretation being a judicial authority. Any branch of the government can interpret the Constitution, and in doing so, there will undoubtedly be conflicting interpretations. However, in such circumstances, there must be one institution with the authority to provide the final and binding interpretation, one that is binding on all other institutions.⁵⁰ Applying this theory within the Afghan context, Parliament may interpret the Constitution, while drafting and approving legislation; and the executive while implementing the legislation. Similarly, the Supreme Court would not be able to exercise judicial review unless they interpret the Constitution and confirm the compliance of statutes to it; and comparably, the ICOIC will not be able to exercise their supervisory power without being able to first interpret the Constitution.

With regards to the Supreme Court and the ICOIC, and which is the right institution for interpretation, two elements are important to note. The first is the extent of constitutional powers provided to each to discharge this power; and second, whether other institutions have access to them to request interpretation. In the judiciary, although the Court can, and should, exercise the power of interpretation for any judicial review cases, its power to interpret the constitution on all cases is limited by a number of factors. Even assuming that, under article 121, the Supreme Court has the implied power of interpretation, the power is limited both in scope and referrals. As stated by Tom Ginsburg:

Article 121 says that the government or courts can request the Supreme Court to review laws and treaties for compatibility with the constitution. It does not, however, explicitly give it the general power to "interpret" the constitution outside of this context. Thus if there were a dispute over what body is assigned a constitutional power, there would be no mechanism for resolving it.⁵¹

In general, constitutions that depart from the past are ambitious to create "better" institutions and enumerate more rights for their citizens. Such reform-minded constitutions usually envision provisions that the country has not experienced in the past. Hence, what is written on the paper might bring uncertainty, particularly at the early stages of implementing a new constitution. Those are the instances when the stand-alone interpretation of the constitution—unlike those as a part of a checking mechanism—becomes crucial. As the constitution matures, and precedents are established, there is more certainty and potential for agreement among the branches of the state on their mandates. Hence, the demands for such interpretations substantially decline.

The practice of this type of interpretation requires a wide range of access to the Court, including the formal institutions of the state, as well as the watchdog bodies such as Human Rights and Elections commissions, and civil society. In the past 12 years, the need for such interpretation in Afghanistan has been very high; however, the ambiguity in the text and disagreement among the branches has allowed the executive branch of the government to interchangeably refer to the two institutions and do forum shopping when they need a constitutional interpretation.

⁵⁰ Dr. Ulrich Maidowski, Justice of the Second Senate, German Federal Constitutional Court, conference proceeding held at Heidelberg Germany, June 2016.

⁵¹ Ginsburg, "Comparative Constitutional Review." 6.

Which institution has the power to resolve inter-branch disputes under the Constitution of Afghanistan?

In the aftermath of the Spanta case, there were attempts by different institutions to resolve the ambiguity in the power of interpretation. First, the Supreme Court presented an amendment to the Law on Organization and Jurisdiction of Courts to clarify that it had the power of interpretation.⁵² Parliament, however, rejected the proposal for amendment and approved the law, initiated by the government, on article 157 defining the powers of ICOIC. In this law, Parliament gave the power of interpretation to the ICOIC. Even though the President vetoed the law, Parliament overrode it with a two-thirds majority. The President then referred the law to the Supreme Court for judicial review based on article 121.

It was clear from the outset that the Supreme Court ruling would invalidate the law, reasoning that it encroached on the Court's jurisdiction. Hence, prior to the decision, Parliament openly expressed its disregard for any review. They explained that the Court's review is a clear conflict of interest, and it cannot review and invalidate a law that alienates one of its assumed powers. As the law was published in the Official Gazette, a Supreme Court ruling appeared before the law invalidating the provisions of the law that the Court deemed unconstitutional. However, the Court, mistrustful of Parliament to change the law after this ruling, went so far as to omit the provisions it deemed unconstitutional, and provided footnotes explaining the reasons. Therefore, the Supreme Court, in order to protect its jurisdiction, actually infringed upon the law-making powers of the Parliament by modifying the law. Parliament disregarded the decision and maintained its position on the powers of ICOIC. Thus, the lengthy and ineffective process produced a law that was approved by Parliament, considered unconstitutional by the President, called unconstitutional by the Supreme Court, and yet in force in both versions. The approval of this law gave rise to a situation in which two institutions carry out interpretation, and authorities use them interchangeably, depending which institution is more likely to provide a decision in their favour.⁵³

This inter-institutional dialogue signified a major constitutional flaw: the absence of a mechanism and an institution to resolve inter-branch disputes. When constitutional questions arise and there is no consensus between the branches of the government, as in the examples above, there is no constitutional institution specified with the power to adjudicate and resolve such disputes.

Eventually, the intensity of the dispute over the power of interpretation has overshadowed the importance of judicial review in the Afghan constitutional order. Hence article 121 is seen as the interpretation clause, rather than the judicial review clause.

⁵² Dempsey and Thier, "Resolving the Crisis over Constitutional Interpretation in Afghanistan," 4.

⁵³ Examples of this are seen in the case of Special Election Tribunal, when the President sought opinion from both institutions for constitutionality of the Court.

PART THREE: ENFORCING JUDICIAL REVIEW

3. Judicial Review: 12 Years of Practice

Constitutional review is overseeing of the law-making powers of Parliament and the executive.⁵⁴ For a similar purpose, judicial review was incorporated in the Constitution of Afghanistan in 2004. Nevertheless, it was anticipated that judicial review would be followed by challenges. Judicial review not only remained broad and imprecise, but was also envisioned as a difficult task, particularly for the Supreme Court, as the institution had never exercised judicial review in the past.

As much as the decades of war damaged the judiciary in Afghanistan, historically, a deep legacy of political interference and executive dominance marred its development into an independent and strong branch of the state.⁵⁵ Expectedly, as the judiciary was being established under the Constitution of 2004, it was suffering not only from damages to office structures, equipment and records, but also much more severely from lack of competent judges and judicial personnel.⁵⁶ For an effective judiciary, wide-ranging changes were required to transition to a competent and independent branch as outlined by the new constitution.⁵⁷

Indisputably, an almost broken judiciary was incapable of immediately taking charge of such ambitious powers entrusted to it—including some that were all too new to it. In light of this, building the capacity of the judges and educating them on the new constitution was a fundamental prerequisite for the judiciary before it exercised its oversight powers such as judicial review and upholding constitutional rights. In addition, it had to assert its independence, so as to wield its constitutional powers to restrain the other branches if they acted against or beyond their constitutional mandate. It was to be seen whether the judiciary would stand out as a strong institution despite its serious capacity challenges, and the executive's tendency to overshadow it. In the years after the Constitution, the problems that the judiciary faced in practice proved that it was facing severe problems in exercising its constitutional powers.

Assessing the overall performance of judiciary in the last 12 years would be beyond the scope of this paper; therefore, it will briefly assess the implementation of judicial review by the Supreme Court. In the past 12 years, judicial review has been marked by a lack of statutory law (required by the Constitution), procedures, requests by lower courts, standard legal reasoning, and consistency. These shortcomings (discussed in detail below) are coupled with unavailability of many of the decisions, making it difficult to assess the quality of reviews both substantively and procedurally. The section below will briefly study these shortcomings.

⁵⁴ “Constitution of Afghanistan” (2004). articles 121 and 157; and the *Law on Independent Commission on Overseeing the Implementation of the Constitution*.article 8.

⁵⁵ For details of political interferences in the judiciary under different regimes, see: International Crisis Group, “Reforming Afghanistan’s Broken Judiciary” (Kabul/Brussels: International Crisis Group, November 2010). 4-7.

⁵⁶ For details on the state of the judiciary after the conflict see, Wardak, “Building a Post-War Justice System in Afghanistan” (State reconstruction and international engagement in Afghanistan, LSE Research Online, 2003), <http://eprints.lse.ac.uk/28381>. 328.

⁵⁷ See, for example: Martin Lau, “Final Report on Afghanistan’s Legal System and Its Compatibility with International Human Rights Standards,” (International Commission of Jurists, 2003), available at: <http://www.refworld.org/docid/48a3f02c0.html>, and International Crisis Group, “Reforming Afghanistan’s Broken Judiciary.”

3.1 The legal framework and procedures for judicial review

In general, constitutions do not provide detailed rules for every provision they stipulate. The provisions may intentionally remain general or vague by the drafters for a variety of reasons. One reason could be lack of consensus, information and/or expertise among the drafters.⁵⁸ Another reason for employing general and vague provisions is when the drafters face time constraints. Constitution drafters may also defer decision-making to the future with the intention not to bind their successors, mainly the legislature. Uncertainties on the side of the drafters could also be a reason; therefore, the drafters, instead of stalling the process, choose to defer this to the future lawmakers, who would regulate the matter while having a fairer idea about the potential outcomes.⁵⁹ This practice, known as deferral, is seen in many constitutions where provisions will use the terms “by law” or “in accordance with law”.

The practice is commonly seen in the Constitution of Afghanistan as well. For instance, a similar approach was used with judicial review, which was left by the drafters without details or procedures for the Supreme Court to fulfil it. Whereas the Constitution recognised Supreme Court’s power to check legislation, it left the details to be regulated by statutory law. Law, as defined by the Constitution, is “what both houses of the National Assembly approve and the President endorses,”⁶⁰ and can be initiated “by the Government or members of the National Assembly or, in the domain of regulating the judiciary, by the Supreme Court, *through the Government* [emphasis added].”

The Constitution, by leaving the elaboration of one of the most crucial powers of judiciary to the discretion of Parliament (and the executive), had clearly created competing interests between the branches of the government. The Constitution allowed the judiciary to propose a law for this power; nevertheless, it had to be presented to the government that would then present it to Parliament. Parliament was empowered to pass the law, which in fact aimed to limit its legislative powers. Ideally, Parliament should not be left in a position to regulate its own overseer. For the same reason, this power should be well defined by the Constitution. If delegated to Parliament, there is little, if any, chance that it will grant extensive powers to the judiciary. The possibility of such contention is higher in nascent constitutional orders, where institutions struggle to secure more power for themselves by trying to limit the powers of other branches.

In the last 12 years, the Supreme Court never attempted to propose a law for judicial review. Although the Law on Organization and Jurisdiction of Judiciary (LOJJ) entrusts the High Council with the power, it provides no details on how the Council should conduct judicial review. In addition, the Court has endorsed numerous regulations, procedures and guidelines to regulate the internal affairs of the judiciary, though none on judicial review.⁶¹ Hence, judicial review has endured as one of the general authorities of the High Council of Supreme Court, consisting of all nine justices and the highest decision-making body of the Court.⁶² The practice, as described by Supreme Court staff, is artless.⁶³ This is because the High Council conducts judicial review in the absence of substantive rules and procedural guidelines. In view of these circumstances, when the Court is requested a review of constitutionality of a law or an interpretation, the General Directorate for Scrutiny and Perusal of the Supreme Court prepares a draft as the basis for justification. The issue then becomes a weekly agenda item for the High Council, which, without much deliberation, issues a decision.⁶⁴

58 Markus Böckenförde, Nora Hedling, and Winluck Wahiu, *A Practical Guide to Constitution Building* (Stockholm, Sweden: International IDEA, 2011), 49-50.

59 Rosalind Dixon and Tom Ginsburg, “Deciding Not to Decide: Deferral in Constitutional Design,” *International Journal of Constitutional Law* 9, no. 3-4 (2011), 637-641.

60 *Constitution of Afghanistan, 2004*. article 94.

61 *Saalmnama Qaza (the Judicial Yearbook): A Reflection of the Activities and Achievements of the Judicial Branch*, vol. 1 (Kabul: Supreme Court of Afghanistan, 2014), 87-90.

62 “Law on Organization and Jurisdiction of Judiciary,” Official Gazette 1109 § (2013). articles 24 and 28. Despite the fact that the organization of Supreme Court includes five chambers, each with exclusive jurisdiction and headed by a Justice, none of the chambers have authority over judicial review. The five chambers of the Court are: 1) Public Crimes Chamber, 2) Public Security Chamber, 3) Civil and Public Rights Chamber, 4) Commercial Chamber, and 5) Military Crimes and Crimes Against Internal and External Security.

63 Supreme Court staff (*anonymity requested*), personal communication, June 2016.

64 Interview with the head and staff of the General Directorate for Scrutiny and Perusal, at the Supreme Court of Afghanistan, 13 July 2016.

This practice, without any rules and regulations, gives enormous discretion to the High Council of the Supreme Court. Consequently, on one hand, the manner in which the Court exercises judicial review gives rise to inconsistency and lack of objectivity in the decisions of the court. On the other hand, it is endangering the development of judicial review as a power-restraining mechanism for other branches. Most importantly, in the long term, it will deepen the already existing disillusionment with the judiciary, its competency and independence.

3.2 Referrals for judicial review

An important question in practicing judicial review is how the court receives a request for review. Countries may use different mechanisms, however these are linked with a model of judicial review. For instance, in concrete review cases, the party that initiates the lawsuit challenges the constitutionality of a legislation or executive action.⁶⁵ In countries like the US, such claims can be heard and adjudicated by the court in which the claim is made. In other countries, lower courts do not have this authority, and have to refer the case to a higher court, or to a constitutional court. In abstract review, the request for constitutionality can be made at the request of a designated public actor (such as the president, the legislature, ombudsman, independent commissions, etc.), in constitutional complaints, at the instance of the individual whose right has been infringed.⁶⁶

Judicial review, in accordance with article 121, is limited to referral by the government and courts. Other institutions (some listed above) cannot refer a law for a constitutionality check. Although Parliament, as the legislative body may not be expected to send a law for constitutionality, they should however, be allowed to refer a legislative decree, a treaty or a covenant, for a check before they vote on it. Furthermore, the article does not allow the ICOIC or the Afghanistan Independent Human Rights Commission (AIHRC), or any other institution to make such a request, even if they identify that a certain law violates certain fundamental rights of the citizens. The sections below will briefly look at the referrals made to the Supreme Court for judicial review by courts and government.

1. “At the request of courts”

The Constitutional text on referral of cases by lower courts does not provide details. In the absence of a statutory framework, there are no further rules on how the courts could refer a case to Supreme Court, and whether at the request of the parties the judge of the lower court could refer the law, applicable on the case, for a constitutionality check. Hence, in the last 12 years of the practice of judicial review, no questions were raised by the lower courts on the constitutionality of a statute. The courts have only asked for clarifications and interpretations of certain articles of the Constitution.⁶⁷

Although there are claims that at least one case was referred to the Supreme Court for constitutionality, the case was not referred by a lower court, but rather by the General Directorate for Scrutiny and Perusal of the Supreme Court. The Directorate claimed that article 27 (2) of the Law for Secured Transaction on immovable Property in Banking Transactions, that allowed the banks to sell the security over a loan transaction, in case the court did not rule on the case within 20 days, in violation of article 122 of the Constitution. Article 122 prohibits the inhibition of the jurisdiction of the judicial organ by any law under any circumstance. Therefore, the Directorate found this provision a limitation of the jurisdiction of judiciary and asked the Supreme Court to

⁶⁵ For a party to bring such a claim to the court, however, the party must have *standing*: an individual’s legal right to initiate a claim in a court. To get the right of standing, the litigant must have been directly affected and have sustained (or will be affected and will sustain) direct injury or harm by the matter at hand, and the matter could be resolved by legal action.

⁶⁶ Thomas Fleiner and Cheryl Saunders, “Constitutions Embedded in Different Legal Systems,” in *Routledge Handbook of Constitutional Law*, ed. Mark V. Tushnet, Thomas Fleiner, and Cheryl Saunders (Abingdon, Oxon; New York, NY: Routledge, 2013), 26-28.

⁶⁷ Personal communication with Justice Abdul Qader Adalatkah, member of the high Council of Supreme Court and Mr. Ahmad Hussain Khenjani, Deputy Secretary General, Supreme Court, October 2016. See also, *Collection of Supreme Court Circulars, Decisions, and Guidelines for 1385-89 (2006-10)* (Kabul: Supreme Court of Islamic Republic of Afghanistan, 2011).

pronounce it unconstitutional.⁶⁸ It is important to note that the Directorate did not have the legal authority to refer the law to the Court, and the Supreme Court still accepted the claim and found the law unconstitutional based on this reference.

The reason the judges of the lower courts have never asked for judicial review is two-fold: one, lack of rules and guidance at the Supreme Court level to the judges of the lower level; and two, lack of constitutional experience among the judges of lower courts.

Afghanistan follows the civil law legal system, in which the way the judges perform their judicial functions differs from the judges in the common law system. Civil law is generally seen as a tradition in which ordinary judges -- unlike their counterparts in the common law -- are passive and do not “exercise any vision,” but follow the text of the law closely and narrowly.⁶⁹ John Henry Merryman, in his famous book “The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America” notes that civil law judges are provided with detailed legislation, therefore, for any judgment they make, the “major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows.” Merryman concluded that a judge in a civil law context is perceived as an “operator of a machine designed and built by legislators.”⁷⁰

While it may not be fair to generalise the characteristics of the civil law judge in all contexts, in some civil law jurisdictions, Afghanistan being one example, they are still passive actors in the judicial machinery. Afghan judges suffer from lack of institutional and personal development as a result of decades of conflict, inadequate legal education, and dominance of strong executives;⁷¹ thus they closely follow the text of the law on the cases they adjudicate. In the case of judicial review, judges in Afghanistan do not have any rules or regulations, except for article 121, which gives no details on the procedures under which judicial review should be conducted. This creates a huge challenge for the judge to understand and practice judicial review. Thus, one can conclude that the concept of judicial review is alien to the judges of the lower courts, in the absence of a statutory law that clearly defines the procedures for judicial review.

Judicial review in Afghanistan is vested in the highest judicial organ—the Supreme Court—and ordinary courts do not have jurisdiction on any constitutional matter. Hence, the centralised review system limits the chance for lower-tier judges to acquire any knowledge or experience of dealing with constitutional cases. If appointed to Supreme Court, the judges find themselves with lack of requisite knowledge, not to mention a lack of a repository of well-reasoned constitutional cases and a framework and procedures on which they could rely. Besides, the judges have never received any training on this, and the majority see article 121 exclusively as the interpretation clause, rather than the judicial review clause.⁷²

In Badakhshan, a lower court judge dismissed a case because it involved a dispute over interest rates in a banking transaction. The judge found the interest over a bank loan un-Islamic, and thus held that the case and the law were unconstitutional based on article 3. The parties to the case then appealed to the appellate court of Badakhshan, which accepted and heard it.⁷³ This case is a clear example of confusion among the judges both on their own authority, and the practice of judicial review. Article 121 clearly vests the power of judicial review to the Supreme Court; however, cases like this indicate a clear lack of procedures to lower court judges on how to deal with questions of unconstitutionality, or inconsistency with Islamic rules and principles.

68 Interview with the head and staff of the General Directorate for Scrutiny and Perusal, at the Supreme Court of Afghanistan, 13 July 2016.

69 Herman Schwartz, “Constitutional Courts and the Implementation of Human Rights,” in *Constitutionalism in Transition: Africa and Eastern Europe*, ed. Mihaela Serban Rosen (Warsaw: Helsinki Foundation for Human Rights, 2003), 175.

70 John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed. (Palo Alto, CA: Stanford University Press, 1990), 36.

71 International Crisis Group, “Reforming Afghanistan’s Broken Judiciary.” p. 14.

72 Personal communication, Judge Aref Hafiz, member of ICOIC, October 2016.

73 Interview with the head and staff of the General Directorate for Scrutiny and Perusal, at the Supreme Court of Afghanistan, 13 July 2016.

These factors not only have impeded the evolvement of an independent and active judiciary, but also of impartial and visionary judges. Thus, due to the character of the judges under civil law, their lack of constitutional law expertise and absence of a defined legal framework, the institution of judicial review has not grown in Afghanistan.

2. “At the request of government”

The second authority to request judicial review is the government. In the last 12 years, the Supreme Court has primarily and exclusively exercised its judicial review powers at the request of government. This section will look into two issues. First, what constitutes the government; and second, what cases has it presented to the Supreme Court.

The first issue is addressed by article 71 of the Constitution: “The Government shall be comprised of Ministers who work under the chairmanship of the President.” Nonetheless, the President himself initiated the majority of the requests made to the Supreme Court. According to this definition, the government comprises both the President and ministers; therefore, the admissibility of the case for review by the Court must satisfy the requirements under articles 121 and 71. In certain circumstances, however, the judiciary’s acquiescence to political questions has inhibited the Court from determining its jurisdiction, the *justiciability* of a case (types of matters that the courts can accept to adjudicate), and *standing* of parties (the right of an individual to initiate a legal claim).

For many, including Parliament, the Court did not have the jurisdiction to hear or review the constitutionality of the impeachment of Minister Spanta. Parliament had argued that, based on article 121, the Court could only review laws, legislative decrees, international treaties, and international covenants. The Court had no power to review and overturn an act of impeachment by Parliament.⁷⁴ Nevertheless, the President had argued that an interpretation was required to ensure that Parliament followed the impeachment procedures set out by article 92. Conversely, a closer look at the questions presented by the President to the Court reveal that the case of Spanta could both be defined as a case of interpretation or of constitutionality of Parliament’s actions.⁷⁵ The questions read:

1. *Article 92, Clause 3 of the Constitution provides: “The no-confidence vote on a Minister shall be explicit, direct, as well as based on convincing reasons.” If the justification of the Wolesi Jirga of the Islamic Republic of Afghanistan is the fact that the Foreign Minister did not take measures to prevent the expulsion of Afghan Refugees by the authorities of the Islamic Republic of Iran, taking into account the degree to which the decisions of the Foreign Minister of one country [Afghanistan] could influence the policies of another country [Iran], is this a “convincing reason” pursuant to Article 92, Clause 3 of the Constitution?*
2. *[Article 92, Clause 3 of the Constitution provides: “The vote shall be approved by the majority of all members of the Wolesi Jirga.”] Based on the accepted formula of 50 percent plus 1 [which constitutes a majority] of votes in the Wolesi Jirga, 124 votes (50 percent) were counted for the unseating of the Minister on the first day of voting. Because one vote was contested, the issue was referred for a second vote. In such cases, is the second vote legitimate and lawful? Or shall the decision be made based on negotiation and the ordinary National Assembly procedure (which relies on the first vote)?*
3. *One hundred ninety-five members of the Wolesi Jirga were present on the first day of voting, whereas 217 were present on the second day of voting. The members who were absent for the first vote did not hear the questions and answers during the interpellation session. Should their judgment and vote be considered under the law?⁷⁶*

⁷⁴ See, Dempsey and Thier, “Resolving the Crisis over Constitutional Interpretation in Afghanistan,” 3.

⁷⁵ For details of the questions presented by the President to the Supreme Court see, Rose Leda Ehler et al., *An Introduction to the Constitutional Law of Afghanistan* (California: Afghanistan Legal Education Program, 2013), 81-86.

⁷⁶ *Ibid.*

It is apparent that the first question is asking for an interpretation, while the other two question the constitutionality of Parliament's actions. The court had the option of rejecting the case on the basis of lack of jurisdiction, but it chose to accept it as a mere question of interpretation. Understandably, while asking for an interpretation—at a time when the authority of the Supreme Court was not challenged—did not entail any questions over jurisdiction, it surely could raise questions over *justiciability* and *standing* in the case under consideration. The Court recognised the case as *justiciable* in the absence of any extant rules. The court also accepted the President's *standing* in the case, although article 121 authorises such a referral only by the government.

On a similar question, however, Interior Minister Mujtaba Patang, when impeached by the Wolesi Jirga some years later, petitioned to the Supreme Court to determine whether this was based on convincing reasons. Patang was raising similar questions to those of Spanta's case that the Court had found unconstitutional. However, the court held that Patang, as an individual Minister, did not have *standing* before the court, and refused to hear the case. The Court reasoned that only the executive or the President could make such a request.⁷⁷ The point however, is that neither the case of Spanta, nor that of Patang were judicial review cases, but rather requests for interpretation of the Constitution, and required the Supreme Court to check the constitutionality of a parliamentary act.

Although both the cases were presented to the Court by individuals, that is, the President and Minister Patang, it chose to accept the case of the former, and reject the latter, on the basis of lack of *standing*. The Court had based its argument on article 121 that requires the review to be requested by the government or courts. It is important to note that if article 71 does not allow an individual minister to approach the Court for an opinion, it cannot allow the President as an individual to do so. As individuals, none of the two mentioned can constitute the government, because it is explicitly defined as a collective body by the Constitution. If the Court requires a referral from the government, then, based on article 71, it has to be from the cabinet (comprised of ministers and chaired by the President) and not the President. In the cases of Spanta and Patang, the questions presented to Supreme Court were indisputably political, and so were the subsequent rulings.

The other important point of consideration is the legislation that the government has presented to the Supreme Court for judicial review. The examination of these laws shows that judicial review was used as a means by the President to succeed in policy disagreements with the Parliament. The President, on several occasions, which are discussed more fully below, had used judicial review against Parliament after exhausting all constitutional remedies to ensure his policy options are well reflected in the law. These laws include the Media Law of 2009, the ICOIC law of 2009, the Law on Diplomatic and Consular Employees of 2013, and the law on the salaries of the high governmental officials.⁷⁸ Other than these, there are no records available for judicial review of legislation by the Supreme Court.

3.3 The imbalance between legal and political reasoning

An independent judiciary empowers the judges to make impartial and unbiased decisions, and provides checks and balances on other branches of the government,⁷⁹ and ensures rule of law. The Basic Principles on the Independence of Judiciary, endorsed by the United Nations General Assembly, requires judiciaries to decide cases with: "impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."⁸⁰ For judges to reach a desirable decision, with elements mentioned above, they should enjoy a great deal of independence.

⁷⁷ Kamali, "The Relationship Between Executive and Parliament and the Problem of Constitutional Interpretation and Adjudication During the Karzai Years."

⁷⁸ The first three laws are published in the official gazette; the last one is not published in the gazette but was obtained by the author from the Supreme Court.

⁷⁹ Constitution Project, "The Newsroom Guide to Judicial Independence," 2006, Available at: <http://www.constitutionproject.org>.

⁸⁰ "Basic Principles on the Independence of the Judiciary, Endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985" (Milan: United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1985).

Judicial independence can be either institutional or decisional. The former is a constitutional guarantee that the judiciary is an independent, separate and co-equal branch of the government, while the latter is the authority granted to the judge by the Constitution or a statute to decide a case independently.⁸¹ For a judicial decision to be considered independent, of high quality and be effectively enforceable, it must be the outcome of accurate application of law, a fair trial, proper evaluation of facts, and legal reasoning.⁸² Among these, however, the court's reasoning in a judicial decision is of utmost importance. The Consultative Council of European Judges present their opinion on the significance of reasoning of cases under a court's review as follows:

The statement of the reasons not only makes the decision easier for the litigants to understand and be accepted, but is above all a safeguard against arbitrariness. Firstly, it obliges the judge to respond to the parties' submissions and to specify the points that justify the decision and make it lawful; secondly, it enables society to understand the functioning of the judicial system...

The opinion requires the following attributes for the reasoning in the judicial decision:

The reasons must be consistent, clear, unambiguous and not contradictory. They must allow the reader to follow the chain of reasoning which led the judge to the decision... The statement of the reasons must respond to the parties' submissions... In terms of content, the judicial decision includes an examination of the factual and legal issues lying at the heart of the dispute... The judge will also consider the weight of the factual evidence likely to be relevant for the resolution of the dispute... The reasons should refer to the relevant provisions of the Constitution or relevant national ... and international law.⁸³

Although, as a general principle, all judicial decisions must be well reasoned and be based on facts and law, the focus of a judge in a lower court is to "include the nature of the case, the issues, the facts, the law applicable to the facts, and the legal reasoning applied to resolve the controversy."⁸⁴ However, higher courts, including the Supreme Court, can provide "a succinct statement of the facts with the major emphasis placed upon the law."⁸⁵ Furthermore, the decisions made by high and supreme courts do not merely impact the individuals involved in the case, but also society at large. The outcome of these decisions are not just limited to the case at hand, but are important in common law jurisdiction for developing judicial precedents, while in civil law jurisdictions for entrenching consistency in jurisprudence of the court.⁸⁶ Additionally, because decisions of the Supreme Court cannot be appealed, it is important for the court to present well-reasoned decisions so as to attain justice and ensure some level of judicial accountability to society.

Despite the issues discussed above, it is important to note that judges making a decision in constitutional cases are presented with more complexities than those in ordinary cases. While judges are bound to reason on the basis of legal provisions in all ordinary cases, they might need to go beyond the law in constitutional cases. Many of the constitutional questions are political in nature, deal with much larger issues that are mostly unforeseen, and may require solutions compatible with changing dynamics of social, political, economic and even cultural life of the society. Even the Court's most technical power, that is, invalidating legislative enactments, could have significant political consequences, despite the fact that the reasoning might be purely technical.⁸⁷ Thus, on constitutional cases, it is difficult to expect that the Court could make all its decisions purely on the basis of legal norms. In fact, the Court may often present legal, political and, if required, social arguments in its decisions. However, it is also imperative for the Court not to base all its decisions purely on political grounds. There has to be some level of balance in the Court's reasoning. When the Court clearly has identifiable legal rules, it cannot base its decisions solely on political grounds.

81 Constitution Project, "The Newsroom Guide to Judicial Independence."

82 Consultative Council of European Judges, *Opinion on the Quality of Judicial Decisions*, Opinion No. 11 (Strasbourg: Council of Europe, 2008).

83 Ibid.

84 Joyce J. George, *Judicial Opinion Writing Handbook*, 5th ed. (Buffalo, New York: Hein & Co, 2007), 32-33.

85 Ibid.

86 S.I. Strong, "Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges," *Journal of Dispute Resolution* 2015, no. 1 (2015), p. 126.

87 Victor Ferreres Comella, "The Spanish Constitutional Court: Time for Reforms," *Journal of Comparative Law* 3, no. 2 (2009), 22-23.

As the author of a textbook in law notes, judicial decisions, especially those of high constitutional importance, should include certain judicial virtues. He explains these as:

Impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision. No doubt because a plurality of such principles is always possible it cannot be demonstrated that a decision is uniquely correct: but it may be made acceptable as the reasoned product of informed impartial choice. In all this we have the “weighing” and “balancing” characteristic of the effort to do justice between competing interests.⁸⁸

Unfortunately, many of these virtues have been missing from the Supreme Court’s rulings. For instance, in 2009, when the election administration bodies announced that the presidential elections could not be held as scheduled, a question was raised whether the term of the President, who was also a presidential contender, should be extended for another three months. The Court found that in order to avoid a vacuum of political power, the term should be continued.⁸⁹ The Court’s ruling incited uproar among Karzai’s opponents who called it “unacceptable and unconstitutional,” and were concerned about Karzai’s abuse of his position.⁹⁰ The court’s decision was based on nominal legal arguments, but rather essentially premised on political reasons. Karzai’s opponents said the Court’s decision was made “under pressure.”⁹¹

The way the Court has made its decisions on judicial review cases exhibits its inclination toward political, rather than legal, reasoning, and its lack of balance in presenting the two. For any court to deliver sound decisions, it is important to employ legal arguments and reasoning; for the constitutional matters, even more so. A number of examples below will further elaborate on the claim made here.

3.4 Analysing a number of judicial review opinions

The Mass Media Law of 2009: In 2009, when a draft of the Media Law was presented to Parliament for approval, the Wolesi Jirga, seemingly in an attempt to increase its oversight over executive institutions, stipulated that the head of the state media outlet Radio Television of Afghanistan (RTA) would acquire a vote of confidence. Upon the veto by President Karzai, the Wolesi Jirga reapproved the law with such a provision with two-thirds majority. The President then referred the law to the Supreme Court for a judicial review.⁹² The Court issued a brief ruling and argued that the provisions of the constitution clearly stipulate the positions for which a confirmation by Parliament was needed. The ruling also made a reference to the drafts of the Constitution to support the argument on why only certain positions required a confirmation. The opinion concluded that any addition to the list is therefore considered an amendment to the provision, which solely fell under the authority of the Loya Jirga. Therefore, the Court found article 13 of the law unconstitutional. As the law was published in the Official Gazette, article 13 was removed, and a footnote on the bottom of the page explained the unconstitutionality of the provision.⁹³

It could be argued that the court used a similar argument to US Chief Justice John Marshall in *Marbury v. Madison* when he reasoned that Judiciary Act of 1789, by empowering the Supreme Court with the *writ of mandamus*,⁹⁴ expanded its original jurisdiction, and the law essentially amended the Constitution. However, the argument of the Afghan Court was short and brief,

88 H. L. A. Hart, *The Concept of Law*, 2nd. ed., Clarendon Law Series (Oxford: Clarendon Press, 1998), 199-200.

89 “Afghanistan’s Election Challenges” (Kabul/Brussels: International Crisis Group, June 2009), 13.

90 Najibullah Farangis, “Karzai’s Opponents Slam Supreme Court Ruling As ‘Unconstitutional,’” *Radio Free Europe Radio Liberty*, 30 March 2009, available at: http://www.rferl.org/content/Karzais_Opponents_Slam_Supreme_Court_Ruling_As_Unconstitutional_/1564465.html.

91 Ibid.

92 See a report by the Reporters Without Borders/Reporters Sans Frontières, Media Law Published in the Official Gazette, available at <http://www.rsf-persan.org/article16820.html>.

93 “Judicial Ruling No. 6 of the Supreme Court of Islamic Republic of Afghanistan,” Published in Official Gazette no. 986, (2009).

94 A writ of mandamus is an order from a court to an inferior government official ordering the government official to properly fulfill their official duties or correct an abuse of discretion. See Cornell University, Legal Information Institute, <https://www.law.cornell.edu/wex/mandamus>

and mainly presented a historical account of the issue from the constitutional drafting period, and a textual argument, and reached the decision on unconstitutionality. There was no further reasoning and analysis presented by the court.

The Law on Independent Commission for overseeing the Implementation of the Constitution (the ICOIC Law) of 2009: The ICOIC law was drafted by the Government and presented to Parliament in the wake of the Spanta case, when the Parliament had challenged the power of Supreme Court under article 121 to interpret the Constitution. Therefore, the law gave the parliament the opportunity to use its legislative powers and entrust the ICOIC with the authority to interpret the Constitution. Once the law was passed, the President vetoed it, arguing that it contradicted articles 121, 122 and 157.⁹⁵ The Wolesi Jirga used its power to override to reapprove the law with a two-thirds majority. The President then referred the law to the Supreme Court for judicial review under article 121. The Court reviewed the law and presented its most detailed judicial ruling to date, holding that many articles of the law were unconstitutional.⁹⁶ The ruling of the court had a number of arguments that were well reasoned; however, others had no strong reasoning.

The Court provided a detailed explanation of its interpretative powers and used originalism to go back to the opinion of the drafters of the Constitution. The aim in this section is to look at the patterns and methods through which the Court has presented its judicial review decisions. The section will present a substantive overview of the decisions of the Court, rather than a detailed discussion on the authority of interpretation in Afghanistan, which was discussed in detail earlier.

In general, the Court seemed discontented with the powers granted to the ICOIC. Parliament had clearly used the ICOIC Law to create a counterbalance against the Supreme Court, which it found acquiescent toward the government. Hence, the Court presented a ruling that was merely conjecture. Article 7 of the ICOIC law, for example, regulated the dismissal of the members of the ICOIC. The procedure was for five members to propose dismissal of any member for, among others, misuse of official authority, violations of provisions of the ICOIC law, and continuous violations of procedures. The proposal for dismissal had to be approved by the lower house of Parliament. The Court, in its Judicial Decision no. 5, found this article “against the law”, without specifying which law; however, in the text of the gazette they specified it as unconstitutional. The ruling read:

- a. *The Commission is not a company or commercial organization to dismiss one of its members through a majority vote of other members;*
- b. *Wolesi Jirga is not the executive branch so as to approve the dismissal of the members of a commission that is part of the executive branch;*
- c. *The procedures are even explicit about the ministers that despite the approval required by Wolesi Jirga for their appointment, their dismissal is directly under the authority of the President...*
- d. *This mechanism, that the proposal for the dismissal of a member comes from other members of the Commission and approval by Wolesi Jirga, is detrimental to the independence of the Commission, and there is the fear that the commission will be highly susceptible to the influence of Wolesi Jirga.*⁹⁷

In general, it is apparent from the text of the ruling that the decision has little if any legal reasoning. To be specific, first, without a diligent study of the Constitution, the ruling called the ICOIC an executive agency. There are no indications that could support this; indeed, there are many reasons why this argument could easily be refuted. The nature of the work of the ICOIC, as an independent institution, necessitates the ICOIC to be free of any influence by any of the branches of the government, particularly the executive, which is more inclined to violate

⁹⁵ Ministry of Parliamentary Affairs, “Letter No. 945 to the Head of Wolesi Jirga of the National Assembly of Afghanistan, Stating President’s Arguments for Rejecting the ICOIC Law, Approved by the National Assembly,” May 2007.

⁹⁶ “Judicial Ruling No. 5 of the Supreme Court of Islamic Republic of Afghanistan,” Published in Official Gazette no. 986, (2009).

⁹⁷ Ibid.

the Constitution, as compared to the two other branches of the state. Furthermore, it is the authority of the ICOIC to review the work of the President, Parliament, the judiciary, and other governmental high officials to ensure the application of the Constitution. Therefore, if ICOIC were an executive body, it would be an inferior one, and, therefore, less powerful to supervise any of the three branches of the government. Additionally, had the constitution regarded the ICOIC as an executive body, it would place it under the chapters on government, or administration in the Constitution, not the miscellaneous chapter. The second issue was that the court assumed that if the Wolesi Jirga were involved in the approval of a dismissal, the ICOIC's independence would be compromised; however, it hinted that only the President could implement such a dismissal. This argument was perhaps an attempt to restrict parliamentary powers; however, it failed to notice whether the independence will be compromised by giving this power to an individual (the President), or a representative body (Parliament). As such, this particular part of the review was a mere collection of statements, and had no legal arguments of any kind to substantiate these assertions.

The Court also found clause 4 of article 8 of the ICOIC law to be in contradiction with article 121. The article had authorised the ICOIC to “study the enforced laws in order to identify contradictions with the Constitution and present those to the President and National Assembly for taking measures to resolve such contradictions.” The ruling of the Court read:

This clause is also in clear contradiction with article 121 of the Constitution, because in the mentioned article, not only the interpretation of the Constitution, and other laws, and also the interpretation of decrees, treaties, and international covenants, are the duties of the Supreme Court, their conformity with the Constitution is also explicitly outlined as the authorities of the Supreme Court. However, in the [ICOIC] law newly passed by the parliament, under article 8 (4), this authority is given to the Commission.

In this part of the reasoning, the Court again failed to be meticulous in its study to differentiate the two reviews that were required. Article 121 undoubtedly authorises the Supreme Court to review laws, legislative decrees, and international treaties and covenants. Nevertheless, this review is conditional on a referral either by the government, or lower courts. However, the article, under the ICOIC law, required the ICOIC to review such inconsistencies without any referrals, and present them to the President and Parliament to take corrective measures. Such an authority would also help better implement article 162, part of which reads “Upon the enforcement of this Constitution, laws and legislative decrees contrary to its provisions shall be invalid.” At the moment, there is no such institution in Afghanistan that would do such a review, and present a legal reform agenda to Parliament and the President in view of the current Constitution. Parliament has a high accumulation of laws that are expected to be reviewed and amended, and, as discussed in the section above, the lower courts continue to apply old laws on the cases, and have not found any inconsistencies. Whereas the Court restricted ICOIC's power to do such a review, in the past 12 years, it has only been able to review four legislations for constitutionality. However, a brief study by ICOIC shows that there are many laws prior to and after the endorsement of the Constitution that are in force and yet contradict it.⁹⁸

The Court also found clause 1 of article 5 contrary to the Constitution. The clause required the members of the ICOIC to have only Afghan citizenship. The Court found that:

Limiting the citizenship only to Afghans is beyond the scope of ordinary law to decide, because citizenship is one of the fundamental rights of the citizens and therefore restricting it for certain positions should only be stipulated by the Constitution.

The other part of the ruling found article 11 (1) in “explicit contradiction” with the Constitution. The article provided that “Member(s) of Commission cannot be arrested, detained or prosecuted without the assent of the President. Evident crimes are an exception to this.” The court ruled:

This clause is also in explicit contradiction with the Constitution, because judicial immunity is a privilege that is specifically given to the President, members of Parliament, and judges by the provisions of the Constitutional; no other individual can benefit from such privileges under statutory laws.

⁹⁸ Examples include, the Criminal Code of 1976 and the Land Expropriation Law of 2001.

These claims of the Court that certain aspects of ICOIC law are not in the Constitution would have been true had it provided details similar to those of Parliament and the judiciary for the ICOIC. The Constitution clearly deferred all the details related to the ICOIC, allowing certain mechanisms like citizenship as well as immunity to be regulated under ordinary law. This in no way can be considered the expansion of constitutional provisions, or “beyond the scope of ordinary law.” This is mere deferral and cannot be considered as unconstitutional privileges given to the ICOIC or an amendment to the Constitution.

Law on Diplomatic and Consular Employees – 2013: The other example that shows lack of consistency in the Court’s decisions is the review of the Law on Diplomatic and Consular Employees. Parliament had approved the law, stating that the diplomatic and consular employees of Afghanistan abroad, can not have dual citizenship, and those who held dual citizenship would immediately be terminated at the enforcement of the law. The Ministry of Foreign Affairs had found this worrying, stating that many of their diplomatic and consular staff would lose their jobs, and their rights violated. Therefore, the Ministry referred the case to the Supreme Court.

The Court reasoned that according to the Constitution, the conditions for single citizenship are only provided for the President, Vice Presidents, and government ministers; other than those, the Constitution does not require single citizenship for any other government high official, and, therefore, this rule cannot be extended to the diplomatic and consular employees.⁹⁹ It could, however, be argued that because the Constitution does not go to that level of detail on administrative positions, therefore, there is no mention of such positions and the requirement for their nationality in the Constitution. This does not negate the fact that since the constitution does not go to that level of detail, Parliament cannot legislate it. The whole logic of having a legislative body is to regulate everything that is not necessarily regulated by the Constitution.

Furthermore, ambassadors are the top diplomatic representatives of one state to another. Thus, in order for them to best represent the interests of their nation, it may as well be required that they hold the sole nationality of the nation they are representing. For example, in February 2016, the President appointed the outgoing Minister of the Interior Nour Ul Haq Ulomi as the ambassador to the Netherlands. However, some sources reported that Ulomi held both Afghan and Dutch nationalities. Since this presented a conflict of interest, individuals representing their countries in other states should solely hold the nationality of the nominating country.¹⁰⁰

A comparison with other provisions of the constitution shows that certain positions require nominees to only have Afghan nationality; this holds for ministerial positions. However, the provision presents an exception that “if the ministerial candidate has the citizenship of another country as well, the House of the People shall have the authority to approve or reject the nomination.” It is noteworthy to ask how, if the Constitution has provided such authority to Parliament to decide on the whether or not an individual with dual nationality could take up a ministerial position—let us assume the Minister of Foreign Affairs—this power could be limited such that Parliament could not make that same decision about the employees of that ministry including diplomats and ambassadors.

The concern of the Ministry of Foreign Affairs (MoFA) regarding the sudden loss of hundreds of employees is also valid. Parliament, in view of the facts and figures, should have provided MoFA adequate time to implement this law, so as to avoid the loss of personnel. However, concluding that this is purely against the Constitution does not provide much of a convincing reason.

The examples above prove how judicial review has been practiced in a partisan manner in Afghanistan. They also highlight the pattern in which judicial review had become a tool for advancing executive interests, since all the laws presented above were those that the President

99 “Decision No. 20 of the High Council of Supreme Court Regarding Lack of Compliance of Article 5(1) and Article 8 of the Law on Diplomatic and Consular Employees with the Constitution of Islamic Republic of Afghanistan,” Published in Official Gazette no. 1114, (2013).

100 “Ghani Nominates New Afghan Interior Minister, Attorney General,” *Reuters*, 24 February 2016, available at: <http://www.reuters.com/article/us-afghanistan-nominees-idUSKCN0VX29L>. See also, http://www.afghan-bios.info/index.php?option=com_afghanbios&id=3486&task=view&total=3272&start=2180&Itemid=2.

had vetoed and Parliament had reapproved with a two-thirds majority vote. As noted in one of the International Crisis Group reports: “Although the [Constitution] does not allow the Supreme Court to weigh in on controversial political questions, the President has often turned to the court to settle political disputes, substantially weakening perceptions of its independence.”¹⁰¹

Additionally, the only consistency in the court’s reasoning is its inconsistencies, including the referring authorities in these cases having been the President (in two instances), a Ministry and the Administrative Office of the President and the Secretariat for the Council of Ministers. The four opinions presented are under different titles: two of them are called *Qaraar Qazayee* (judicial verdict), *Musaweba Shura-i-Aali* (the decision of the High Council), and *Hukm-e-Qazayee* (judicial ruling). Likewise, while conducting reviews, the Court failed to maintain a balance between using methods of originalism (given the newness of the Constitution), and ensuring that its decisions are pragmatic, bearing in mind the consequences of the decision in a new constitutional regime. The Court has given preference to the political importance of the questions, at the cost of disregarding interpretation methods. For instance, when the Court had to defend its own position in the ICOIC law, it made a reference to the founders of the Constitution, and their intent to entrust the Supreme Court with the power of interpretation.

Apparently, while certain of these decisions were accepted by Parliament, including the mass media law and diplomatic law, others, such as the ICOIC law, were not. All of this is due to there being no legal framework that could guide the court on how to review and make decisions.

3.5 Review of Compatibility of International Treaties and Covenants with the Afghan Constitution

Two theories define the relationship between public international law and national law: monism and dualism. Monism considers international and national law part of the same legal order. In cases where conflict between the two arises, international law is considered superior and thus prevails. Dualism, however, regards international and national laws as separate and independent systems that operate in different areas. Under dualism, the courts will only apply international law if the constitution of the state has allowed for it. Dualism disapproves of the superiority of international law; therefore, the courts will apply national laws where there is a conflict between the two.¹⁰² Each country is able to decide in favour of any of these theories, and define the relationship between international and national laws. Therefore, the constitutions define the interaction between the two systems and their application in the national courts.¹⁰³

Modern constitutions generally incorporate clauses for adoption and observance of international treaties into the state’s internal legal order. However, this does not immediately guarantee a treaty’s integration domestically. For states following dualism, international treaties do not become part of the national legal system, unless clear provisions are incorporated in the Constitution or there is an implementing legislation,¹⁰⁴ which refers to national legislation passed through domestic channels in order to give effect to the international law.

The Afghan Constitution has a number of references to international law and Afghanistan’s legal obligation to it. The preamble of the Constitution states:

We the people of Afghanistan... Observing the United Nations Charter as well as the Universal Declaration of Human Rights... Have, herein, approved this constitution...

Under article 7 of the Afghan Constitution, the state is required to “observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has acceded, and the Universal Declaration of Human Rights.” Article 64 (17) authorises the President to “[i]

101 International Crisis Group, “Reforming Afghanistan’s Broken Judiciary.” 15.

102 See, Alina Kaczorowska, *Public International Law*, 4th ed. (Oxon and New York: Routledge, 2010), 146-148; and Ademola Abass, *International Law: Text, Cases, and Materials*, 2nd ed (Oxford: Oxford University Press, 2014), 305-307.

103 Kaczorowska, *Public International Law*, 146-148

104 Michael Schoiswohl, “Linking the International Legal Framework to Building the Formal Foundations of a ‘State at Risk’: Constitution-Making and International Law in Post-Conflict Afghanistan,” *Vanderbilt Journal of Transnational Law* 39, no. 819 (2006), 29-31.

ssue credential letters for conclusion of international treaties in accordance with the provisions of the law". Article 90 (5) empowers the National Assembly to ratify¹⁰⁵ "international treaties and agreements, or abrogation of membership of Afghanistan in them." Successively, article 121 requires the Supreme Court to review international treaties and covenants for their compliance with the Constitution, and also to interpret them. This article recognises the supremacy of the Constitution with regards to international treaties, thus making Afghanistan a dualist state.

The articles mentioned above present two major problems. First, and most relevant, the constitutional provisions do not provide any clarity on how, and at what stage, should this review be conducted; and how the Court could interpret international treaties, in view of the rules presented under the Vienna Convention on the Law of Treaties.¹⁰⁶ Article 121 presents similar complexities by not prescribing procedures and conditions under which the court could review international treaties and covenants.

Judicial review of international treaties and covenants is conducted under the same conditions of referral by the courts or the government, which raises a number of questions: *One*, should the government present the treaties and covenants to the Court before it signs it so that it could set reservations? *Two*, since Parliament is the ultimate authority to approve the covenants and treaties, how could it send the covenants and treaties for a constitutionality check given article 121's restrictions? *Three*, if at the request of a lower court, the Supreme Court finds a covenant or treaty in contradiction with the Constitution, what authority does the Court have to call the international document incompatible with the Constitution, and what procedures should Afghanistan follow to make the two compatible? Considering the fact that Afghanistan is dualist, it might need to make reservations to the international document, rather than making its laws or constitution compliant. None of the questions above have an answer in the legal system of Afghanistan. The Supreme Court has never faced questions like these, and hence has no answers for the questions mentioned above.¹⁰⁷ Thus, the problem here is even more complicated and the referral more limited, as compared to review of national laws.

Second, although article 7 of the Constitution requires the observance of the international treaties and covenants to which Afghanistan is a party, this and the subsequent articles fail to present any incorporation mechanism through which international law will become effective in the domestic legal order. The understanding at the Court level is that international treaties and covenants do not take the force of law, and thus are not enforceable in the courts. This argument stems from the perception that international treaties and covenants do not come in the hierarchy of legal norms. According to Judge Haleem at the General Directorate for Scrutiny and Perusal at the Supreme Court, article 130 of the Constitution of Afghanistan presents a hierarchy and serves as a guide to the judges on the order of rules that could be applied on the cases. The article reads:

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.

Thus according to Judge Haleem, the hierarchy as presented in the Constitution as well as the Civil Code of Afghanistan,¹⁰⁸ does not include international laws; therefore, applying international law on the cases has no basis in the constitution and statutory laws. This argument of the Supreme Court violates article 27 of the Vienna Convention on the Law of Treaties¹⁰⁹ to which Afghanistan

¹⁰⁵ The term used in Dari is *Tasdeeq* which would translate as attestation or certification; however, since the two terms are not used in the process of signing a treaty, therefore, the term ratify is used in this paper.

¹⁰⁶ "Vienna Convention on the Law of Treaties" (1961). section 3, articles 31-33.

¹⁰⁷ Personal communication with Justice Abdul Qader Adalatkah, member of the High Council of Supreme Court and Mr. Ahmad Hussain Khenjani, Deputy Secretary General, Supreme Court, October 2016

¹⁰⁸ Articles 1 and 2 of the Civil Code of 1977 prohibit the judges to conduct *Ijtehad* (deriving a rule of law by independent interpretation of the Quran and Hadith) on the matters where explicit provisions of the law exist. The articles, however, present a hierarchy for ruling on the cases: first, provisions of the law, second, the Hanafi Jurisprudence, and third, the general customs of the society, with the condition that the customs do not contradict the law or principles of justice.

¹⁰⁹ "Treaties are known by a variety of differing names, ranging from Conventions, International Agreements, Pacts, General Acts, Charters, through to Statutes, Declarations and Covenants." Malcolm N. Shaw, *International Law*, 5th ed (Cambridge and New York: Cambridge University Press, 2003).

is a party, and the Constitution of Afghanistan requires its observance. The article does not allow the states to “invoke the provisions of its internal law as justification for its failure to perform a treaty.” In practice, some judges may use international treaties in the reasoning of the case, while a majority refrain from the application of these international documents.¹¹⁰ It is apparent that without applying the treaties, the judges cannot ask for a review based on constitutionality. This further restricts the referral authority of the treaties and makes it exclusive to the government.

3.6 Judicial Review and Protection of Fundamental Rights

Courts, as the ultimate authority to ensure justice, play a crucial role in protecting constitutionally guaranteed rights. Judicial review is, thus, one of its tools for doing so by reviewing the constitutionality of the legislation and executive actions that violate the fundamental rights of the citizens. Do the courts in Afghanistan have such authority and use it as an effective tool to advance and protect fundamental rights? A quick answer to this is, yes, article 121 is comprehensive and includes review of all laws, including those that may violate constitutional rights. Nevertheless, the mechanism for requesting such a review, either through the government or courts (mentioned in detail above), is hardly convincing or convenient for protection of these rights.

The first challenge is the lack of standing for the citizens to challenge a statutory law that has violated their constitutional rights. There are no procedures through which citizens could bring a lawsuit against a legislation that violates their constitutionally recognised and guaranteed fundamental rights. According to a former Judge, Aref Hafiz, the courts will only accept lawsuits if the claimant, the defendant, the issue, and the authoritative court are clearly specified.¹¹¹ It is also believed that citizens may not file a case, unless they have suffered directly as a result of the enforcement of the law. Judge Hafiz emphasises that instead of bringing the case to the court, the citizens should lobby and advocate and try to influence the law-making institutions to resolve such contradictions through statutory amendments.¹¹²

However, even if citizens suffer harm as a result of the enforcement of a law, there seems to be no remedy foreseen for them. An important example of this is the Afghanistan National Amnesty Law of 2007, which provided amnesty to the political wings and hostile parties involved in conflict before the interim administration was formed in 2002. Although the law allowed the victims to bring complaints to the Court, it restrained the government authorities from initiating a claim against accused war criminals. The law not only breached principles and values enshrined in the Constitution, but also Afghanistan’s international commitments to ensure accountability for serious human rights abuses.¹¹³ However, the institutions such as the AIHRC or the victims or their families were not able to challenge the constitutionality of this law. AIHRC had legal restrictions; however, victims and families could present a complaint to the courts, complaining that this law violates their fundamental rights. However, according to Judge Homa Alizoy, due to the lack of a legal framework and procedures on judicial review, a lack of experience on the side of the judges, and a lack of awareness on the side of citizens, this practice has never been used as an opportunity to protect fundamental rights.¹¹⁴

Eventually, it is solely at the discretion of the government or lower court judges to refer it to the Court for review, or to choose not to. This raises a number of concerns because post-conflict and developing governments may not be interested in, or have the capacity to, advance human rights. Similarly, the courts in these contexts are likely to lack capacity and respect for fundamental rights. In Afghanistan, for instance, several reports on the judiciary provide data on the failure of the courts to uphold human rights. Reports reveal how judges, in the course of legal

110 Personal Communication, Judge Arif Hafiz and Judge Homa Alizoy, October 2016.

111 Personal communication, Judge Arif Hafiz, former judge, member of the Independent Commission for Overseeing the Implementation of the Constitution, October 2016.

112 Ibid.

113 These include violation of the preamble and article 6 of the Constitution, and the Rome Statute. See, Emily Winterbotham, *The State of Transitional Justice in Afghanistan: Actors, Approaches and Challenges* (Kabul: Afghanistan Research and Evaluation Unit, 2010).

114 Personal communication, Judge Homa Alizoy, Head of the Kabul Juvenile Primary Court, October 2016.

proceedings, overlook basic constitutionally guaranteed rights such as the principle of legality of crimes, norms of due process, and equal treatment of citizens (mainly men and women) before the courts.¹¹⁵

Elaboration on reviews of human-rights-related cases remains largely undefined within statutory laws as well. Although article 29 of the Law on Organization and Jurisdiction of Judiciary (LOJJ) allows the government to “refer matters, that involve breach of the provisions of the law, to the Supreme Court for interpretation and making decision,” the article raises serious questions as to what breaches of law could be covered under this article, or under which circumstances the government can directly refer cases to the Supreme Court, disregarding other institutions in the judicial hierarchy. Further, does an article like this give broad powers to the government, as opposed to the other branches and institutions of the state and citizens? Unsurprisingly, none of these are answered in the law, implying that the government is given immense discretion under the article. The other very important question is breach of law by whom? While the occurrence of “breach of the law”, including instances of human rights violations, is highly probable within or by the government, the law fails to provide such a platform for other institutions or citizens to directly approach the Supreme Court for adjudication.

These circumstances reveal the weaknesses of the judiciary as an institution for upholding human rights, and miss the opportunity provided by the Constitution for the same purpose. It is important to note that the judiciary has the crucial mandate of ensuring justice and upholding the law. Many of the current debates over the role of the judiciary in Afghanistan revolve around judiciary’s independence, internal capacity and integrity and its accessibility in far-off parts of the country. The judiciary needs extensive reforms to address these concerns. In addition, Afghanistan’s constitutional reform should focus on methods for judicial accountability, transparency and fair trial, as well as citizens’ access to judicial review. Only such extensive reforms will ensure substantive and procedural protection of individual rights by the judiciary.

115 See for example: Martin Lau, “Final Report on Afghanistan’s Legal System and Its Compatibility with International Human Rights Standards,” (International Commission of Jurists (ICJ), 7 February 2003), available at: <http://www.refworld.org/docid/48a3f02c0.html>; and, Afghanistan Independent Human Rights Commission, “Citizen’s Access to Justice - A Monitoring Report on the Implementation of Presidential Decree No. 45.,” 2012; and Afghanistan Independent Human Rights Commission, “Report of Monitoring the Situation and Performance of Courts and the Judicial System in Afghanistan,” 2013.

4. Constitutional Oversight

The Constitution, as the supreme law of the land, establishes the government and its institutions. Nonetheless, it also brings about the dilemma of how to limit the arbitrariness inherent in government, and how to ensure that its powers are to be used solely for the good of society.¹¹⁶ To define the political limitations upon the government, the concept of constitutionalism emerged, which not only recognises the necessity for the existence of the government, but also equally insists on limitations being placed upon its powers.¹¹⁷ The main objective of constitutionalism is to “uphold the rule of law, enforce effective limitations on government powers, and the protection of fundamental rights.”¹¹⁸

While the term “constitutional government” implies a government according to the terms of a constitution, a formal written constitution is not necessarily evidence of one. A political organisation is constitutional to the extent that it “contain[s] institutionalised mechanisms of power control for the protection of the interests and liberties of the citizenry.”¹¹⁹ To restrain power, constitutions should not only formulate effective checks and balances between state institutions, but also devise effective independent institutions to serve as watchdogs and be the guardian of the constitution. Many post-conflict societies suffer from lack of constitutionalism and rule of law. Hence, while designing the constitutions, they ought to be more vigilant in creating adequate checks and balances. Furthermore, constitutions tend to be responses to the historical events and conditions, and must be understood in that context.¹²⁰

The rationale behind an institution with a specific mandate to oversee the implementation the Constitution in post-conflict Afghanistan was also a response to historical challenges, including limited experience of stable regimes, constitutionalism and rule of law. Therefore, the ICOIC was envisaged to supervise the creation of new state institutions and their execution of their mandate as defined by the Constitution; with the ultimate goal of promoting constitutionalism. It is clear that such an institution would be most crucial in the early years of implementing the Constitution; however, the establishment of ICOIC never became a priority for the government. ICOIC was established in June 2010 as one of the last institutions foreseen in the Constitution.¹²¹

It was discussed in the earlier parts of the paper that constitutional review in Afghanistan can be defined as the Supreme Court’s power to review laws, legislative decrees, international treaties and covenants for their compliance with the Constitution; and, furthermore, the ICOIC’s power to oversee the constitutionality of actions of different state actors and institutions. The shortcomings on the side of the Supreme Court were discussed above. This part will briefly look at whether the ICOIC has fulfilled its mandate in the last 7 years.

It was discussed in the earlier parts of the paper how the ICOIC was initially not foreseen in the Constitution. It was inserted at a later stage in the Loya Jirga, when the members realised there was no mechanism, after the removal of the Constitutional Court, for supervision of the implementation of the Constitution.¹²² Eventually, the Jirga members inserted an incoherent article in the Constitution that read: “The Independent Commission for supervision of the implementation of the Constitution shall be established in accordance with the provisions of the law. The President with the endorsement of the House of People shall appoint members of this

116 Nwabueze B. O., *Constitutionalism in the Emergent States* (London: C. Hurst & Company, 1973), 1.

117 Ibid.

118 Abd Allāh Ahmad Naʿīm, *African Constitutionalism and the Role of Islam* (Philadelphia: University of Pennsylvania Press, 2006), 3.

119 Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Harvard University Press, 1999).

120 Ehler et al., *An Introduction to the Constitutional Law of Afghanistan*.

121 After the endorsement of the Constitution in January 2004, the state institutions were established in accordance with it in the following order: The structure of the Executive branch was completed in December 2004, following the presidential elections in October 2004; Parliament was established in December 2005, following parliamentary elections in September 2005; and the Judiciary was established in June 2006.

122 Dempsey and Thier, “Resolving the Crisis over Constitutional Interpretation in Afghanistan.” See also, Ahmadi, “The Authority of Constitutional Interpretation in Afghanistan.”

Commission.” The article deferred all details ranging from the name, structure, powers, tenure and the like to be legislated. The Constitution of Afghanistan was endorsed in January, 2004; in the years that followed, the government made little effort to establish this critically mandated commission. Kamali rightly notes:

The basic purpose and intention of Article 157 was to provide for an orderly implementation of the new Constitution. For this was a post-conflict Constitution formulated at a time when uncertainties of the transitional periods were looming ahead, and this included introduction of literally dozens of decree laws that needed to be introduced during the one year (transitional period) following promulgation of the new Constitution... It was simply meant to supervise a step-by-step implementation of the new Constitution.¹²³

The government seemingly had drafted the ICOIC law based to a large extent on the Law on the Constitutional Council under the Constitution of 1988, and provided a general and vague description of the ICOIC’s oversight powers. Nevertheless, the draft was never sent to Parliament, until the power battle started between the three branches in the aftermath of the case of Spanta in 2008.

Once the law was tabled, Parliament saw it as an opportunity to circumscribe the powers of the Supreme Court, rather than objectively trying to create an oversight commission. Parliament granted the ICOIC the power to interpret the Constitution. As mentioned earlier, the law was rejected by the President on grounds that it violated the provisions of the Constitution pertaining to interpretation. Parliament voted with two-thirds majority to override the veto. The Supreme Court then conducted judicial review, and, for similar reasons as the President, invalidated the provisions of the law that they deemed contrary to the Constitution. Interestingly, the Supreme Court removed certain provisions of the ICOIC law (mentioned above), and clarified in the Official Gazette footnotes why these provisions were removed. In reality, the Supreme Court amended the law passed by Parliament without having such constitutional or statutory authority.

The manner in which the law was passed made many believe that all the branches of the state took extra-constitutional measures. Parliament extensively interpreted the Constitution to grant the power of interpretation to the ICOIC;¹²⁴ the Supreme Court modified the approved law on grounds of unconstitutionality, which in itself violated the explicit separation of powers; and the Executive published the law, modified by the judiciary, in the Official Gazette. Despite all the issues, the Commission was established under two different versions of the law, each claiming sole legal validity.

4.1 The legal framework of ICOIC

At a glance, the relatively brief law of 17 articles (the version published in the Official Gazette) introduced a seven-member commission with four-year terms, and underlined its independence. It described the conditions for membership, the instances of losing membership and dismissals. The law described the powers of the Commission to include overseeing the observance and implementation of the provisions of the Constitution and providing legal advice and reports to the President on instances of violations. The law allowed the President, National Assembly, the Supreme Court, Independent Human Rights Commission, Independent Election Commission, and the Commission on Administrative Reform and Civil Services to refer constitutional matters to the ICOIC to obtain a legal opinion.¹²⁵

Notwithstanding the efforts by Parliament to create an independent body, many parts of the law, some of which are outlined above, brought about scepticism about the institution. The independence of the ICOIC is not only highlighted in the Constitution and subsequently in the title of the law, but article 2 further stresses the independence of the ICOIC, stating the following: “*The ICOIC, is established within the structure of the State of Islamic Republic of Afghanistan, and is completely independent in its activities.*” Such an assertion is extremely important for

¹²³ Kamali, “Afghanistan’s Constitution 2004 : An Islamic Perspective on Interpretation.”

¹²⁴ Kamali, “The Relationship Between Executive and Parliament and the Problem of Constitutional Interpretation and Adjudication During the Karzai Years.”

¹²⁵ *Law on Independent Commission on Overseeing the Implementation of the Constitution.*

a commission that is established to deal with important constitutional matters. The problem, however, is that other provisions of the law remain largely inconsistent with this article. For instance, the ICOIC members are appointed simultaneously by the President and approved by Parliament for a four-year term. Allowing the term to coincide with the President's without a staggered method of appointment could weaken the ICOIC.¹²⁶ Furthermore, the law does not restrict the re-appointment of the members of the ICOIC, thereby making the members prone to partiality toward the President, in anticipation to get re-introduced.

The judicial review of the Supreme Court created further difficulty in understanding the independence of the ICOIC. The judiciary's review selectively rejected some articles on grounds of endangering the ICOIC's independence, but ignored other provisions that did the same. The Court's review overturned the dismissal mechanism provided in the law, which had required an internal motion within the ICOIC for the dismissal of its members. If the majority approved the motion, it would then require a vote of the Wolesi Jirga for the dismissal to be approved. The ruling of the Court found the mechanism unconstitutional and maintained that the ICOIC is not a "business institution" to adopt such an internally initiated method of dismissal. The ruling asserted that if the Wolesi Jirga were involved in the dismissal of the members of the ICOIC, it would negatively affect its independence. Paradoxically, the Court called the ICOIC a "part of the executive branch," and thus required the dismissal of any member to be the sole power of the President, similar to the ones of ministers. The Court made such claims despite the fact that the Constitution explicitly called the ICOIC "independent" and did not place it under the chapter on executive power. The Court's self-contradictory reasoning falsely inferred that an independent commission foreseen by the Constitution was a sub-unit of the executive branch.

126 Dempsey and Thier, "Resolving the Crisis over Constitutional Interpretation in Afghanistan," p. 6.

Chapter three of the ICOIC law that was titled “Duties and Authorities”, only included two articles below:

Chapter three

Duties and Competences

Article (8)

The commission, in order to have a better oversight on the implementation of the provisions of the constitution, shall have the following competencies:

1. *
2. Overseeing the observance and implementation of the provisions of constitution by the President, government, National Assembly, judicial branch, the administrations, governmental and non-governmental institutions and organizations.
3. Providing legal advice regarding the issues arising from the constitution to the President and National Assembly.
4. **
5. Providing specific propositions to the President and the National Assembly in the area of taking measures for the development of legislation in cases where the Constitution demands it.
6. Provide reports to the president on breaches and violations of the provisions of the constitution.
7. Enactment of relevant guidelines and rules of procedure.

Competence to Refer

Article (9)

The following higher authorities are competent to refer issues arising from the provisions of the constitution to the Commission in order to seek legal opinion:

1. The President
2. The houses of the National Assembly
3. Supreme Court
4. The Independent Human Rights Commission, The Independent Election Commission and The Administrative Reform and Civil Services Commission.

*The high council of the Supreme Court has found Paragraph 1 of article 8, which states the following, in contradiction with the constitution:

(Interpretation of the provisions of constitution based on the request by president, national assembly, Supreme Court and the government.)

**The high council of the Supreme Court has found Paragraph 4 of article 8, which states the following, in contradiction with the constitution:

(Study of the existing laws in order to identify their contradictions with the constitution and its presentation to the president and the national assembly in order to take steps for the removal of contradictions.)

As discussed earlier in this paper, the powers ascribed by the law to the ICOIC remained broad and ambiguous, despite the fact that there was not much detail in the Constitution for this, and the ICOIC was a victim of a political fight between the three institutions.

One of the major issues seen in the powers of the ICOIC was the fact that Parliament did not grant the power of issuing decisions or rulings to the ICOIC, but rather opinions and advice. Article 8(3) of the law regarding its competencies reads: “Providing *legal advices (Mashwara hai Huqoqi)* in matters pertaining to Constitution to the President and to the National Assembly.” On the other hand, article 9 reads: “The following high authorities are competent to refer the issues arising from the provisions of the Constitution to the Commission for the purpose of requesting *legal opinion (Nazar-e-Huqoqi)*: The President, the Houses of National Assembly, Supreme Court, Independent Human Rights Commission, Independent Election Commission and The Administrative Reform and Civil Services Commission.” Neither of the words—*Mashwara* and *Nazar*—have a binding effect, and might be used as synonyms.

What we see in practice is a state of confusion over whether the opinions, legal advice or interpretive opinions of the ICOIC are binding or not. In certain circumstances, the President and the National Assembly have turned a blind eye to the legal opinions (*nazar-e-huqoqi*) of the ICOIC. Two examples are relevant here. The first was when the President asked ICOIC for its opinion on formation of the Special Election Tribunal and the ICOIC found it unconstitutional. Despite the ICOIC's rejection, the President still proceeded and established the Tribunal through the Supreme Court. The second was when Parliament was debating the Provincial Council law, and they reversed their oversight power, of the local administration, on constitutional grounds; subsequently, the question was raised before the ICOIC. In its interpretive opinion, the ICOIC found that providing the Provincial Councils with the power of oversight through statutory legislation does not violate any provision of the Constitution.¹²⁷ However, the Parliament overlooked the response of the ICOIC and approved the law, annulling the Councils' oversight powers. Such a treatment of the ICOIC by the state institutions, particularly by Parliament as its architect, shows the insignificance of its decisions, thus allowing state institutions to act on their own will when the provisions of the constitution are unclear.

Furthermore, the law requires the ICOIC to present a report to the President in the instance of observing violation or breach of the provisions of the constitution (article 8(6)). Although the first of the responsibilities of the President under the Constitution is to 'supervise the implementation of the constitution,' the ICOIC's findings of the violations of the Constitution cannot be simply referred as a report to the President. The law should have provided mechanisms for establishing the finality of the ICOIC's decisions, and should have made it an obligation of the President to take measures and address the breach of the Constitution. Some of the examples from the publications of the ICOIC show its advice on the Constitutional matters to the President, but there were no measures taken by then-President Hamid Karzai on those matters.¹²⁸

4.1 Fulfilling the oversight mandate

The ICOIC, from its inception, suffered from a power battle between the three institutions. It was discussed in detail above how the political environment affected the formation, and later the performance of, the ICOIC. Once formed, the ICOIC was not accepted as an institution with authority to conduct constitutional oversight. Examples include when the ICOIC requested the judiciary to allow its staff to attend and oversee Court proceedings. The response was that since the judiciary is an independent branch, institutions should not be allowed to potentially influence it by observing the proceedings of the court. Likewise, when the ICOIC wanted to supervise the timeline within which laws were passed, Parliament did not provide any information, basically questioning its oversight authority.¹²⁹

Furthermore, the ICOIC has been subject to pressure from other branches of the government. For instance, in September 2016, the Parliament summoned the members of the ICOIC for interpellation regarding an opinion ICOIC had issued. As an independent institution, ICOIC is not accountable to any institution for the opinions it presents, and refused to appear. As a result, Parliament intimidated the ICOIC by giving it a vote of no confidence, making major cuts in its budget, and amending the ICOIC law to reduce its powers.¹³⁰

127 "Interpretive Opinion of the Independent Commission on Overseeing the Implementation of the Constitution on Addition of the Term 'Oversight' in the Draft of the Law on Provincial Councils" (Kabul: Independent Commission on Overseeing the Implementation of the Constitution, 1392, 2013).

128 "Legal Advice of the Independent Commission on Overseeing the Implementation of the Constitution on Actions to Be Taken by the President for Upholding the Constitutional System" (Kabul: Independent Commission on Overseeing the Implementation of the Constitution, 1390, 2011).

129 Correspondence between the ICOIC and Supreme Court, and Parliament. Available at ICOIC, Department for Oversight of Governmental institutions.

130 Wolesi Jirga proceedings discussing the interpellation of Commission Members, broadcasted by Wolesi Jirga TV.

Hence, the ICOIC did not play as effective a role in upholding constitutional values and principles, and protecting them from violation by state institutions, as it was expected to do. The ICOIC was also engrossed with the question of whether or not it had the power of interpretation. Although, the ICOIC had a constitutional power, that is, oversight, and a disputed power, that is, interpretation, it was not able to maintain a balance between the two and has frequently exercised the latter, without much effort to develop oversight mechanisms to better perform its principal mandate.

Nevertheless, in less than eight years, the ICOIC has presented 80 legal, advisory and interpretative opinions on various constitutional issues. The basic characteristics of these opinions were, first, that they were largely based on legal reasoning, rather than political reasoning or non-legal statements. Second, the ICOIC responded to a variety of opinions, and did not only receive referrals from the government. In total, the ICOIC provided 29 legal and advisory opinions at its own initiative; 31 opinions in response to referrals of institutions identified in the law; and 14 opinions in response to referrals from other institutions.¹³¹ Third, the ICOIC allowed a wider range of institutions to ask constitutional questions, and made all its decisions open to the public. Hence, if a comparison is drawn between the work of the ICOIC and the Supreme Court for upholding constitutional values and principles, in practice, the ICOIC has been more active. When asked questions on both interpretation and the compatibility of issues with the Constitution, the ICOIC has acted in a more vigorous manner.

¹³¹ *A Collection of Interpretations, Legal and Advisory Opinions 2010-2014* (Kabul: Independent Commission for Overseeing the Implementation of the Constitution, 2014).

PART FOUR: CONCLUSION AND RECOMMENDATIONS

Conclusion

Institutional design is one of the core functions of a constitution. Depending on the context in which constitutions are introduced, they either establish new institutions or replace older ones.¹³² Afghanistan's fairly young constitutional regime has suffered from design defects, leaving ambiguities in the powers of two oversight institutions. These ambiguities coupled with the dispute over the authority of interpretation have not only inhibited the development of a body of constitutional interpretation to provide certainty over vague aspects of the young constitution, but have also endangered the institution and practice of judicial review and constitutional oversight in Afghanistan.

The Supreme Court has failed to address constitutional questions in a manner that exhibits its independence, impartiality and professionalism as the highest judicial body in the country. On the other hand, ICOIC—a product of the dispute between the three branches of the state—has struggled to become a strong and effective institution owing to a lack of agreement on its legal framework, and broad legal powers. Undoubtedly, situations like this have left the nation sceptical that the country has a guardian to protect the constitution from the arbitrariness of political power. In such circumstances, state institutions have adopted self-styled solutions in an attempt to protect and expand their own powers, resulting in limiting the powers of other branches and ultimately encroaching into each other's domain. Such behaviour in the country is extremely dangerous to the constitutional regime and the rule of law.

Recommendations

The 12 years of constitutional implementation have not provided any helpful solutions to the problem of judicial review in Afghanistan. Therefore, through a constitutional amendment, Afghanistan should regain control of this opportunity by taking the the followings steps to strengthen the practice of judicial review and constitutional oversight in Afghanistan:

In the long term:

The State should establish a Constitutional Court to maintain the constitutional achievements of the last decade. An independent court should bring an end to the competing interpretive authority between two institutions, and be empowered to respond -- with binding and final decisions -- to questions of judicial review, interpretation, constitutional oversight, and other missing pieces of judicial review, and should actively support the emergence of a strong constitutional regime in Afghanistan.

In the immediate future:

1. The State institutions, specifically the Executive, Legislative and Judicial branches, must respect and observe the independency of Supreme Court and ICOIC, so as to allow them to function without any external influences.
2. The Supreme Court, in complying with the article 121 of the Constitution, should take immediate action to draft the law defining the scope and procedure for judicial review, and present it to the National Assembly for approval.
3. The Supreme Court should ensure that judges at all levels of the judiciary are trained on the concept and theoretical aspects of judicial review; and on the referral guidelines and procedures for constitutional questions.

¹³² Russell Hardin, "Why a Constitution?," in *Social and Political Foundations of Constitutions*, ed. Mila Versteeg and D. J. Galligan, 2013, 51.

4. The judiciary's legal reasoning in all cases, and in particular in the cases of judicial review must be strengthened, and be based on legal reasoning, not political motives. The Supreme Court must ensure that judicial decisions are well reasoned, consistent, and publicly available.
5. The Judiciary must make additional efforts to enhance judicial independence, and its internal capacity and integrity. The Supreme Court must take measures to ensure the court's impartiality, in particular with the judicial review cases, to ensure this is a mechanism to check, and not a means to advance executive interests.
6. The Supreme Court and the ICOIC should engage in greater collaboration and coordination so as to ensure they uphold the supremacy of the Constitution and contribute to rule of law in Afghanistan. Negative competition between the two institutions is only going to weaken the constitutional order. The two institutions should agree, in writing, on the respective powers of the Supreme Court and, the ICOIC on constitutional interpretations and constitutional review.
7. The ICOIC should present amendments to the statute that defines its mandate so as to better define the scope of its powers. The three branches of the Government must reach a mutual agreement on the powers of the ICOIC.
8. The ICOIC must create more effective mechanisms to oversee the implementation of the Constitution, or its violation thereof. The ICOIC must act more proactively on constitutional violations and regularly communicate with the state institutions to ensure better constitutional implementation.

Interviews:

No.	Name	Title
1	Lutforahman Saeed	Vice President, ICOIC
2	Abdul Qader Adalatkah	Member, Supreme Court High Council
3	Judge Aref Hafiz	Member ICOIC
4	Sayed Qutbuddin Roydar	Deputy Minister, State Ministry on Parliamentary Affairs
5	Khuda e Nazar Nasrat	Secretary General, Wolesi Jirga
6	Ghulam Hassan Gran	Former Secretary General for Wolesi Jirga
7	Timor Shah Qaweem	Deputy Secretary General, Mishrano Jirga
8	Hussain Ahmad Khenjani	Deputy Secretary General, Supreme Court
9	Nesar Ahmad Malikzai	Head of the General Directorate for Scrutiny and Perusal, at the Supreme Court
10	Judge Homa Alizoy	Head of Juvenile Primary Court, Kabul
11	Shoaib Timory	Assistant Professor, American University of Afghanistan
12	Nezamuddin Abdullah	Legal Scholar
13	Abdul Qayum Haleem	Member, General Directorate for Scrutiny and Perusal, at the Supreme Court
14	Judge Saif ur Rahman	Member, General Directorate for Scrutiny and Perusal, at the Supreme Court
15	<i>Anonymity requested</i>	Supreme Court Senior Official

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