



UNITED STATES INSTITUTE OF PEACE

An independent institution established by Congress to strengthen the nation's capacity to promote peaceful resolution to international conflicts

The Status of Constitutional Interpretation in Afghanistan

J Alexander Thier
US Institute of Peace

The ratification of a new constitution in 2004 has laid the groundwork for a historic shift in the political and legal system of Afghanistan. This document creates a new framework for government in Afghanistan, with three co-equal branches as well as other independent institutions, each with separate powers and critical checks and balances between them. The three fundamental principles upholding this arrangement are democratic norms, the rule of law, and respect for Islamic values.

It is incumbent upon each branch of government – as well as Afghanistan's citizens, private sector, and civil society – to uphold and protect the constitution. With these new constitutional arrangements, supported to by new (or newly reestablished) institutions, there will be a significant need, and desire, over the next few years to interpret, define, and test the boundaries of this new arrangement. There are numerous places within the constitution where this need is explicit, for example rights and limitations concerning personal liberty, citizenship, and public property are to be defined “by law”. There are many other places – perhaps most yet to be discovered – where the gaps, conflicts, and ambiguity will require definition or resolution. Indeed, several such important cases have already arisen concerning, for example, the meaning of the parliamentary powers to confirm and dismiss ministers and judges.

However, one of the very issues that remain undefined concerns how these questions can actually be resolved: in other words *who has the power to interpret the constitution, and how is that power accessed?* If there is not a clear path to settling constitutional disagreements, there is a risk that the system become deadlocked, or will break down. The case of Foreign Minister Spanta is instructive in this regard. When the parliament acted to dismiss the Foreign Minister through a no-confidence vote, the office of the President did not recognize the power of the Wolesi Jirga to take this action, and asked the Supreme Court to rule. When the Supreme Court issued a decision in the case, the Parliament did not recognize the power of the Court to make a decision in this case. If this basic disagreement over competencies has no resolution within the system, the system cannot function. It is not difficult to imagine a scenario, perhaps a disputed election result, when the various branches of government cannot agree on the means to settle the dispute, creating a dangerous constitutional crisis.

It is, therefore, of central importance to the development and stability of Afghanistan's nascent constitutional democracy that the role and means of constitutional interpretation be more clearly defined.

To that end, we have identified five central questions regarding the scope and process of constitutional interpretation that need to be addressed and resolved:

1. Jurisdiction to Interpret the Constitution: Who can interpret the constitution under what circumstances?
2. Standing: Who can bring a claim?
3. Timing: When can claims be brought?
4. Effect: What is the impact of a decision?
5. “Islamic Review”: Are there special procedures or bodies engaged in constitutional decisions involved in the interpretation of Article 3 or other Islamic provisions?

This paper addresses the current status of questions 1-4 under Afghan law, and raise questions to be answered. A second paper will provide a comparative perspective on these issues, and a third paper will address the question of Islamic review.

Jurisdiction to Interpret the Constitution

Article 121 of the Afghan constitution marks a historic shift for the judiciary in Afghanistan. Prior to 2004, the Afghan Supreme Court has never explicitly had the power, as an independent branch of the government, to interpret the constitution.

Article 121

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

In order to fulfill its obligations under Article 121, the Supreme Court will need to interpret the language of the constitution in order to determine whether laws, legislative decrees, international treaties and international covenants comply with the meaning of the constitution. For example, a law is passed allowing the government to purchase private land for 10,000 Afs per jerib, no matter the location. A case before the court challenges the constitutionality of the law under Article 40, which requires “just compensation” for private property acquired by the state. In order to decide in this case, which clearly falls under the language of Article 121, the Supreme Court must interpret the meaning of the constitution in order to make a decision. Article 121 similarly allows the meaning of those subsidiary laws to be interpreted. In other words, in order to determine whether a “law, legislative decree, international treaty, or international covenant” complies with the constitution, the court must be able to interpret what the language of both the constitution and the law in question means.

However, it remains unclear whether the court can interpret the constitution when no law, legislative decree, international treaty, or international covenant is involved. Such a question arises in two cases: 1) there is a request to the court for an abstract (i.e. hypothetical) question on the meaning of the constitution, or 2) the court is asked to judge a case that questions the constitutionality of government actions. For example, Article 29 of the constitution states that “torture of human beings is prohibited.” If a prisoner is locked in a windowless room for a month without break, he may want to file a legal claim stating that this form of confinement amounts to torture, and violates Article 29 of the constitution. Since this treatment is not specified in any law, settlement of the case requires interpretation of the constitution (in this case the word “torture”) based on a government action.

This is the question raised by some members of parliament in the deadlock over the case concerning Foreign Minister Spanta. The parliament acted according to powers it possesses under to Article 92 of the constitution, which allows the Wolesi Jirga to make take a no-confidence vote on a government minister based on well-founded reasons. Following such a vote against Foreign Minister Spanta, the Office of the President asked the Supreme Court to review whether the act of the Wolesi Jirga was constitutional. The court found that the vote in this case was both unconstitutional, as the basis for the vote was not something within the rational control of the Foreign Minister, and improper, as the vote violated established parliamentary procedure. Some members of parliament, however, have stated that the Supreme Court did not have jurisdiction to hear this case, and therefore do not recognize its decision. Therefore Afghanistan now faces a critical constitutional impasse, with no agreed means of resolving the dispute. Whatever the outcome, *the absence of any process to contest the constitutionality of government actions would leave an enormous and dangerous gap in the ability of Afghan citizens and institutions to enforce their rights and check the power of government institutions.*

There are credible legal arguments to be made on both side of this dispute. The Supreme Court (and the Executive) argue that the power to judge the constitutionality of government actions is inherent in the constitutional interpretation powers of the Supreme Court, and that such powers for the Court were intended by the drafters of the constitution. Making such decisions is a natural role for a high court to play. However, Wolesi Jirga members argue that the language of Article 121 is limited and specific, and that additional powers not specified to the court cannot be read into the constitution. Instead, the parliament would assign some of this authority to a new Independent Commission for Overseeing the Implementation of the Constitution, called for in Article 157 of the constitution. Each side has thus far attempted to remove this significant gap through legislation.

The Supreme Court has attempted to clarify its jurisdiction through a proposed amendment to the Law on the Organization and Jurisdiction of the Courts (2005), revising the previous Article 24 to read:

The Supreme Court High Council shall have the following jurisdiction within the scope of drafting, organizing, proposing and interpreting laws:

1. *Assess the conformity of laws, legislative decrees, international treaties and conventions with the Constitution upon a request from the government or courts and issue the necessary awards.*
2. *Interpret the Constitution, laws and legislative decrees upon request from the government or courts.*
- ...
4. *Resolve disputes stemming from the implementation of law and exercise of legal authority between the National Assembly and the Government.*

The new additions in parts 2 and 4 of the article would empower the Supreme Court to hear any question of constitutional interpretation, whether based on a law or a government action, and whether concrete (based on an actual harm) or abstract (based on a hypothetical conflict). This draft is still before the parliament.

There has been a legislative struggle over the purpose and power of the the Independent Commission for Overseeing the Implementation of the Constitution (Article 157 Commission). The constitution states:

Article 157

The Independent Commission for the Supervision of the Implementation of the Constitution will be established by the provisions of the law.

Members of this Commission shall be appointed by the President with the confirmation of the Wolesi Jirga.

The executive proposed language in a draft law to establish Article 157 Commission that would have allowed that Commission to review draft legislation “prior to the endorsement of the President” to express an opinion of the constitutionality of the law. The Commission was also empowered to provide legal advice on “issues arising from the Constitution” and “studying previous laws for their inconsistency” for the President. In this draft, the Commission was empowered to provide advice, not to issue binding decisions on any subject, or to interpret the constitution outside the bounds of the issues prescribed.

The parliament then amended the legislation to remove the explicit but limited power to provide an opinion on legislation prior to endorsement by the President, and added the expansive power of “*Interpretation of the Constitution on the request of the President, the National Assembly, the Supreme Court, and the Executive.*”

President Karzai then vetoed this legislation, on the grounds that this language violated articles 121, 122, and 157 of the constitution. The primary argument of the President’s veto message is that 1) Article 121 of the constitution implies broad constitutional interpretation powers for the Supreme Court, which has historically had this power, and 2) the Article 157 Commission was meant to be a supervisory body for the implementation of the constitution, not a body for interpretation.

We will not review the validity of these arguments here, but they set out the clear basis of disagreement over the location of these powers. It is worth noting that some of the disagreement about this issues arises from decisions made during the drafting of the current constitution. The question of the intent of the constitutional drafters in this regard is unclear and complicated. In summer 2003, the draft constitution contained provisions for a Constitutional Court:

Article 146

The Constitutional High Court has the following authorities:

- 1. Examining the conformity of laws, legislative decrees and international agreements and covenants with the Constitution.*
- 2. Interpretation of the Constitution, laws and legislative decrees.*

The plans for a Constitutional Court were removed from the draft constitution prior to the Loya Jirga, and the basic competencies folded into the Supreme Court. However, the language changed when Article 121 was finalized. Also, the language of Article 157 was placed into the constitution without significant debate. Was omission of the phrase “interpretation of the constitution” merely an oversight or an intentional distinction to limit the powers of the new Supreme Court?

There may be no correct answer to these questions, but the resolution of this fundamental gap in the legal and political process urgently requires resolution to ensure that constitutional crises do not endanger the political process and that citizens and institutions are able to protect and enforce their rights.

Standing

Standing is essentially the question of who has access to the court or other designated body for constitutional claims. Without access to the appropriate tribunal to enforce them, rights and restrictions themselves are meaningless. Such rules must be clear to all parties, to ensure that access and transparency.

Article 121 provides some guidance as to *how* the court is to be accessed for constitutional interpretation questions: on the request of the government or the courts. While this creates (and limits) avenues of access to the Supreme Court, it is far from clear exactly what is meant by “government” or “courts” and considerably more definition needs to be provided to ensure that rules of access are clear. For example, does “government” include the parliament? If so, is any single member of parliament able to bring a claim? A percentage? A majority? Does it include provincial level officials? Similarly, the meaning of “court” is unclear. Does this pertain to any lower court? Can the Supreme Court decide for itself to raise a constitutional question even if no other court has raised the issue?

Generally, the mechanism for lower courts to address constitutional questions is for the court in possession of the case to certify a constitutional question that it will submit to the Supreme Court. According to Art. 32 of the draft Law on the Organization and Jurisdiction of the Court (2008):

If during adjudication of a case, a court realizes that decision on that case requires interpretation of the Constitution, it shall stop adjudication process and shall refer the issue to The Supreme Court High Council.”

Presumably the method the court would use to evaluate the justiciability of the question would be the same as that used for cases raised by the other party(s) with standing, the “government.”

The parliament’s draft of the Article 157 law and the draft amendment of the Courts law both restrict access to the Commission or Supreme Court to government bodies or officials: the executive, the parliament, or the courts.

Such a process leaves citizens with out any right to directly petition the relevant body on constitutional questions. If such a right is desirable – perhaps to address reluctance of lower courts to certify constitutional questions no matter how valid – a private appellate route could easily be created to enable higher courts or a Commission to review such claims. One possibility, as in the Kuwaiti system, is to create an appellate review mechanism within the Supreme Court for private party appeals on constitutional questions in on-going cases. Based on a quick review of the claim, the review committee could either could reject the claim or certify the question and notify the lower court to hold proceedings until the Supreme Court has the opportunity to address the claim. Alternatively, the lower courts could be required to include any denied claim of a constitutional issue in their decision with reasons as to why the claim was not certified, for use by the party in the appeals process.

Timing

Article 121 does not clearly answer when a claim can be brought. This raises questions addressed earlier in the discussion of the courts and the Article 157 Commission. Some systems allow review of a law before it is passed, some after, some both. Some systems require that an actual (concrete) injury be suffered in order to bring a claim, others allow a claim based on a hypothetical problem. At present, can the court be asked to judge (or advise) on the text of a draft law or regulation? Once a law is passed, does the law need to go into affect and be tested, or can the law be challenged simply based on the text?

In the draft law on the Article 157 Commission put forward by the Executive, it seems like a division is made allowing the Commission to provide advisory opinions on draft legislation, while Article 121 would allow the Supreme Court to rule on cases involving legislation once passed. But this distinction is not made clear, potentially setting up a clash of jurisdictions in the future.

On the question of when constitutional decisions can be made in a case within the regular courts, a solution has been proposed in the amended draft of the Courts law:

Article 32

If during adjudication of a case, a court realizes that decision on that case requires interpretation of the Constitution, it shall stop adjudication process and shall refer the issue to The Supreme Court High Council.

Effect

The effect of a constitutional decision by the appropriate body is also something that requires careful clarification. The first question that must be answered is whether the opinion is binding or non-binding.¹ If the opinion is non-binding, it can, of course, be ignored. Such an opinion, in the case of legislation, may provide language suggesting how a constitutional problem can be avoided, but the decision cannot control the outcome. Depending on the rules of constitutional interpretation raised in this paper, the role of non-binding opinions can change. For example, if a court has the power to issue binding decisions on legislation once it is passed, then a non-binding opinion by that same court would have high value, as it suggests the opinion of the court in a future case. Non-binding opinions can be very influential even when the body may not ever have the power to bind decision-making. For instances, non-binding opinions may be very important in questions concerning the interpretation of Islam, if the body issuing the opinion is a recognized authority.

There is also the critical question of what exactly an appropriate body hearing a constitutional claim can do in its decision. Can the decision stop implementation of an entire law, or does the decision only pertain to any specific issue or language found to be problematic. In the later case, can the court strike specific language, or even add language, while leaving the rest of the law in place? In the case of a decision concerning a government action or policy (rather than a law), can the appropriate body forbid the government to continue this practice, or can it merely say award relief to someone who has suffered from the unconstitutional practice?

Islamic Review

Article 3 of the Afghan constitution, as well as other provisions of criminal and family law, suggest that some body within the political/legal system will have the power to determine Islamic standards.

Article 3

In Afghanistan no law can be contrary to the beliefs and provisions of the sacred religion of Islam.

¹ In some systems, non-binding opinions are called “advisory opinions” while in other systems advisory opinions can be binding. The status of advisory opinions in the Afghan legal system is unclear to the author at present based on existing law.

When combined with Article 121 this provision suggests that the Supreme Court has the power to review laws to ensure they comply with “the beliefs and provisions of the sacred religion of Islam.” Pending the resolution of the powers of the Article 157 Commission, similar analysis will apply. Therefore, it is critical to address whether there are any special processes or entities involved in such decisions that may differ from other type of constitutional review claims. This question touches not only process but also the legitimacy of the process, and the concerns of all branches of government that their efforts to uphold the meaning of the constitution be respected. A separate paper addresses these questions in greater depth.