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# Judicial Review and Constitutional Interpretation in Afghanistan: A Case of Inconsistency\*

BY SHOAIB TIMORY\*\*

## EXECUTIVE SUMMARY

Constitutionalism and separation of powers are distinct features of modern democracies.<sup>1</sup> While democratic constitutions attempt to divide authorities and responsibilities between the branches of the state as clearly as possible, differences exist and state branches sometimes trespass on the territory of other branches out of self-interest.<sup>2</sup> This trespass sometimes results in confrontation between the branches or violation of individuals' fundamental rights. To deter such infringements, judicial review emerged as a mechanism for protecting the supremacy of the constitution.<sup>3</sup>

In 1803, *Marbury v. Madison* was the first critical instance of exercising judicial review and soon thereafter, a large number of

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\* Footnotes with the following asterisk indicia (\*) were not independently verified by the Loyola of Los Angeles International and Comparative Law Review and the reader is thus relying on the veracity of the author for sources so marked.

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1. Aileen Kavanagh, *The Constitutional Separation of Powers*, in PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 221, 221-23 (Dyzenhaus David & Malcolm Thorburn eds., 2016).

2. *Id.* at 223.

3. *Id.*

countries followed the concept with variations in style and detail.<sup>4</sup> Today, we witness the emergence of two main forms of judicial review: the European model and the American model.<sup>5</sup> Under the European model, a centralized body ensures constitutionality of laws and government acts and protects the fundamental rights of citizens.<sup>6</sup> Under the American model, the ordinary courts ensure constitutionality of bills in the context of ongoing litigation.<sup>7</sup> While the structure and authorities vary from one country to another, states ensure the basic mechanisms, such as review by third parties and the opportunity to request constitutional review by more than one party, are in existence.

Historically, constitutional supremacy has been recognized in nearly all constitutions of Afghanistan; however, a full-fledged judicial review system has never emerged.<sup>8</sup> Elements of judicial review appeared in nearly all of the six short-lived constitutions of Afghanistan in the twentieth century.<sup>9</sup> The 2004 Constitution is not in any better shape.<sup>10</sup> Sixteen years since promulgation of Constitution of 2004, the flaws and weaknesses of the inherited judicial review system are exposed.<sup>11</sup>

The Afghanistan Supreme Court conducts judicial review at the request of the government or the courts.<sup>12</sup> However, the practice of judicial review after 2004 has been inconsistent. A quick look at how the Supreme Court is making judicial review and interpretation decisions reveals that the only common element among those decisions is inconsistency. While there is some clarity on the subject of constitutional review and the role of the Supreme Court, the topic of constitutional interpretation is more controversial. On one hand, the Supreme Court has held that constitutional interpretation is a part of its authority; however, on the other hand, some claim this authority can be

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4. MAARTJE DE VISSER, CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE ANALYSIS (2014).

5. GHIZAAL HARESS, JUDICIAL REVIEW IN AFGHANISTAN: A FLAWED PRACTICE 5-6 (Afg. Research & Evaluation Unit ed., 2017); Devashri Sinha, *Constitutional Review: A Critical Study of American Model and European Model*, 2016 INDIAN L. INST. L. REV. 158, 158.

6. VISSER, *supra* note 4, at 95.

7. Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 163 (2011).

8. This article uses the terms "constitutional review" and "judicial review" interchangeably. J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 558, 564 (2007).

9. HARESS, *supra* note 5, at 7-8.

10. Thier, *supra* note 8, at 579.

11. *Id.* at 572.

12. QANUN-I ASSASI-YE JAMHURI-YE ISLAMI AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] of 2004 (Afg.) [hereinafter 2004 CONSTITUTION OF AFGHANISTAN].

delegated to the Independent Commission for Overseeing Implementation of the Constitution (“ICOIC”) because the Constitution is not offering a clear viewpoint on this topic.<sup>13</sup>

This article gives a detailed account of the legal framework, application, examples, and flaws of judicial review and constitutional interpretation in Afghanistan and concludes that the current model of judicial review is not responsive to the growing demands of the legal sector and it is essential that judicial review undergo substantial reforms. The following summarizes key recommendations of the article:

1. Given the importance of the subject matter, the reforms to judicial review and constitutional interpretation should come through a constitutional amendment process that clarifies the role of each relevant entity in conducting judicial review.
2. One option is to make modifications in the existing Supreme Court model. Setting forth a clear role for the Supreme Court to interpret the Constitution, designing a separate mechanism for judicial review of international treaties and government regulations, and clarification on ensuring Sharia compliant-legislation are examples of the required modifications.
3. A more preferred option is to replace the current model of constitutional review with the European model. The European model would not only address the constitutionality of acts but also address the constitutionality of the political questions frequently raised in Afghanistan.
4. Until a revision of the constitutional review model takes place through the marathon process of a constitutional amendment, it is necessary that both the Supreme Court and the ICOIC reach an agreement, followed by either an introduction of new legislation or amendment of the existing legislation, to bring some clarity on their roles and responsibilities.

## INTRODUCTION

In modern democracies, constitutions adhere to the principles of separation of power and assign authorities to different branches of the state accordingly. Even though division of authorities is mentioned explicitly in most constitutions, the conflict between the branches sometimes becomes unavoidable due to different interpretations of laws and the constitution, which might result in one branch trespassing into the territory of the other.

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13. HARESS, *supra* note 5, at 14-16.

Judicial review, or the authority to review the constitutionality of legislation or governmental acts, is one of the features of modern democratic governments. A theory of judicial review based on separation of power requires the reviewing bodies to insist on adherence to the principle of separation of powers whenever the government or legislature seeks derogation of constitutional values. Therefore, judicial review is based on the notion that the constitution is superior to the other laws and administrative decisions. In addition, because constitutions generally outline fundamental rights of citizens, judicial review is considered a key factor in upholding the fundamental rights of the citizens.

There are two main forms of judicial or constitutional review practiced around the world.<sup>14</sup> The United States first introduced the decentralized model of judicial review.<sup>15</sup> The landmark *Marbury v. Madison* case in 1803 introduced the concept of judicial review and supremacy of the United States Constitution at the federal level.<sup>16</sup> Based on the American model, the courts, at any level, can review the constitutionality of acts when they decide cases before them.<sup>17</sup> Under this model, the judges are of high caliber and have a comprehensive understanding of constitutional values and principles.

The European model, which is also known as the Kelsenian model, named after its Austrian founder, is the other primary type of judicial review.<sup>18</sup> Under this model, one centralized body, like a court or council that sits outside the judicial system, reviews the constitutionality of laws.<sup>19</sup> Though Hans Kelsen introduced this type of judicial review for Austria, many countries around the world, such as Germany and Italy, followed suit and applied this centralized type of judicial review.<sup>20</sup>

Based on the time the review is taking place, judicial review is divided into priori review and posterior review.<sup>21</sup> Priori review takes place before the legislation is put into effect.<sup>22</sup> For instance, if the

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14. MARTIN M. SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION (2002).

15. VISSER, *supra* note 4, at 94.

16. See Martin T. Manton, *The Doctrine of Judicial Review*, 8 N.Y. ST. B. ASS'N BULL. 205, 207 (1936).

17. VISSER, *supra* note 4, at 94.

18. *Id.* at 95.

19. *Id.*

20. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 9 (2003) (Ginsburg enlists a list of seventy-one new democracies out of which forty-two have one type of constitutional review body in place).

21. VISSER, *supra* note 4, at 96.

22. *Id.*

legislation passed by the parliament is reviewed before the final signature, it is a form of priori review.<sup>23</sup> On the other hand, if review is only possible after the legislation is put into effect, it is called posterior review.<sup>24</sup> Scholars also categorize judicial review as abstract review, concrete review, or individual challenge based on the nature and type of review.<sup>25</sup> If the reviewing body conducts the review without consideration of litigation, it is called abstract review.<sup>26</sup> Concrete review takes place as part of ongoing litigation.<sup>27</sup> In some countries, individuals can also file a request in which they challenge the constitutionality of a government act or legislation.<sup>28</sup>

This article examines whether Afghanistan has followed the American or the European model of judicial review and whether judicial review has been successful. The article begins by looking at the history of judicial review in Afghanistan and then examines the application of judicial review and its challenges under the Afghan Constitution of 2004. This article also explores the subject of constitutional interpretation and the reasons it has been portrayed as a controversial matter in recent years. Based on the lessons learned after 2004, the author provides his recommendations on enhancement of the judicial review in Afghanistan.

## I. PART ONE: HISTORY OF JUDICIAL REVIEW IN AFGHANISTAN

### A. *Judicial Review Before 2004*

Abdul Rahman Khan (1880-1901) was the first ruler of Afghanistan to initiate the establishment of modern state courts beside Sharia courts.<sup>29</sup> For the most part between the 1880s and 1960s, Afghanistan continued the tradition of having a dual court system: Sharia courts handled matters like criminal law, family law and personal law, and the state courts decided matters like tax, commerce, and civil service.<sup>30</sup> Afghanistan did not have a constitution or recognize the

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23. *Id.*

24. THE OXFORD HANDBOOK OF LAW AND POLITICS 131 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Calderia eds., 2008).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Ramin Moschtaghi, *Organization and Jurisdiction of Newly Established Afghan Courts – The Compliance of the Formal System of Justice with the Bonn Agreement*, 10 MAX PLANCK Y.B. U.N. L. 531 (2006), [http://www.mpil.de/files/pdf3/mpunyb\\_12\\_ramin.pdf](http://www.mpil.de/files/pdf3/mpunyb_12_ramin.pdf).

30. J. Alexander Thier, *Reestablishing the Judicial System in Afghanistan* 5 (Ctr. on Democracy, Dev., and Rule of Law, Stanford Inst. for Int'l Studies, Working Paper No. 19,

concept of separation of powers until achieving independence in 1919.<sup>31</sup> Abdul Rahman Khan and his successor, Habibullah Khan, relied on their own creeds and decrees to run the country.<sup>32</sup>

After the 1919 Independence War, King Amanullah introduced the first Constitution of Afghanistan in 1923.<sup>33</sup> That Constitution did not foresee the establishment of a parliament.<sup>34</sup> Following the examples of France and Egypt, the 1923 Constitution established a Council of State that had two main duties: first, to review the text of laws before the Council of Ministers approve them; and second, to act as the Higher Court for civil service disputes.<sup>35</sup> The 1923 Constitution also authorized the Council of State to explain and interpret any article of the Constitution or other laws followed by the approval of the Council of Ministers.<sup>36</sup> There is no evidence, however, that indicates the Council of State exercised this power. Though the main purpose of review of laws by the State Council was to improve the quality of laws, the process could be seen as a semi-priori review of laws against the Constitution. The constitutions that came into existence after the 1923 Constitution possessed some elements of judicial review, but none introduced a robust mechanism.

The 1931 Constitution that created a legislature for the first time lacked any reference to judicial review except for containing a repugnancy clause. Article 65 stated that legislative documents adopted by the National Assembly shall not be repugnant to principles of Islam or the policy of the government;<sup>37</sup> however, it failed to mention any mechanism for ensuring adherence to the repugnancy clause.<sup>38</sup> Given the advisory role of the National Assembly, it was not a surprise that such a mechanism was lacking. The first two constitutions of Afghanistan were weak documents that did not clearly define the structure of the state and separation of power.<sup>39</sup> A real legislative branch

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2004), [https://www.fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/Reestablishing\\_the\\_Judiciary\\_in\\_Afghanistan.pdf](https://www.fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/Reestablishing_the_Judiciary_in_Afghanistan.pdf).

31. *Constitutional History of Afghanistan*, ENCYCLOPAEDIA IRANICA, <http://www.iranicaonline.org/articles/constitutional-history-of-afghanistan> (last visited Oct. 11, 2018).

32. Moschtoghi, *supra* note 29.

33. *Id.*

34. *Constitutional History of Afghanistan*, *supra* note 31.

35. SARWAR DANISH, HUQOQ EDRAI AFGHANISTAN [THE ADMINISTRATIVE LAW OF AFGHANISTAN] (Kabul: Ibn Sina Higher Education Institute Publications, 2013).

36. NEZAMNAMEH-I ASSASI-YE DAWLAT ALIAH AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] of 1923 (Afg.) [hereinafter 1923 CONSTITUTION OF AFGHANISTAN].

37. OSOUL-I ASSASI-YE DAWLAT-I ALIAH AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] of 1931 (Afg.) Art. 65 [hereinafter 1931 CONSTITUTION OF AFGHANISTAN].

38. *Id.*

39. HARESS, *supra* note 5, at 7.

was not in place to create legislation that could be repugnant to the Constitution or Sharia and thus there was no possibility of conflict between the legislative and executive branch.

By 1963, King Zahir Shah (1933-1973) began his reform plan in order to democratize the country by establishing separation of branches and decreasing the power of the Monarch and the Royal Family.<sup>40</sup> For the first time, the 1964 Constitution—considered as the finest constitution of the Muslim world at the time of its introduction<sup>41</sup>—declared the judiciary an “independent organ of the State which charges its duties side by side with the Legislative and Executive Organs.”<sup>42</sup> In addition, a consolidated and unified judicial system, at the top of which was the Supreme Court, took its place in the Constitution.<sup>43</sup> The Constitution and the laws were also declared as the dominant sources for decision-making in the courts, and Sharia law (Hanafi School of Jurisprudence) could be applied only if a rule was not found in the Constitution or in the ordinary laws.<sup>44</sup> Recognized as an independent organ, the judiciary was the real winner of the 1964 Constitution. The current structure of the judiciary resembles the same structure that the 1964 Constitution introduced.

The 1964 Constitution tagged the King as the guardian of the Constitution.<sup>45</sup> It also contained a repugnancy clause stating that no law shall be against the principles of Islam or other values enshrined in the Constitution.<sup>46</sup> The 1964 Constitution, however, did not have a clear reference to a judicial review mechanism. To fill in the gap, the 1967 Law of Jurisdiction and Organization of the Courts provided that the Supreme Court has the power to abstain from applying laws repugnant to the provisions of the Constitution and to interpret laws at the time of implementation.<sup>47</sup> Interviews and research,<sup>48</sup> however, show that the Supreme Court failed to exercise a single case of judicial review.<sup>49</sup>

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40. *Reestablishing the Judicial System in Afghanistan*, *supra* note 30, at 5.

41. LOUIS DUPREE, *AFGHANISTAN* 565 (3d ed. 1980).

42. QANUN-I ASSASI-YE JAMHURI-YE ISLAMI AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] of 1964 (Afg.) art. 97 [hereinafter 1964 CONSTITUTION OF AFGHANISTAN].

43. *Reestablishing the Judicial System in Afghanistan*, *supra* note 30, at 10.

44. 1964 CONSTITUTION OF AFGHANISTAN, *supra* note 42, at art. 102.

45. *Id.* at art. 7.

46. *Id.* at art. 64.

47. Afghanistan Law of the Jurisdiction and Organization of the Courts, AFGHANISTAN OFFICIAL GAZETTE No. 89, Art. 13.a. 1-2 (1967) (Afg.) [hereinafter 1967 Afghanistan Law of the Courts].

48. Interview with Mohammad Sediq Zhobl, Directorate Gen. of Scrutiny and Perusal, Supreme Court (Jan. 10, 2018) (on file with author).

49. *See generally* Martin Lau, *Islamic Law and the Afghan Legal System* (May 30, 2003),



The 1976 Constitution that was ratified during the first Republic also had a repugnancy clause.<sup>50</sup> Article 135 gave the authority of interpretation of the Constitution to the Supreme Court.<sup>51</sup> However, before the President established the Supreme Court, the communists' coup in 1978 changed the regime. The new regime set aside the Constitution and started ruling the country by decrees until a new Constitution was introduced in 1980.<sup>52</sup> The first constitution of the Communist Regime authorized the Executive Board of the Revolutionary Council to interpret the law but it lacked a clause allowing judicial review.<sup>53</sup>

It was not until 1987 that a constitution in Afghanistan incorporated different aspects of constitutional review.<sup>54</sup> In addition to a repugnancy clause that stated that no law shall be against the principles of Islam or other values enshrined in the Constitution,<sup>55</sup> the 1987 Constitution introduced a French-style model of judicial review. This was the first time an Afghan constitution introduced a robust, but still flawed, mechanism for review of legislation. Chapter Ten of the 1987 Constitution was devoted to the Constitutional Council.<sup>56</sup>

The Constitutional Council was composed of a chairperson and eight members.<sup>57</sup> The President appointed the members for a term of six years.<sup>58</sup> The amendments to the Constitution in 1990 changed the composition of the Constitutional Council by adding deputy and secretary positions, increasing the number of Council members to eleven.<sup>59</sup> The Council was accountable to the President and was obliged to report to him.<sup>60</sup> The role of the President in appointing the council members and accountability of the Council to the President clearly negated any claim of independence of the Council. Thus, the Council

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[https://www.eprints.lse.ac.uk/28366/1/Lau\\_LSERO\\_version.pdf](https://www.eprints.lse.ac.uk/28366/1/Lau_LSERO_version.pdf), (unpublished conference paper) (on file with London School of Economics Research Online).

50. QANUN-I ASSASI-YE DAWLAT-I JAMHURI-YE AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] of 1976 (Afg.) art. 64 [hereinafter 1976 CONSTITUTION OF AFGHANISTAN].

51. *Id.* at art. 135.

52. *Constitutional History of Afghanistan*, *supra* note 31.

53. OSOUL-I ASSASI-YE JAMHURI-YE DEMOCRATIC AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] of 1980 (Afg.) [hereinafter 1980 CONSTITUTION OF AFGHANISTAN].

54. *Constitutional History of Afghanistan*, *supra* note 31.

55. QANUN-I ASSASI-YE JAMHURI-YE AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] of 1987 (Afg.) [hereinafter 1987 CONSTITUTION OF AFGHANISTAN].

56. *Id.* at art. 125.

57. *Id.*

58. *Id.*

59. QANUN-I ASSASI-YE JAMHURI-YE AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] of 1990 (Afg.) [hereinafter 1990 CONSTITUTION OF AFGHANISTAN].

60. 1987 CONSTITUTION OF AFGHANISTAN, *supra* note 55, at art. 126.

had only an advisory role. This was proof that the Constitution only copied the physical features of the French model of judicial review. The entity lacked the independence exercised by similar entities in the democratic world.

Putting aside the critics, the main objective of the establishment of the Council was to ensure the constitutionality of laws, legislative documents, and international treaties.<sup>61</sup> In addition, the Constitutional Council had a duty to provide legal and judicial opinions to the President on matters related to implementation of the Constitution.<sup>62</sup> The Council could also share its recommendations on effective execution of legislative documents prescribed by the Constitution with the President.<sup>63</sup> The Council had a long list of duties; however, due to the advisory nature of its decisions, it lacked the power to overturn unconstitutional documents. As per Article 124 of the 1987 Constitution, the Constitutional Council had a priori review authority.<sup>64</sup> This Article and the text of Constitutional Council Law reveal that the ruling of the Council on such matters was advisory in nature and it was up to the President to consider or ignore the Council's opinions.<sup>65</sup>

The Council also had the authority for posteriori review of the legislative documents at the request of rights protecting entities, other state institutions, and individuals.<sup>66</sup> It was required that organizations and individuals share their questions with the Constitutional Council and if the Council agreed with the unconstitutionality of the legislative document, the Council would send its proposal for abolishment of the legislative document to the President.<sup>67</sup> Despite its lack of authority in enforcing its opinions, the range of institutions and accessibility of individuals to the Constitutional Council was revolutionary.

The records of the Ministry of Justice show that the Constitutional Council issued fifty-six opinions on different legislative documents.<sup>68</sup> Out of those cases, the Constitutional Council announced constitutionality of forty-two of the legislative documents, declared twelve of the legislative documents unconstitutional, and the Council

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61. *Id.* at art. 122.

62. *Id.* at art. 123.

63. *Id.* at art. 124.

64. *Id.*

65. Law on Constitutional Council, AFGHANISTAN OFFICIAL GAZETTE No. 682, art. 12 (1988) (Afg.).

66. *Id.*

67. *Id.*

68. OFFICIAL GAZETTE, (last visited Oct. 11, 2018) (Afg.).

provided its opinion as a commentary on two other subjects.<sup>69</sup> The opinions of the Council included a variety of subjects that came from different entities, groups, and even individuals.<sup>70</sup> While the Constitution required a party to ask for review of the constitutionality of legislative documents, the Constitutional Council, without being asked, provided an opinion defining the term “urgent need” for approval of a legislative decree by the government during the recess of the National Assembly.<sup>71</sup> This was an indication that the Council wanted to take initiative and expand its jurisdiction beyond what the Constitution and the Council’s Law had mandated.

In one of its first decisions, the Constitutional Council announced that a number of articles of the Law on National Assembly were unconstitutional.<sup>72</sup> The relevant unconstitutional articles restricted candidacy for leadership positions in the two houses of the National Assembly to only candidates of political parties. In addition, the Council stated that articles of the Law on the following subjects are unconstitutional: (1) the requirement of two-thirds majority vote to hold a non-public session of the National Assembly, (2) declaring opinions of the Senate over the national budget as advisory, and (3) expansion of the oversight authority of the National Assembly over the judiciary.<sup>73</sup> The Council shared the opinion with the President, who returned the law back to the National Assembly, based on that opinion.<sup>74</sup> Another case concerns the decision of the Council of Ministers for waiving tax-related penalties. The Constitutional Council rejected the decision, calling it unconstitutional since only the President had such an authority according to the Constitution.<sup>75</sup> There has also been one request from an employee of the Supreme Court who believed Article 32 of the Civil Servants Law on implementation of illegal orders of their supervisors is violating Article 42 of the Constitution, which asks for implementation of orders of the senior officials.<sup>76</sup> The concerned individual did not send the request directly to the Council; rather, he shared his request with the High Council of the Supreme Court and the Supreme Court sent the

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69. *Id.*

70. *Id.*

71. Constitutional Council Opinion, AFGHANISTAN OFFICIAL GAZETTE No. 682 (1989) (Afg.) [hereinafter 1989 Constitutional Council Opinion].

72. *See id.*

73. *Id.* at 11.

74. *Id.* at 26.

75. *Id.* at 16-17.

76. *Id.* at 18-20.

request to the Constitutional Council.<sup>77</sup> Ultimately, the Constitutional Council struck down the request and declared the relevant article of the Civil Servants Law as constitutional.<sup>78</sup> The Constitutional Council also faced a question concerning Sharia. In 1988, the Women's Association of Afghanistan requested the Constitutional Council to declare a number of articles of the Civil Code related to divorce unconstitutional since those articles undermined the equality of men and women, a principle recognized under Article 38 of the Constitution.<sup>79</sup> The Constitutional Council, after explaining how men and women could apply for divorce under the Civil Code, which is based on Sharia, rejected the request.<sup>80</sup>

Though the Constitutional Council reviewed a considerable number of laws, the biggest flaw was the advisory role of the Council and its inability to enforce its findings.<sup>81</sup> Therefore, the impact of this short-lived Council was minimal, and the safeguards against violation of the Constitution were weak and ignorable.

It is worth mentioning that while the Constitutional Council had the power of constitutional review, the Constitution had authorized the National Assembly to interpret the ordinary laws.<sup>82</sup> This was not strange, at least in the region. In Iran, the Guardian Council of the Constitution ensures compliance of legislation with Sharia and Constitution,<sup>83</sup> while the parliament interprets its own passed-laws.<sup>84</sup>

The Taliban regime did not have a constitution or they did not introduce it publicly, and they did not announce the abolishment of previous constitutions either. However, in a rather interesting action, the Taliban slightly revised the previously enforced Constitutional Council Law and published the law in the Official Gazette.<sup>85</sup> The so-called Constitutional Council of the Taliban was supposed to work under the auspices of the Administrative Office of the Taliban Government.<sup>86</sup> Article 2 of that law authorized the Constitutional Council to ensure

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77. *Id.* at 20.

78. Constitutional Council Opinion, AFGHANISTAN OFFICIAL GAZETTE No. 763 (1992) (Afg.) [hereinafter 1992 Constitutional Council Opinion].

79. 1989 Constitutional Council Opinion at 31.

80. *Id.*

81. Lau, *supra* note 49 (manuscript at 219).

82. 1987 CONSTITUTION OF AFGHANISTAN, *supra* note 54.

83. QANUNI ASSASI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1979 art. 91 [hereinafter 1979 CONSTITUTION OF IRAN].

84. *Id.* at art. 73.

85. Law on Constitutional Council, AFGHANISTAN OFFICIAL GAZETTE No. 797 (2001) (Afg.).

86. Law on Constitutional Council (Taliban Regime), AFGHANISTAN OFFICIAL GAZETTE No. 797 (2001) (Afg.).

compatibility of laws, other legislative documents and international treaties with Sharia.<sup>87</sup> It is unknown whether the Constitutional Council was ever established or reviewed any legislative document for its compatibility with Sharia. Interviews with individuals who are familiar with the institutions at the time of the Taliban indicate that only one individual, Mohammad Musa Nohmat, who had been a member of the Constitutional Council before the collapse of the communist regime, continued to have his previous title at the time of the Taliban regime, though he did not have any authority.<sup>88</sup>

The review of previous Afghan Constitutions reveals that a full-fledged system of constitutional review was never in place.<sup>89</sup> At times, there were elements of a Supreme Court model of judicial review introduced like the one under the 1976 Constitution of Daud Khan. On the other hand, the 1987 Constitution established a constitutional council similar to that of France. However, unlike its French counterpart, Afghanistan's Constitutional Council had a shorter lifespan, was not independent, and was dysfunctional due to the collapse of the regime.<sup>90</sup>

### *B. Judicial Review Under the 2004 Constitution*

Compared to previous constitutions of Afghanistan, the Constitution of 2004 has recognized a vast range of fundamental rights and liberties and it has tried to create a government of separation of power. The Judiciary is an independent organ of the State and has three tiers of courts: primary courts, appeals courts, and the Supreme Court as the highest organ of the judiciary.<sup>91</sup> The legislature has extensive power and is mandated to oversee the Executive using different means. To summarize, this Constitution designs a system of checks and balances that creates an unprecedented democratic system of governance.

While the 1987 Constitution had introduced a constitutional review mechanism similar to that of France, the 2004 Constitution derogates from that tradition. The 2004 Constitution gives the Supreme Court the power to ensure conformity of the laws, legislative decrees, inter-state treaties as well as international covenants with the Constitution and their interpretation.<sup>92</sup> There are limitations on who and what entities can

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87. *Id.* at 11.

88. Interview with Mohammada Gul Koochay, Dir. of Monitoring, Office of Chief of Staff to the President (Jan. 3, 2018) (on file with author).

89. HARESS, *supra* note 5, at 10.

90. *Constitutional History of Afghanistan*, *supra* note 31.

91. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 116.

92. *Id.* at art. 121.

ask for a review of constitutionality. Article 121 only authorizes the government and the courts to submit requests for constitutional review.<sup>93</sup> Besides, the Constitution requires passage of a law that will regulate the practical details of the judicial review and interpretation.<sup>94</sup> This law is yet to be introduced, though some aspects of judicial review and interpretation are addressed in the new draft Law of Organization and Jurisdiction of the Judiciary.<sup>95</sup>

During the 2004 Constitutional Loya Jirga, judicial review appeared to be a contentious issue.<sup>96</sup> The Constitutional Drafting Commission had suggested a Constitutional Court be established to ensure conformity of laws and other legislative decrees with the constitution.<sup>97</sup> The draft Constitution had outlined the judicial review and authority to conduct interpretation of the Constitution and other legislative decrees quite clearly.<sup>98</sup> The following text is an excerpt from Chapter 8 of the Draft Constitution:

#### Chapter Eight—Draft Constitution of Afghanistan

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.

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93. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 121.

94. *Id.*

95. Draft Law on Jurisdiction and Organization of the Judiciary, (2018) (Afg.) (on file with author).

96. Shamshad Pasarlay, *Constitutional Interpretation and Constitutional Review in Afghanistan: Is There Still a Crisis?*, I-CONNECT: BLOG (Mar. 18, 2015), <http://www.i-connectblog.com/2015/03/constitutional-interpretation-and-constitutional-review-in-afghanistan-is-there-still-a-crisis/>.

97. *Id.*

98. Thier, *supra* note 8, at 579.

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.<sup>99</sup>

This chapter provided a clear definition and mechanism for judicial review and interpretation. It also provided a clear path for courts and individuals to challenge the constitutionality of various legislative documents.

Once the Draft Constitution was submitted for review to Hamid Karzai, the then Head of the Transitional Government, he and his cabinet did not agree with the establishment of an independent court to ensure constitutionality.<sup>100</sup> Some argue that Hamid Karzai was afraid of a possible tension between the branches and the possible limitation a Constitutional Court could impose on the next President of the country.

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99. SARWAR DANISH, *HUQUQ-I ASSAS-I AFGHANISTAN [AFGHANISTAN CONSTITUTIONAL LAW]* (Kabul: Ibn-e-Sina Institute of Higher Education, 3rd ed. 2015) (on file with author).

100. Pasaaray, *supra* note 96.

Others argue he was advised not to accept that institution since it might function like the Guardian Council of Iran, which frequently limits the power of the executive and legislature.<sup>101</sup>

In the Draft Constitution that was published in late 2003 and distributed to Constitutional Loya Jirga for discussion and approval, the authority of judicial review, in its initial form, was scrapped and was awarded to the Supreme Court. Article 121 of the Draft Constitution distributed to Constitutional Loya Jirga members reads as follows: “At the request of only the Government or the courts, the Supreme Court reviews compliance of laws, legislative decrees, inter-state treaties and international covenants with the Constitution and issues the necessary verdicts. Supreme Court is authorized to interpret the Constitution, laws and legislative decrees.”<sup>102</sup>

In contrast to the proposed model of the Constitutional Drafting Commission, Article 121 was very brief and insufficient. However, despite being brief, Article 121 separated the subject of judicial review from the subject of interpretation. Few changes made to this Article in the Constitutional Loya Jirga, with the objective to keep the Article precise, proved to be a trigger for the controversy between the three branches of the state in the upcoming years. Article 121 of the Constitution as approved in Loya Jirga reads as follows: “At the request of the Government or courts, the Supreme Court shall review the laws, legislative decrees, inter-state treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.”<sup>103</sup>

Compromise on the last day of Loya Jirga resulted in the introduction of Article 157 and the establishment of the ICOIC.<sup>104</sup> Though it looked like a positive step for ensuring full and timely implementation of the Constitution, later incidents proved a constitutional crisis was in the making due to the vagueness of Articles 121 and 157.

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101. Barnett R. Rubin, *Crafting a Constitution for Afghanistan*, 15 J. OF DEM. 1, 15 (2004).

102. Stera Mahkama Afghanistan [Supreme Court of Afghanistan] Qarari Qazai Shomara 5 Stara Mahkama-Ye Afghanistan Raji ba Adam Motabiqat-I Mawad-I Qanun-I Kamison-I Mostaqil-I Nizarat bar Tatbiq-I Qanun Assasi ba Qanun Assasi [Opinion No. 5 on the Unconstitutionality of Law of the Independent Commission for Overseeing the Implementation of the Constitution], AFGHANISTAN OFFICIAL GAZETTE NO. 986 (2009) (Afg.).

103. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 121.

104. HARESS, *supra* note 5, at 11.



## II. PART TWO: KEY FEATURES AND APPLICABILITY OF JUDICIAL REVIEW UNDER THE 2004 CONSTITUTION

Legal systems usually follow either a centralized or decentralized model of judicial review. However, judicial review under each legal system has its own features. Constitutions, laws, relevant procedures, bylaws and precedents highlight these features. The following two sub-parts discuss the basic features of judicial review in Afghanistan and the key judicial review decisions made so far on constitutionality of the bills passed by the National Assembly. As discussed earlier, the language of the Constitution is very brief on the issue of judicial review and interpretation, and the law is not in place to regulate its mechanism. To understand the key features, we have to rely heavily on the decisions made by the Supreme Court so far.

### *A. Key Features of Judicial Review Under the 2004 Constitution*

The Constitution requires passage of a law to enable the Supreme Court in its judicial review and interpretation tasks.<sup>105</sup> However, the Supreme Court has not submitted a draft law to regulate the subject of the judicial review yet. In the absence of such regulating legislation, the Supreme Court has thus far acted inconsistently in accepting requests and deciding judicial review cases. The following paragraphs elaborate some aspects of judicial review based on the practice of the Supreme Court in recent years.

#### 1. Request Mechanisms

According to Article 121, the Supreme Court can only receive requests for judicial review and interpretation from the government and the courts based on law.<sup>106</sup> Therefore, the range of institutions that can challenge the constitutionality of legislative documents is limited.

##### a. From the Government

The government, as described by the Constitution, “shall be comprised of the Ministers who work under the chairmanship of the President.”<sup>107</sup> A simple interpretation of this clause is that whenever the President, any minister, or heads of any other government agency want to trigger Article 121, they must call a meeting of the cabinet. Only after the cabinet’s approval can the official ask the Supreme Court for

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105. See 2004 CONSTITUTION OF AFGHANISTAN.

106. *Id.*

107. *Id.* at art. 71.

constitutional review or interpretation. In practice, however, the government has taken different approaches in asking the Supreme Court for judicial review. In many cases, the Office of Administrative Affairs of the President has sent official letters, on behalf of the President, to the Supreme Court asking for a review of the conformity of certain laws with the Constitution.<sup>108</sup> In a few cases, the President has held a meeting of the cabinet, and after the approval of the cabinet, the Administrative Office of the President has sent official letters to the Supreme Court.<sup>109</sup> On only one occasion did the Supreme Court reject requests made by the Administrative Office of the President for interpretation of Higher Education Law and asked that the request first be approved by the cabinet of ministers.<sup>110</sup>

While on most occasions, the Administrative Office of the President officially asked the Supreme Court to review the conformity of laws, on a few other occasions, the cabinet assigned other institutions to ask the Supreme Court to make such a request. For instance, in 2016, the cabinet assigned the Ministry of Education to work with the Afghanistan Independent Administrative Reform and Civil Service Commission to increase the number of women in decision-making positions. The Ministry of Education submitted its proposal; however, the Independent Administrative Reform and Civil Service Commission argued the decision contradicted the Labor Law and Civil Service Law, which bars the dismissal of current employees without legal justification. On November 6, 2016, the President asked the Independent Administrative Reforms and Civil Service Commission to either work based on Article 44 of the Constitution or ask the Supreme Court to interpret the extent to which the cabinet has authority to create a developed and balanced society.<sup>111</sup>

On another occasion, the Ministry of Foreign Affairs sent an official letter to the Supreme Court and asked for a review of the constitutionality of the Law on Diplomatic and Consular Employees.<sup>112</sup> It is not known whether they had the authority of the cabinet or the President to make such a request. While the Supreme Court accepted

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108. Letter from Admin. Office of the President to Supreme Court (n.d.) (on file with author).

109. *Id.*

110. Letter from Supreme Court to Admin. Office of the President (n.d.) (on file with author).

111. The author was given responsibility to follow up implementation of the presidential instruction to the relevant agency.

112. See generally *Stera Mahkama Afghanistan* [Supreme Court of Afghanistan] Ruling No. 20 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, AFGHANISTAN OFFICIAL GAZETTE No. 1114 (2013) (Afg.).\*

the request from the Ministry of Foreign Affairs, it rejected a request made by an individual minister after his impeachment by Wolsi Jirga.<sup>113</sup> In the famous case of Mujtaba Patang, he asked the Supreme Court to clarify whether his dismissal by Wolsi Jirga was a constitutional decision.<sup>114</sup> The Supreme Court did not accept the request citing lack of authority of the impeached minister to forward such a request.<sup>115</sup> Overall, the practice of acceptance of requests by the Supreme Court shows inconsistency in dealing with the requests from the government. Government agencies have varied in their approaches, and while the Supreme Court has objected on a few occasions, it has accepted on others.

#### b. From the Courts

Article 121 also allows the courts to make requests for judicial review and interpretation.<sup>116</sup> However, a clear procedure has never been put in place. For many years, it was believed the Supreme Court did not receive requests on judicial review or interpretation through the courts.<sup>117</sup> Interviews with Supreme Court officials and a closer look at Supreme Court publications reveal that such requests are made on a number of occasions.<sup>118</sup>

Until 2013, it was doubtful whether lower courts were able to stop court proceedings if they realized there was a need for interpretation of the law. The current Law on Organization and Jurisdiction of Judiciary prescribes that if during court proceedings, the court determines that deciding the case before the court needs interpretation of the law, the court stops the proceedings and refer the case to the High Council of the Supreme Court.<sup>119</sup> This Article is unfortunately unclear on whether the primary courts are able to refer the case directly to the Supreme Court or they should refer them to the Appellate Court first. Furthermore, it is not known whether the question from the lower court can be also about compliance of laws with the Constitution or interpretation of the Constitution, international treaties and legislative decrees as outlined in Article 121 of the Constitution. In addition to lack of a clear procedure for the courts to pose judicial review questions to the Supreme Court, a

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113. HARESS, *supra* note 5, at 23.

114. *Id.*

115. *Id.*

116. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 121.

117. HARESS, *supra* note 5, at 20.

118. Interview with Mohammad Sediq Zhobl, *supra* note 48 (on file with author).

119. Afghanistan Law of Organization and Jurisdiction of the Judiciary, AFGHANISTAN OFFICIAL GAZETTE No. 1109, Art. 30 (2013) (Afg.).

lack of capacity in the lower courts on constitutional matters can be the other key reason for lack of referral of judicial review questions by the lower courts.

The lower courts have yet to ask the Supreme Court questions as part of concrete review. However, they do make their abstract questions to the Supreme Court when they need guidance or when they are unsure of the meaning of a law or when they believe a particular article of the law does not conform to the Constitution. Historically, the Supreme Court has received requests for *estihda*, which literally translates as “request for guidance,” from the lower courts and other institutions such as ministries. After adoption of the 2004 Constitution, some of these requests by the lower courts concerned subjects of Article 121 of the Constitution. The Supreme Court organizes regular seminars in which the Heads of Appellate Courts and members of the Supreme Court participate. After discussing each *estihda*, members provide written answers to those questions. The Supreme Court subsequently publishes the responses to the questions in a collection series.

There are many examples of court requests, a few of which are discussed here. For instance, the Provincial Appellate Court of Sar-i-Pul wrote to the Supreme Court that Articles 32 and 37 of the Law on Criminal Procedures that regulate the search of houses is not in conformity with Article 38 of the Constitution.<sup>120</sup> The Supreme Court in a one-paragraph response explained the differences and concluded that there is no contradiction between those two articles and the Constitution.<sup>121</sup> The same court, in a separate request, wrote that clause 4 of Article 53 of the Interim Criminal Procedures is not in conformity with Article 134 of the Constitution and the word “investigation” should be replaced with “detection.”<sup>122</sup> The Supreme Court rejected the request and argued there is no contradiction.<sup>123</sup> These examples demonstrate the questions of constitutionality the courts face; however, they do not make the questions a part of specific cases. Instead, they continue the old way of asking for *estihda*.

An interesting aspect of Afghanistan judicial review is whether the Constitution of 2004 or practice of courts established the innovative approach of letting the courts make requests on “abstract review” from

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120. SUPREME COURT OF ISLAMIC REPUBLIC OF AFGHANISTAN, DOCUMENTS AND DECISIONS (Kabul: Supreme Court of Islamic Republic of Afghanistan, 2007) (on file with author).

121. *Id.* (on file with author).

122. *Id.* (on file with author).

123. *Id.* at 109 (on file with author).

the Supreme Court. Constitutional review mechanisms around the world do not allow requests for abstract review by the courts. Only in Spain, does the mechanism have some similarity to practices in Afghanistan. Under section 163 of the Spanish Constitution, when hearing a case, if an ordinary court considers a government act unconstitutional, it may bring the matter to the Constitutional Court for review of its constitutionality.<sup>124</sup> In those circumstances, if the issue of the law's constitutionality has 'relevance' to the case, the Constitutional Court may make a decision for nullification of the law and subsequently, the referring court may make a decision regarding the case based on the ruling of the Constitutional Court.<sup>125</sup> In practice, however, the lower courts do not wait for the final ruling of the Constitutional Court. Therefore, when the ruling of the Constitutional Court is announced, it seems like an 'abstract review' of the question. The practice of *estihda* is very similar to this procedure. While we have not experienced 'concrete review' cases yet, the practice of ordinary courts and the response of the Supreme Court illustrate an 'abstract review' in response to requests of the courts. The inability of the lower courts to make an appropriate analysis of constitutional law questions is a key factor in their unwillingness to operationalize concrete review. Instead, those courts forward the questions to the Supreme Court, so the Supreme Court response helps them with similar cases in the future. This practice of forwarding constitutional review matters to the Supreme Court is not an ideal mechanism since concrete review is a tool for individuals to challenge legislation that contradict their fundamental rights. An abstract review request by the ordinary courts takes away this opportunity from the individuals.

The limitation on the number of entities that can request judicial review has worked in the government's favor. This has sparked criticism that the Supreme Court is accepting political requests. The political question doctrine is based on the notion that courts should abstain from deciding those constitutional matters that fall under the jurisdiction of political branches of the state.<sup>126</sup> The Supreme Court has not rejected any case for its non-justiciability so far, though there are opinions that the case of Mujtaba Patang was not justiciable.<sup>127</sup> While

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124. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 163, Dec. 29, 1978 (Spain).

125. Enrique Guillen Lopez, *Judicial Review in Spain: The Constitutional Court*, 41 LOY. L.A. L. REV. 529, 546 (2008).

126. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1458 (2005).

127. Interview with Ghizaal Haress, Member of Indep. Commission for Overseeing Implementation of the Constitution (Feb. 8, 2018) (on file with author).

the Supreme Court accepted and decided the impeachment case of Minister Spanta, perhaps a political matter,<sup>128</sup> it did not give a response to the government when Wolesi Jirga impeached seven ministers in 2016, presumably for political reasons. The Supreme Court's lack of response can possibly indicate that it considers the case to be non-justiciable, though influence from the executive branch on the Supreme Court to avoid issuing an unfavorable decision cannot be overruled. It is necessary for the Supreme Court to clearly spell out its stance on political matters. A clear stance by the Supreme Court sets the precedent and prevents referral of political question in the future.

Under the American model of judicial review, courts are barred from hearing political claims.<sup>129</sup> In *Baker v. Carr*, the Supreme Court of the United States defined political question and ruled that the courts cannot decide those cases.<sup>130</sup> The relevant part of the decision reads:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>131</sup>

In contrast to the American model of judicial review, adjudicating political matters is not a strange practice under the European model.<sup>132</sup> Hans Kelsen, the founder of the theory, acknowledges the role of the political decisions in such structures.<sup>133</sup> According to Kelsen, since courts do not enter the political arena, it is up to a political organization to make such decisions.<sup>134</sup> There are also examples of High Courts that hear cases of a political nature, but those courts possess clear

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128. HARESS, *supra* note 5, at 22.

129. ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 49-53 (5th ed., 2015).

130. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

131. *Id.*

132. Nuno Garoupa & Tom Ginsburg, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, 28 ARIZ. J. INT'L & COMP. L. 539, 556-58 (2011).

133. LARS VINX, HANS KELSEN'S PURE THEORY OF LAW: LEGALITY AND LEGITIMACY 1, 145 (2007).

134. Garoupa & Ginsburg, *supra* note 132, at 548-49.

constitutional authority.<sup>135</sup> For example, the High Court of the Greek Cypriot State has jurisdiction to hear cases in connection with conflicts, contests of power, or competence arising between the House of Representatives and any other organ of the state.<sup>136</sup> These are of course political questions; however, the articles of the Constitution of Cyprus are elaborate and one cannot contest the legitimacy of the power of the High Court which has the final decision making authority in regard to decisions coming from the inferior courts.<sup>137</sup> Meanwhile, the 2004 Afghan Constitution mandates that any dispute arising between parties, including the state, should be submitted to the courts for adjudication.<sup>138</sup> Does that mean political questions can be filed in the Supreme Court?

It makes sense that a majority of judicial review requests have come from the government considering that the Afghan government and courts have the exclusive right to make such requests. Moreover, it is also logical that individual citizens do not make requests for judicial review directly to the Supreme Court considering that they are not specifically conferred that right under Article 121 of the Constitution. One assumption is that if individual litigants realize that the legislation that concerns their disputes is potentially unconstitutional, they will ask the ordinary court to request the Supreme Court to engage in judicial review. Ideally and as the law vaguely requires, the ordinary court should stop the proceedings, send the question up to the Supreme Court to ensure conformity of the legislation with the Constitution, and resume the case once the Supreme Court issues a verdict. This has not happened yet.<sup>139</sup> Instead, ordinary courts send their abstract questions to the Supreme Court.<sup>140</sup> This may be because they are unfamiliar with the system and ordinary courts are not ready to hear such cases: it was as if such requests by the citizens never existed. Difficulty to file cases of judicial review to the Supreme Court through lower courts might justify why the majority of Supreme Court decisions favor the government.

To summarize, the requests by the Government are under 'abstract review,' while the requests by courts are supposed to be done under 'concrete review.' Nevertheless, the courts have filed their requests under the 'abstract review' mechanism and have not considered the constitutionality of the matters as part of an ongoing dispute. 'Concrete review' is yet to be practiced in Afghanistan.

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135. Miscellaneous Provisions of 1964, Admin. of Justice Pub. L. No. 33-04 (Cyprus).

136. *Id.*

137. VISSER, *supra* note 4, at 95.

138. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 120.

139. HARESS, *supra* note 5, at 20.

140. *Id.*

## 2. Time It Takes to Issue a Verdict

In the absence of the required legislation, the Supreme Court has not established any timeline for discussions and timelines for issuing a verdict.<sup>141</sup> The timeline for each case varies and has ranged from thirteen days to many months. When the Court reviewed the constitutionality of the ICOIC Law and Media Law, it took almost seven and a half months.<sup>142</sup> The judicial review of the Law on Diplomatic and Consular Employees took thirteen days.<sup>143</sup> Lack of a clear timeline has branded Supreme Court judicial review as an unpredictable process.

## 3. Bench that Decides

The nine members of the Supreme Court are divided into five divisions or *diwans*. If parties to the case challenge a decision of an appellate court, or legislation requires a mandatory decision in the Supreme Court, each diwan has the authority to make a decision based on their subject-matter jurisdiction. On the contrary, the High Council of the Supreme Court, which consists of all nine justices, must review requests made under Article 121 of the Constitution.<sup>144</sup> The Council meetings are held every fifteen days, or as deemed necessary.<sup>145</sup> In ordinary cases, it is possible for a bench member to attach his dissent; however, no member of the Supreme Court has published a dissent on judicial review or interpretation issues.

Constitutional issues are intricate and therefore a consensus of the bench members is not always expected. Dissent is a normal practice. Individual Supreme Court members can see lack of dissent in judicial review decisions as a sign of lack of independence. In addition, it raises the question whether the members are afraid of being politically questioned for their opinions.

## 4. Procedures

The Supreme Court has not issued any procedures for deciding judicial review issues.<sup>146</sup> When a request reaches the Supreme Court, it

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141. *Id.* at 18.

142. *Stera Mahkama Afghanistan* ruling No. 5, AFGHANISTAN OFFICIAL GAZETTE No. 986. *See also*, *Stera Mahkama Afghanistan* ruling No. 6, AFGHANISTAN OFFICIAL GAZETTE No. 986.

143. Supreme Court of Afghanistan Ruling No. 20, AFGHANISTAN OFFICIAL GAZETTE No. 1114.\*

144. HARESS, *supra* note 5, at 19.

145. Interview with Mohammad Sediq Zhobl, *supra* note 48 (on file with author).

146. HARESS, *supra* note 5, at 19.



goes to the Directorate General of Scrutiny and Perusal.<sup>147</sup> The General Directorate of Scrutiny and Perusal, which acts as the research body of the Supreme Court, primarily performs a review of the subjects in question and then shares the arguments with a proposed text of verdict to the High Council meeting for final decision-making.<sup>148</sup> However, in the absence of established and elaborated procedures, there is little known about how the issues are discussed and how the Supreme Court High Council comes to a conclusion on a given subject.

Constitutional matters possess sophisticated aspects, and every decision made by the decision making body should be well reasoned and justified.<sup>149</sup> The standard of reasoning in judicial review cases decided by the Supreme Court differs from one case to the other.<sup>150</sup> While the Supreme Court conducts robust analysis in some cases, its reasoning in other cases is less substantial. For instance, when the Supreme Court reviewed the constitutionality of the ICOIC Law, it considered the ICOIC as part of the executive branch,<sup>151</sup> while the Constitution clearly recognizes the independence of the ICOIC.<sup>152</sup> In addition, the Supreme Court erred in mixing review of constitutionality with review of laws and giving feedback for improvement of legislation when it reviewed the ICOIC Law.

Some Supreme Court judicial review decisions also show that whenever a question is raised even on one article, the Supreme Court entitles itself to review the constitutionality of the entire law. This has been evident in review of ICOIC Law. Though the government's questions were about Article 8, which concerns the interpretation of the Constitution, the Supreme Court did not stop there and went on to review constitutionality of other articles that had not been asked by the government.

The Supreme Court has followed the trend of inconsistency even in the title of its judicial review decisions. The Court used different phrases bearing different legal meanings in its decisions. Ghizaal Haress puts this inconsistency in the following language: "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)."<sup>153</sup>

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147. *Id.* at 19-20.

148. *Id.*

149. *Id.* at 24.

150. *Id.* at 25.

151. Stera Mahkama Afghanistan ruling No. 6, AFGHANISTAN OFFICIAL GAZETTE No. 986.

152. See 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 157.

153. HARESS, *supra* note 5, at 29.

In the absence of a law, an internal procedure that unifies the steps, procedures, timelines and terms could be very helpful in bringing some level of consistency to judicial review in Afghanistan.

### 5. Type of Review

Constitutional review is conducted either before (*priori*) or after (*posteriori*) legislation comes into force.<sup>154</sup> In Afghanistan, judicial review has been done on a *posteriori* basis. This principle is unwritten; however, Article 121 of the Constitution mentions the word “law” and, as defined by the Constitution, “[l]aw shall be what both houses of the National Assembly approve and the President endorses, unless this Constitution states otherwise.”<sup>155</sup> While it is assumed that the review takes place on a *posteriori* basis, a *posteriori* review of international treaties is not practical. Given the existence of the issue, the new draft Law on Jurisdiction and Organization of the Judiciary, which is debated in the National Assembly, requires a *posteriori* review of laws and legislative decrees, and a *priori* review of international treaties before Afghanistan can accept those treaties.<sup>156</sup> The Supreme Court has yet to receive a request for reviewing the constitutionality of an international treaty.

In most cases, after rejecting the legislation by the President, Wolsi Jirga passes those laws without any changes by two-thirds majority in which case, those laws are considered as approved without endorsement of the President.<sup>157</sup> In 2018, the government established a committee to scrutinize the laws passed by the National Assembly before they are submitted to the President. If the committee realizes there are constitutionality issues, like in the case of the Law on Issuance of Legislative Decrees, it recommends submission of the law to the Supreme Court to ensure its constitutionality.<sup>158</sup> Only in the case of Law on Diplomatic and Consular Employees, after the President signed the law, did the Ministry of Foreign Affairs raise concerns and ask the

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154. VISSER, *supra* note 4, at 96.

155. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 94.

156. Draft Law on Jurisdiction and Organization of the Judiciary, art. 16.2 (2018) (Afg.) (on file with author).

157. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 94.

158. The committee is led by the 2nd Vice President and has representatives from the Ministry of Justice, Administrative Office of the President, Ministry of Parliamentary Affairs and representatives of the relevant agency that the legislation is related to. The author has represented the Administrative Office of the President in a number of those meetings including the meeting in which it was decided that the government requests from the Supreme Court to review the constitutionality of the Law on Issuance of Legislative Decrees.

Supreme Court to review the constitutionality of that law.<sup>159</sup> To summarize, the law or the legislative decree should be in force before the government or the courts can ask for a review. From the constitutional point of view, *priori* review is not possible.

In contrast to what is said about the requirement of *priori* review,<sup>160</sup> the Supreme Court has provided opinions on draft laws.<sup>161</sup> The Supreme Court has previously provided opinions on the constitutionality of the draft Labor Code, draft Law on Sale of Land, draft Law of Academy of Sciences, draft Law of Military Courts, draft Law of Civil Servants, draft Law of Salary of Senior Officials, draft Law of ICOIC, and draft Law of Media.<sup>162</sup> The Supreme Court has also provided its opinion on the draft Family Law in response to a request from the Ministry of Justice.<sup>163</sup> This again shows lack of consistency. While the Supreme Court is strict in handling some cases, it has been willing to accept other cases even if the practice does not have any basis in the Constitution or the laws.

Meanwhile, an official letter from the Administrative Office of the President to ICOIC shows that President Karzai had asked his Administrative Office to share draft laws after cabinet approval, and before sharing with the National Assembly, for review of ICOIC.<sup>164</sup> This could have been a type of *priori* review. However, this step has been discontinued and is not part of legislative processes anymore.

## 6. Publishing the Decisions

The Supreme Court does not publish its decisions on constitutional matters immediately after decisions are made. The public gets information on the decision from the parties involved through local media. Months after the decisions are issued, the Ministry of Justice publishes the concerned laws along with the verdict of the Supreme Court in the Official Gazette.<sup>165</sup> Departing from custom, the Ministry of Justice published the Supreme Court verdict on the Law on Diplomatic

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159. Supreme Court of Afghanistan Ruling No. 20, AFGHANISTAN OFFICIAL GAZETTE No. 1114.\*

160. Letter from Supreme Court to Administrative Office, Letter No. 2709/909 (Afg.).

161. Saalnama Qaza, *A Reflection of the Activities and Achievements of the Judicial Branch*, 1 JUD. Y.B. 75, 75-76 (2014).\*

162. *Id.*\*

163. *Id.* at 85.\*

164. INDEPENDENT COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION, A COLLECTION OF INTERPRETATIONS, LEGAL AND ADVISORY OPINIONS (2014).

165. HARESS, *supra* note 5, at 17.

and Consular Employees separately in the Official Gazette.<sup>166</sup> This was because the law had been published, and the Ministry of Foreign Affairs challenged the constitutionality of the law after its enforcement.<sup>167</sup> Judicial review decisions and interpretation are highly important to citizens and government entities alike. Lack of publishing or late publishing only tarnishes the importance of this critical process. Understanding the importance of these cases, the High Council of Rule of Law and Anti-Corruption has requested that the Supreme Court publish those decisions.<sup>168</sup> In addition, based on the recently approved draft Law on Jurisdiction and Organization of the Judiciary, the Supreme Court is obliged to publish judicial review and constitutional interpretation decisions in the Official Gazette and other media outlets.<sup>169</sup>

The published decisions contain the arguments and conclusions of the Supreme Court. The Ministry of Justice publishes the Supreme Court decision in full length in Farsi and Pashto, the two official languages of the country.<sup>170</sup> However, the Ministry of Justice removes the articles that are deemed unconstitutional by the Supreme Court from the main body of the law and keeps the places of the removed articles blank.<sup>171</sup> Furthermore, the Ministry of Justice adds a footnote on the same page and clarifies that the article or clause is removed as a result of the Supreme Court decision. Action of the Ministry of Justice is procedural and is meant to put an effect on the decision of the Supreme Court.

There are also reports of unpublished decisions. For instance, after an initial rejection by the President, Wolsi Jirga passed the Law on Salary, Expenditures and Privileges of State High Officials by a two-thirds majority in 2009. The President then asked the Supreme Court to review the constitutionality of this law. While the Supreme Court

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166. Supreme Court of Afghanistan Ruling No. 20, AFGHANISTAN OFFICIAL GAZETTE No. 1114.\*

167. *Id.*\*

168. مصوبه شماره ( ۲ ) سال ۱۳۹۷ جلسه شورای عالی حاکمیت قانون و مبارزه علیه فساد اداری [Resolution No. (2) of 1397 of the Meeting of the Supreme Council of the Rule of Law and the Fight Against Corruption], AOP.GOV.AF (May 2, 2018), <https://www.aop.gov.af/dr/page/80/217> (Afg.) (on file with author).

169. Draft Law on Jurisdiction and Organization of the Judiciary, art. 16.3 (2018) (Afg.) (on file with author).

170. See Supreme Court of Afghanistan Ruling No. 20, AFGHANISTAN OFFICIAL GAZETTE No. 1114.\*

171. HARESS, *supra* note 5, at 17.

announced the law as unconstitutional,<sup>172</sup> the Ministry of Justice never published it.

As mentioned in previous sections, the Supreme Court has a number of publications, including a yearbook and magazines that contain the collection of *estihda* of the lower courts. In these publications, there are also cases of request for guidance on constitutional matters and responses of the Supreme Court.

### 7. Enforceability of Supreme Court Decisions

The text of Article 121 of the Constitution does not clarify whether judicial review and interpretive decisions made by the Supreme Court are merely advisory, or rather final and thus must be enforced.<sup>173</sup> However, the practice and the wording of Supreme Court verdicts give the impression that they are final, enforceable, and not appealable. In one of the requests for interpretation of the Law on Pension, the Supreme Court ruled that there is no difference between a court decision and a Supreme Court decision interpreting a law.<sup>174</sup> The Supreme Court continued by stating that executing interpretive decisions is the responsibility of the Executive branch.<sup>175</sup> This language and implementation of the decisions by state organs proves the decisions are final, though there has been some resistance by Wolsi Jirga following the *Spanta* case.<sup>176</sup> This is not an unfamiliar incident; after *Marbury v. Madison*, although President Jefferson was not happy with the decision and initially objected, believing John Marshall used the opportunity to expand the authority of the judiciary, he eventually bowed to the decision.<sup>177</sup>

After the Supreme Court concludes a judicial review case, the Ministry of Justice publishes the law in the Official Gazette. However, there is no immediate subsequent action by either the National Assembly or the executive branch to fill the gap created by the removal of selected articles.<sup>178</sup> The impact of this gap was felt when the Supreme

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172. Due to the sensitivity of the matter, the case is not published. The author possesses an unofficial copy of the decision.

173. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 121.

174. SUPREME COURT OF ISLAMIC REPUBLIC OF AFGHANISTAN, COLLECTION OF SUPREME COURT CIRCULARS, DECISIONS, AND GUIDELINES FOR 1389-93 (2010-14) (2013).\*

175. *Id.*\*

176. ROSE LEDA EHLER ET AL., AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF AFGHANISTAN (Stephanie Ahmad et al. eds., 2013).

177. *Thomas Jefferson's Reaction*, LANDMARK CASES, <https://www.landmarkcases.org/marbury-v-madison/thomas-jeffersons-reaction> (last visited June 12, 2018); ROSE LEDA EHLER ET AL., *supra* note 176.

178. HARESS, *supra* note 5, at 17.

Court declared certain articles of ICOIC Law unconstitutional.<sup>179</sup> One of the articles was about the process of dismissing members.<sup>180</sup> ICOIC did not propose new articles, nor did the National Assembly take action to add new articles. In 2017, when the majority of ICOIC members voted to oust the Chairperson of ICOIC, the challenge surfaced. On one hand, the majority members of the ICOIC had made a decision to remove the Chairperson. On the other hand, the replacement legislation was not in place. An ICOIC member argued that by removing the text of articles from the law, the Supreme Court departed from its original role in the Constitution and was actually making law.<sup>181</sup> Though this criticism is valid, it is obvious that the Supreme Court is not the party to be blamed. It was the job of the ICOIC, the executive branch or National Assembly to propose new articles to fill in the gap before it became too late.

There are also cases in which the Supreme Court, after providing an opinion on a matter, suggested that an amendment be made to the law. For example, after reviewing Article 39 of the Law on Elimination of Violence against Women, the Supreme Court announced the Article is inapplicable to crimes against women that do not originate from family relationships.<sup>182</sup> The Supreme Court also explained in its opinion that it had proposed an amendment to the law and shared it with the Ministry of Justice for further consideration.<sup>183</sup> While the Supreme Court can request the government and the National Assembly to replace legislation, it is also the responsibility of the government and the National Assembly to take responsibility and to fill in the gaps quickly before a controversy erupts. Again, regulating legislation can prevent similar controversies.

## 8. The Impact on Individuals' Human Rights

The limitation on the entities that can request judicial review and interpretation of legislative documents has resulted in the growing irrelevance of judicial review as a tool for protecting the fundamental rights of individuals. In most countries, judicial review is a key instrument in striking down the legislation or government acts that are not upholding the constitutional rights of the citizens.<sup>184</sup> Ambiguity in Article 121 of the Constitution strips individuals of this important

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179. Interview with Ghizaal Haress, *supra* note 127 (on file with author).

180. *Stera Mahkama Afghanistan* ruling No. 6, AFGHANISTAN OFFICIAL GAZETTE No. 986.

181. HARESS, *supra* note 5, at 17.

182. *See* Qaza, *supra* note 161, at 80.\*

183. *Id.*\*

184. VISSER, *supra* note 4, at 61-62.

opportunity.<sup>185</sup> Additionally, institutions such as the National Assembly or Afghanistan Independent Human Rights Commission also lack this right.<sup>186</sup> Under these circumstances, judicial review decisions have thus far had a minimal impact on the rights of citizens.

There is also legislation that seems to violate the terms of the Constitution; however, there is no interest on the part of the government or the courts to ask the Supreme Court to review the constitutionality of such legislation. The Law of National Reconciliation, Public Amnesty and National Stability, passed in 2007 by the National Assembly, is a bold example.<sup>187</sup> This Law extended a pardon to criminal acts committed by individuals during the years of war in Afghanistan.<sup>188</sup> Had the individuals had the opportunity to request for judicial review, there could have been requests made by individuals on the constitutionality of that law.<sup>189</sup>

Despite those limitations, in at least one example, civil society organizations asked the Supreme Court to decriminalize the 'escape from home' phenomenon, which results from violence against a woman.<sup>190</sup> The Supreme Court accepted the request and agreed with the interpretation of the civil society organizations.<sup>191</sup> However, in its response, the Supreme Court failed to mention a single article of the Constitution or the ordinary laws.<sup>192</sup> Is this an indication that the Supreme Court is willing to hear requests by individuals, and if so, is it constitutional to accept such requests directly? Or this is another example of inconsistency?

As explained above and illustrated by numerous examples, inconsistency is a common feature in nearly all judicial review decisions so far. Lack of clear procedures has resulted in varying decisions. To examine this further, Part B explains the most important cases of judicial review decided by the Supreme Court to date.

### *B. Landmark Judicial Review Cases Under the 2004 Constitution*

Reviewing the key judicial review decisions will provide a better understanding of the challenges and the flaws of the process. This

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185. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 121.

186. *Id.*

187. HARESS, *supra* note 5, at 31.

188. Afghanistan Law of National Reconciliation, Public Amnesty and National Stability, AFGHANISTAN OFFICIAL GAZETTE NO. 985, Art. 3 (2008).

189. HARESS, *supra* note 5, at 31.

190. Qaza, *supra* note 161, at 80.\*

191. *Id.*\*

192. *Id.* at 80.\*

article gives a detailed analysis of one the predominant cases of judicial review and provides a brief analysis of other relevant cases of judicial review. The Ministry of Justice and the Supreme Court have published only a few judicial review decisions. Therefore, this list is not comprehensive.

### 1. Judicial Review of ICOIC Law

Establishment of the ICOIC was foreseen in Article 157 of the Constitution; however, the authorities of this entity are not outlined.<sup>193</sup> The Constitution only articulates the appointment mechanism of ICOIC members and requires parliamentary legislation for defining ICOIC authorities.<sup>194</sup> In a move to challenge the decision of the Supreme Court in *Spanta*,<sup>195</sup> Wolsi Jirga added a clause in the ICOIC Law that authorized the ICOIC to interpret the Constitution.<sup>196</sup> Mishrano Jirga also approved the law; however, the President did not sign the law and sent it back to Wolsi Jirga, citing unconstitutionality of several articles.<sup>197</sup> Furious about the President's position on the subject, Wolsi Jirga approved the law with the two-thirds majority required for bypassing the signature of the President.<sup>198</sup> Given the decision of the Supreme Court in *Spanta*, it was expected that the President would ask the Supreme Court to review the law's constitutionality.

In the *Spanta* case, President Karzai triggered Article 121 of the Constitution, requesting interpretation of the Constitution. However, the ICOIC Law was the first law to undergo judicial review. As a result, the Supreme Court announced a number of the ICOIC Law articles unconstitutional.<sup>199</sup> Given the importance of the *Spanta* case to the future of judicial review, it is important to review how the Supreme

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193. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 157.

194. *Id.*

195. In one of the first cases of constitutional interpretation, the Supreme Court decided that the dismissal of Rangin Dadfar Spanta, Minister of Foreign Affairs, by Wolsi Jirga was not based on justifiable reasons and therefore held he should be able to continue his job. This case will be discussed in detail in the section on constitutional interpretation. HARESS, *supra* note 5, at 17; ROSE LEDA EHLER ET AL., *supra* note 176, at 150.

196. MOHAMMAD HASHIM KAMALI, AFGHANISTAN'S CONSTITUTION TEN YEARS ON: WHAT ARE THE ISSUES? 11 (2014).

197. Official documents on what questions were raised by the government are unavailable; however, it appears from the decision of the Supreme Court that the government likely asked for review of the constitutionality of the law. KAMALI, *supra* note 196, at 12.

198. *See* 2004 CONSTITUTION OF AFGHANISTAN.

199. Supreme Court of Afghanistan Opinion No. 5, AFGHANISTAN OFFICIAL GAZETTE No. 986.\*



Court analyzed the facts of the case and how the decision was ultimately reached.

In its decision, the Supreme Court provided several justifications in support of maintaining its authority to interpret the Constitution.<sup>200</sup> Below is a summary of the Supreme Court's reasoning extracted from the original decision:

(i) The Supreme Court stated that based on the archives of the Constitution Drafting Commission, Article 121 did not exist in the initial drafts of the Constitution. Before September 10, 2003, the draft included a separate chapter regarding a Constitutional Court, which was assigned the authority to (1) review the conformity of laws, legislative decrees, international agreements, and Constitutional covenants, and (2) interpret the Constitution, laws and legislative decrees.

(ii) The Supreme Court adds that after September 2003, the chapter on Constitutional Court was removed for unknown reasons. Instead, the authorities, which had been given to the Constitutional Court, were assigned to the Supreme Court under Article 121. The language used in the draft Constitution that was distributed to the Constitutional Loya Jirga read as follows: "At the request of only the government and courts, the Supreme Court shall review conformity of laws, legislative decrees, inter-state treaties and international covenants with the Constitution and issue the required verdict. Supreme Court is authorized to interpret the Constitution, laws and legislative decrees." The Supreme Court argues that the Constitutional Loya Jirga merely combined the two sentences to make the sentence more precise. In addition, the Supreme Court argues that the Constitution, the laws, legislative decrees, inter-state treaties and international conventions need interpretation. Therefore, merging the two sentences and using the word "their" made it possible for the Supreme Court to interpret the international treaties and covenants as well. The Supreme Court concluded that the best word that could be used was the word "their" since it covers the interpretation of the constitution, the laws, legislative documents, inter-state treaties and international covenants.

(iii) The Supreme Court also addresses Article 157, which outlines the mechanism to establish the ICOIC. The Court mentions that this Article was not part of the draft Constitution and was added by Constitutional Loya Jirga on its last day. Even after the addition of Article 157, no further change was

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200. *Id.*\*

made to Article 121. Adding an article regarding ICOIC without giving the authority of Constitutional interpretation to ICOIC implies that the authority to interpret the Constitution remains with the Supreme Court.

(iv) The Supreme Court asserts that interpreting the Constitution, legislative decrees and laws requires a mandatory judicial verdict, which can only be issued by a court.

(v) Finally, the Supreme Court argued that the very name of the ICOIC suggests that the job of the commission should be limited to overseeing the implementation of the Constitution, rather than interpreting it. If the ICOIC has the authority of interpretation, the Constitution is effectively amended, which is only allowed through Loya Jirga.<sup>201</sup>

The Supreme Court explains the history of how Article 121 was drafted and the intentions behind it.<sup>202</sup> Having the history in mind, it is difficult to argue the ICOIC should have the authority to interpret the Constitution. While the Supreme Court interprets the laws, legislative decrees, inter-state treaties and international conventions, it also reviews their conformity with the Constitution. As Sarwar Danish, a former member of the Constitution Drafting Commission argues, no other country has a system that assigns the authority of judicial review to one institution, while leaving the interpretation of the Constitution in the hands of another institution.<sup>203</sup>

The argument made by the Supreme Court on the role of ICOIC on Constitutional oversight is also worth considering. Having vague language on interpretation of the Constitution does not mean this task should be given to an organization that was merely established to oversee the implementation of the Constitution. As the name of ICOIC suggests, this institution was established to oversee the implementation of the Constitution. Neither in Loya Jirga discussions, nor in the Constitution itself is there an indication that Loya Jirga intended to assign interpretation of the Constitution to ICOIC.<sup>204</sup> Regardless, ICOIC was of the view that since Article 121 does not have an explicit language on assigning the authority of interpretation of the Constitution to the Supreme Court,<sup>205</sup> it is up to the National Assembly to decide

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201. *Id.*

202. *Id.*

203. DANISH, *supra* note 99 (on file with author).

204. ROSE LEDA EHLETT ET AL., *supra* note 176, at 34.

205. Ariz Huq and Tom Ginsburg, *What Can Constitutions Do?: The Afghan Case*, 24 J. OF DEM. 1, 125 (2014).

which organization has this authority.<sup>206</sup> This argument looks compelling; however, the drafting history of Article 121, coupled with the Supreme Court's authority to interpret laws, legislative decrees and inter-state treaties makes it illogical to have a separate institution interpret the Constitution. Many commentators who wrote on Afghanistan's Constitution also agree with this argument.<sup>207</sup>

The Supreme Court did not stop after declaring Article 8 unconstitutional; it went ahead with nullifying other articles of ICOIC Law.<sup>208</sup> One such example is the article that established a mechanism for removal of a member through a proposal<sup>209</sup> made by at least five members and approved by the majority of Wolsi Jirga.<sup>210</sup> The Supreme Court found this provision unconstitutional for the following reasons: (1) ICOIC is not a commercial company in which its members decide on the removal of other members; (2) Wolsi Jirga is not the executive branch to remove members of a committee that is part of the executive branch; (3) though appointment of ministers, Attorney General, Director of National Security, President of the Central Bank and the Director of Red Crescent is confirmed by Wolsi Jirga, the President is charged with handling their dismissal or acceptance of resignation and; (4) the proposal to remove a member of ICOIC by the other members would seriously undermine the independence of the organization and would create fear that ICOIC is influenced by Wolsi Jirga.<sup>211</sup> The Supreme Court's argument regarding the possible political influence of the Wolsi Jirga, as the authority, which was supposed to impeach members of ICOIC, is understandable and justified, a point that is also emphasized by leading constitutional law scholars.<sup>212</sup> However, comparing the ICOIC to a corporation does not make sense. The Constitution uses a similar procedure requiring vote of the relevant house of the National Assembly to hand-over a member to the prosecution office for

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206. ROSE LEDA EHLER ET AL., *supra* note 176, at 34.

207. Rainer Grote, *Separation of Powers in the New Afghan Constitution*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT[ZÄÖRV] 897 (2004) (Ger.).

208. Supreme Court of Afghanistan Opinion No. 5, AFGHANISTAN OFFICIAL GAZETTE No. 986.\*

209. The reasons for initiating the removal process are written in Article 7 of ICOIC Law: (1) having another occupation except for teaching in the university; (2) losing or breaching one of the qualification criteria described in Article 5; and (3) misuse of official position, lack of commitment to work and regular lack of performance. HARESS, *supra* note 5, at 26.

210. Law on Independent Commission on Overseeing the Implementation of the Constitution, AFGHANISTAN OFFICIAL GAZETTE No. 986, (2009) (Afg.).

211. Supreme Court of Afghanistan Opinion No. 5, AFGHANISTAN OFFICIAL GAZETTE NO. 986.\*

212. VISSER, *supra* note 4, at 222.

committing a crime.<sup>213</sup> In a large number of countries with entities similar to the ICOIC, it is up to the members to remove each other.<sup>214</sup> The bodies charged with constitutional review in Belgium, the Czech Republic, Germany, France, Hungary, Italy, Poland, and Spain, among others, exercise a similar removal procedure.<sup>215</sup>

The Supreme Court also found it unconstitutional for the ICOIC to review existing laws, identify unconstitutional articles and submit them to the President and the National Assembly for correction. In the eyes of the Supreme Court this was also unconstitutional because Article 121 of the Constitution not only authorizes the Supreme Court to interpret the Constitution, laws, legislative decrees, inter-state treaties and international covenants, but also gives the sole authority to review the constitutionality of the aforementioned legislative instruments to the Supreme Court.<sup>216</sup> The argument of the Supreme Court is not compelling. It is obvious that constitutional review is a completely different mechanism than reviewing laws with the objective of providing recommendations to improve them.<sup>217</sup> Any branch can exercise the latter and it does not trespass on the authority of the Supreme Court.

Restricting ICOIC membership to only those with Afghan nationality and the immunity of ICOIC members from arrest without agreement of the President were the two other points declared unconstitutional and thus unenforceable by the Supreme Court.<sup>218</sup> Countries around the world have different approaches on these two subjects.<sup>219</sup> The Supreme Court introduced a concept based on which ordinary laws cannot extend the number, authorities or conditions listed in the Constitution. This concept might be difficult to defend in the future because ordinary laws usually expand upon the topics that have a brief mention in the Constitution.

The judicial review of ICOIC law is by far the most detailed decision of the Supreme Court yet.<sup>220</sup> This outcome was expected as the ICOIC law passed by the National Assembly had the intention to restrict

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213. See 2004 CONSTITUTION OF AFGHANISTAN.

214. VISSER, *supra* note 4, at 222.

215. *Id.*

216. Supreme Court of Afghanistan Opinion No. 5, AFGHANISTAN OFFICIAL GAZETTE NO. 986.\*

217. HARESS, *supra* note 5, at 27.

218. Supreme Court of Afghanistan Opinion No. 5, AFGHANISTAN OFFICIAL GAZETTE NO. 986.\*

219. VISSER, *supra* note 4, at 222.

220. HARESS, *supra* note 5, at 27.

the role of the Supreme Court.<sup>221</sup> The Supreme Court, by providing a deep analysis of the subject matters, wanted to put an end to the questions and prove itself as the final authority on Constitutional interpretation. Despite the Supreme Court's attempt, the controversy around constitutional review persists.

Other cases of judicial review are listed briefly here:

## 2. Law on Mass Media

In 2009, in response to a government request, the Supreme Court announced that paragraph 2 of Article 13 of the Mass Media Law, which required Wolesi Jirga approval for appointment of Director of National TV and Radio, was unconstitutional.<sup>222</sup> The Supreme Court argued that the Constitution enlists the officials whose appointments need Wolesi Jirga's approval and that the Director of National TV and Radio is not among them.<sup>223</sup>

## 3. Decision on Law of Diplomatic and Consular Employees

The National Assembly restricted diplomatic employment only to those individuals who are nationals of Afghanistan exclusively.<sup>224</sup> At the request of the government, the Supreme Court rejected the limitations, arguing that the Afghan nationality requirement is limited to holding the office of the Presidency, Vice Presidency and would conditionally apply to ministers but not anyone else.<sup>225</sup>

## 4. Law on Legislative Decrees

In 2018, the Supreme Court declared the Law on Legislative Decrees unconstitutional.<sup>226</sup> The Supreme Court concluded that adopting a law on legislative decrees is an infringement on the work of the Executive Branch.<sup>227</sup>

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221. *Id.*

222. Supreme Court of Afghanistan Opinion No. 6, AFGHANISTAN OFFICIAL GAZETTE NO. 986.

223. *Id.*

224. Stera Mahkama Afghanistan [Supreme Court of Afghanistan] ruling No. 20 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, Afghanistan Official Gazette No. 1114 (2013) (Afg.).\*

225. *Id.*

226. Stera Mahkama Afghanistan [Supreme Court of Afghanistan] ruling No. 71, Feb. 3, 2018, Afghanistan Official Gazette No. 1285 (Afg.).\*

227. *Id.*\*

### 5. Other Less Publicized Cases

In addition to the above cases, the Supreme Court has also reviewed other laws which are listed here:

- (i) Law on Salaries, Expenditures and Privileges of State Senior Officials: In 2009, the government asked the Supreme Court to review the constitutionality of the Law on Salaries, Expenditures and Privileges of State Senior Officials. This decision was never announced, nor was it published.<sup>228</sup>
- (ii) Law for Secured Transactions on Immovable Property in Banking Transactions
- (iii) Law on Property Dealers: After review, the Law of Property Dealers, the cabinet instructed Ministry of Justice to ask the Supreme Court to review the constitutionality of clause 1, Article 34 and Article 35 of the Law.<sup>229</sup>
- (iv) Labor Law
- (v) Law on Sale of Land
- (vi) Law of Academy of Sciences
- (vii) Law of Civil Servants
- (viii) Law of Military Courts<sup>230</sup>

#### *C. Flaws and Gaps in Judicial Review Process of Afghanistan*

Initially, it was not expected that Article 121 of the Constitution would be difficult to implement.<sup>231</sup> However, the vague language of Article 121 and the lack of regulating legislation made judicial review inconsistent and sometimes controversial. The following paragraphs explain the main flaws of judicial review that surfaced after enforcement of the 2004 Constitution.

##### 1. Judicial Review Undermined by Constitutional Interpretation

Judicial review is a new phenomenon in the constitutional culture of Afghanistan. However, the concept of constitutional interpretation has attracted more attention. Most politicians and Afghan citizens do not make a clear distinction between the two concepts and many see Article 121 of the Constitution as an “interpretation clause” rather than a “judicial review clause.”<sup>232</sup> As such, judicial review is underdeveloped

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228. The author has an official copy of the decision on file that is received from private sources.

229. Cabinet Decision on Request from Supreme Court (Mar. 2, 2017).

230. Qaza, *supra* note 161, at 75-76.\*

231. HARESS, *supra* note 5, at 3.

232. HARESS, *supra* note 5, at 17.

and has been practiced inconsistently.<sup>233</sup> Unfortunately, judges do not have a clear understanding of how judicial review works and they are not trained either.<sup>234</sup> The review of the questions raised by judges, as *estihda*, illustrate that the judges just post a question to the Supreme Court rather than trying to contextualize their questions as a concrete dispute that has come before the court. A training program for judges and other actors involved in this area is required to clarify the distinctions and draw attention to the role of judicial review in protecting individual rights and constitutional values.<sup>235</sup>

## 2. Limitation on Accessibility

Article 121 of the Constitution only empowers the government and the courts to ask the Supreme Court for judicial review.<sup>236</sup> Compared to the courts, the executive branch has used this mechanism excessively.<sup>237</sup> The courts have only raised questions regarding the meaning of some terms in the laws, or have merely pointed to an article of the law that they considered unconstitutional.<sup>238</sup> There is no record if individual litigants challenge the constitutionality of any law, legislative document or international treaty in the courts.<sup>239</sup> Even if individual litigants have challenged the constitutionality of a law, their requests may have been ignored or unheard since there is no outlined procedure for this purpose.<sup>240</sup> In the absence of any law or other legislative documents, whether an individual litigant is able to file a case on the constitutionality of laws or legislative documents directly in ordinary courts remains unanswered.<sup>241</sup> However, in a rather surprising instruction, the High Council of Supreme Court in January 2008 asked the primary courts not to share their requests for guidance, *estihda*, directly to the Supreme Court; and instead, they should try to find an answer with the help of the provincial appellate court.<sup>242</sup> The High Council clarified the primary courts are working under supervision of

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233. *Id.* at 3.

234. *Id.* at 21.

235. *Id.* at 39.

236. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 121.

237. HARESS, *supra* note 5, at 22.

238. *Id.* at 20.

239. *Id.* at 22.

240. *Id.*

241. *Id.* at 19.

242. Nooru-Rahman Mayar, *Motahedulmalhay Motafareqa Salhay 1385 - 1396* [Miscellaneous Circulars of March 21, 2006 to March 20, 2017] at 217 (2018) (Afg.) (unpublished circulars by the Supreme Court of the Islamic Republic of Afghanistan) (on file with author).

the appellate courts and thus the primary courts are not authorized to ask for *estihda* to the Supreme Court directly.<sup>243</sup>

There is a possibility that the drafters of the 2004 Constitution thought that whenever an individual litigant challenges the constitutionality of an act, the case should be stopped and the lower court would request the Supreme Court for review. In contrast, and as described earlier, ordinary courts usually ask the Supreme Court for guidance (*estihda*) when they face challenging questions; however, these questions are general in nature and not in the context of specific disputes before the court.<sup>244</sup>

Under either of these interpretations, the right to question constitutionality in Afghanistan is very limited. Unlike some countries where the speakers and/or members of parliament, can ask for constitutional review of legislative or executive acts,<sup>245</sup> Afghanistan has adopted a conservative approach for the use of judicial review resulting in decisions being struck down that do not favor government interests.<sup>246</sup> This is somewhat comparable to the Constitutional Council of France between 1958 and 1970.<sup>247</sup> Charles de Gaulle is quoted as saying the Constitutional Council is a “cannon directed against the Parliament” to protect the interests of the executive against the legislature.<sup>248</sup> Nearly all cases decided by the Constitutional Council of France during that period were in favor of the executive branch.<sup>249</sup> France addressed this drawback by extending access to the Constitutional Council to a range of clients, including individuals, as part of the 2008 constitutional amendments.<sup>250</sup>

In many countries, individuals have the opportunity to request judicial review of laws or government acts.<sup>251</sup> In Afghanistan, individuals might theoretically be able to raise questions about the unconstitutionality of legislative documents before the court during the course of litigation; however, it is completely up to the court whether to ask the Supreme Court for judicial review or simply ignore such

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243. *Id.* at 217.

244. *See* Qaza, *supra* note 161, at 75-76.\*

245. VISSER, *supra* note 4, at 223.

246. HARESS, *supra* note 5, at 3.

247. *See generally* Xavier Philippe, *Constitutional Review in France: The Extended Role of the Conseil Constitutionnel through the New Priority Preliminary Rulings Procedure*, UNIV. PAUL CÉZANNE (AIX-MARSEILLE III), [https://www.ajk.elte.hu/file/anneales\\_2012\\_04\\_Xavier.pdf](https://www.ajk.elte.hu/file/anneales_2012_04_Xavier.pdf) (last visited Feb. 16, 2018).

248. *Id.* at 65.

249. ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* 60 (1992).

250. 2008 CONST. amends art. 61.1 (Fr.).

251. *See generally* VISSER, *supra* note 4.



requests.<sup>252</sup> Therefore, judicial review has not been an effective instrument to uphold citizens' fundamental rights.<sup>253</sup> Rather it is used to uphold the interests of the executive in particular.<sup>254</sup>

### 3. Compliance with Sharia

Prohibition of laws that contradict Sharia is a debated subject matter in Afghanistan. The 2004 Constitution states that no law shall be against the tenants of Islam.<sup>255</sup> The Supreme Court, based on Article 121, is the guardian of the Constitution; however, the Constitution is not clear which entity ensures that contradiction between laws and Sharia does not occur.<sup>256</sup>

One assumption is that the Supreme Court should also examine laws' compliance with Sharia if asked by the courts or the government.<sup>257</sup> In fact, the existence of *Dar-ul-efwa* or Center of *Fatwa*, as part of the Supreme Court could be evidence of the Supreme Court's willingness to conduct judicial review and interpretation under the lens of Sharia. Moreover, in one case where the government asked the Supreme Court to interpret Article 7 of the Constitution, the Supreme Court relied heavily on Article 3 in its analysis.<sup>258</sup> Article 7 obligates the Government to observe and implement the international treaties that Afghanistan has joined,<sup>259</sup> while Article 3, the repugnancy clause, prohibits laws that are against the principles of Sharia.<sup>260</sup> The Supreme Court argued that if any international treaty that Afghanistan has acceded to contradicts Article 3 of the Constitution, the government, considering Article 3 and international law principles, has the right to proceed with withdrawing Afghanistan from those treaties.<sup>261</sup>

On the other hand, there is a notion that rejects the authority of Supreme Court to review compliance of legislation with the Constitution and emphasizes the lack of clarity on this matter.<sup>262</sup> There have not been any judicial review cases referred to the Supreme Court on this ground, though there have been a number of occasions where ordinary courts have stopped applying the laws because they consider

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252. HARESS, *supra* note 5, at 31.

253. *Id.*

254. *Id.* at 28.

255. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 3.

256. HARESS, *supra* note 5, at 13.

257. *Id.* at 13.

258. Qaza, *supra* note 161, at 83-85.\*

259. ROSE LEDA EHLER ET AL., *supra* note 176, at 196.

260. HARESS, *supra* note 5, at 13.

261. Qaza, *supra* note 161, at 83-85.\*

262. HARESS, *supra* note 5, at 13.

the laws contrary to Sharia.<sup>263</sup> One example is hesitation of courts on decisions related to interest or *riba* (usurious interest rates or predatory interest practices in financial transactions) in commercial transactions because Sharia prohibits *riba* as *haram*. The law does not allow courts to stop using legislative documents if they believe they contradict Sharia.<sup>264</sup> Instead of ignoring the laws, the courts should have the opportunity to ask the Supreme Court to decide whether the law conforms with the Constitution or not.

#### 4. Lack of Enabling Legislation

To regulate judicial review and interpretation, the Constitution requires a law to be passed by the National Assembly.<sup>265</sup> Fourteen years after the Constitution's adoption, the law required in Article 121 is not in place.<sup>266</sup> The primary piece of legislation related to the work of the judiciary is the Law on Organization and Jurisdiction of the Judiciary; however, it only has one article regarding interpretation and judicial review.<sup>267</sup> As mentioned earlier, a new Law on Organization and Jurisdiction of Judiciary is currently debated in the National Assembly, which has more guidance on judicial review and interpretation; however, it does not provide detailed procedures.<sup>268</sup>

Typically, a proposed law should outline the process to file a case and specify the timelines, explain the procedures, clarify how to raise questions of constitutionality in the courts, and mandate passage of regulations and internal procedures for the Supreme Court to decide cases of judicial review and constitutional interpretation.

#### 5. Judicial Review of Regulations

Judicial review of regulations and government acts is a critical part of legal systems. Different approaches, such as using ordinary courts, administrative courts or administrative bodies, are applied to strike down regulations, policies or government acts that contradict laws approved by the legislature.<sup>269</sup> The 2004 Constitution authorizes the government to pass regulations and requires the regulations to conform

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263. Interview with Ghizaal Haress, *supra* note 127 (on file with author).

264. *Id.*

265. See 2004 CONSTITUTION OF AFGHANISTAN.

266. Interview with Mohammad Sediq Zhoibl, *supra* note 48 (on file with author).

267. HARESS, *supra* note 5, at 19.

268. Draft Law on Jurisdiction and Organization of the Judiciary (2018) (Afg.) (on file with author).

269. FRANCESCA BIGNAMI, *COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS 2* (2016).

with the spirit and body of laws.<sup>270</sup> However, it does not specify which entity ensures compliance.<sup>271</sup> In the winter of 2018, the Administrative Procedures Law required that such questions be asked to the public rights courts, though there is no evidence that shows such requests are made to the ordinary courts. Currently, the only entity that can abolish or amend the regulations is the Cabinet, which is also the authority that approves regulations. There are examples, however, that the Supreme Court has provided comments on regulation-type documents at the request of the executive branch institutions. In 2008, Independent Directorate of Local Governance requested the Supreme Court to review the Bylaw on Terms of References and Authorities of the Governors and provide their opinions.<sup>272</sup> An expert team assigned by the Supreme Court reviewed the Bylaw against the Constitution and the Law of Local Governance and found it compatible.<sup>273</sup> Subsequently, the High Council of the Supreme Court agreed with the analysis.<sup>274</sup> Does this mean the Supreme Court entitles itself to review regulations and other legislative instruments approved by the executive branch for their compliance with the law? While there are some examples of this intention, we do not have a precise answer from the Supreme Court yet.

## 6. Judicial Review of International Treaties

Article 121 of the Constitution authorizes the Supreme Court to review the constitutionality of inter-state treaties and international covenants.<sup>275</sup> As pointed out in earlier parts of this article, judicial review in Afghanistan is conducted on a posteriori basis. However, it does not make sense to have an already enforced international treaty go through the judicial review process at the domestic level. The most appropriate time to conduct a constitutional review is when the treaty is under discussion or signed by the government, before the government submits it to the National Assembly for ratification, similar to the method employed in France.<sup>276</sup> The recent draft Law on Jurisdiction and

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270. 2004 CONSTITUTION OF AFGHANISTAN.

271. HARESS, *supra* note 5, at 14.

272. Mayar, *supra* note 242, at 198-99.

273. *Id.*

274. *Id.*

275. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 7.

276. *Who May Apply to the Constitutional Council?* CONSEIL-CONSTITUTIONNEL (Feb. 16, 2018), <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/homepage.14.html>.\*

Organization of the Judiciary has recognized priori review of international treaties.<sup>277</sup>

Until today, there has never been a case of review of treaties by the Supreme Court.<sup>278</sup> Therefore, many aspects of judicial review of international treaties are still vague and unclear.<sup>279</sup> The ICOIC has received requests on the interpretation of Article 7 of the Constitution (which is about Afghanistan's adherence to international treaties) and has provided its legal advice.<sup>280</sup> The only example that applies to judicial review of an international treaty is a request by the Afghanistan Independent Human Rights Commission to the ICOIC to give its opinion on the constitutionality of administrative detention centers that kept war prisoners in the custody of foreign forces for extended periods of time, which was mentioned in agreements between the Afghanistan and United States governments.<sup>281</sup> In strong words, the ICOIC announced that the establishment of administrative detention centers is a clear violation of the Constitution.<sup>282</sup> While there has not been a case of judicial review or interpretation of an international treaty in the Supreme Court, it is clear that this subject needs attention and there should be some clarity on how the Supreme Court exercises judicial review over international treaties.

### III. PART THREE: INTERPRETATION OF THE CONSTITUTION UNDER THE 2004 CONSTITUTION

There are not many countries in the world that grant a single entity authoritative jurisdiction for interpretation of the constitution.<sup>283</sup> This is partly because it poses a risk of political misuse by the requesting bodies, particularly the executive, to run their own agendas.<sup>284</sup> Bulgaria, Hungary, and Slovakia among others are examples of countries that granted this authority to their constitutional courts.<sup>285</sup> In Afghanistan, the subject of constitutional interpretation has undermined the concept

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277. Draft Law on Jurisdiction and Organization of the Judiciary (2018) (Afg.) (on file with author).

278. HARESS, *supra* note 5, at 30.

279. *Id.*

280. See INDEPENDENT COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION, *supra* note 164.

281. *Id.* at 137-138.\*

282. *Id.*\*

283. VISSER, *supra* note 4, at 140.

284. *Id.* at 222.

285. *Id.* at 140.

of judicial review.<sup>286</sup> As one author writes, “[e]ventually, 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.”<sup>287</sup> This is an accurate reflection of the politicians’ perception. The cases of judicial review have never created controversy like the decisions on the interpretation of the Constitution. It is mainly because the government has been accused of misusing the interpretation clause for legitimizing its own agenda.

Constitutional interpretation is defined “as the process of constructing, establishing the meaning of and explaining a country’s written constitution (if there is one), other constitutional texts and other (unwritten) norms and principles that are of constitutional quality.”<sup>288</sup> When implementing the Constitution and laws, each implementing agency and branch of the state needs to perform a basic interpretation of the Constitution and laws,<sup>289</sup> which also helps in terms of better implementation of the Constitution. However, authoritative interpretation is different and is usually conducted by an independent body.<sup>290</sup> While the text of Article 121 is clear on the authority of the Supreme Court to interpret laws, legislative decrees, inter-state agreements and covenants, it is not clear enough on the subject of interpretation of the Constitution.

The general understanding is that when judicial review of laws is conducted, the reviewing body is actually interpreting the Constitution.<sup>291</sup> This was the essence of the arguments in *Marbury v. Madison*. In that case, John Marshall and the other justices of the United States Supreme Court argued that it is the role of the judiciary to determine what the proper law is by interpreting the Constitution.<sup>292</sup> However, not everyone has the same understanding on this matter in Afghanistan.

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286. Shamshad Pasarlay, *Restraining Judicial Power: The Fragmented System of Judicial and Constitutional Interpretation in Afghanistan*, 2016 MICH. ST. INT’L. L. REV. 249, 251 (2016).

287. HARESS, *supra* note 5, at 17.

288. VISSER, *supra* note 4, at 2.

289. B. Prakash Saikrishna & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 890 (2003).

290. KAMALI, *supra* note 196, at 4.

291. See generally B. Bisariyadi, *Distinguishing Constitutional and Statutory Interpretation in Judicial Review Cases: A Blurred Boundary Line*, 18.2 JURNAL DINAMIKA HUKUM 235 (2018), (available at [https://www.researchgate.net/publication/329839142\\_distinguishing\\_constitutional\\_and\\_statutory\\_interpretation\\_in\\_judicial\\_review\\_cases\\_a\\_blurred\\_boundary\\_line](https://www.researchgate.net/publication/329839142_distinguishing_constitutional_and_statutory_interpretation_in_judicial_review_cases_a_blurred_boundary_line)).

292. *Marbury v. Madison*, 5 U.S. 137 (1803).

The landmark case of *Spanta* in 2007 proved there are different opinions on this issue and the difference of opinions by each branch drove the state organs to the brink of a full-fledged constitutional deadlock.<sup>293</sup> To understand the importance of constitutional interpretation in Afghanistan, it is of critical importance to examine the facts and consequences of the *Spanta* case and other key cases of constitutional interpretation.

### A. Case of *Spanta*

The Constitution of 2004 authorizes Wolesi Jirga to question the ministers and if not satisfied with the explanations, it can cast a vote of no confidence to each minister separately.<sup>294</sup> A vote of no confidence shall be “explicit, direct and on the basis of well-founded reasons.”<sup>295</sup> During May 2007, the Government of Islamic Republic of Iran urged the expulsions of an estimated one million Afghan refugees.<sup>296</sup> Media reports about the inhumane behavior of Iranian authorities with the Afghan refugees at the time of deportation, resulted in mass protests in the country.<sup>297</sup> There was additional criticism in the National Assembly.<sup>298</sup>

Not happy with the responses from the Minister of Foreign Affairs and the Minister of Refugees, Wolesi Jirga decided to proceed with a vote of no confidence.<sup>299</sup> Based on the formula set forth in Article 92 of the Constitution, 125 out of 249 Wolesi Jirga votes were required to oust a minister.<sup>300</sup> Of the 197 members present in the session, 136 voted against the Minister of Refugees, fifty-six members voted in favor and

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293. Daud Qarizadah, *Afghan foreign minister 'to stay'*, BBC NEWS (June 12, 2007), [http://www.news.bbc.co.uk/2/hi/south\\_asia/6745551.stm](http://www.news.bbc.co.uk/2/hi/south_asia/6745551.stm).

294. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 92.

295. *Id.*

296. Carlotta Gall, *Afghan Legislators Vote Out Foreign Minister*, N.Y. TIMES (May 13, 2007), <http://www.nytimes.com/2007/05/13/world/asia/13kabul.html>.

297. *Afghans Protest Eviction of Refugees by Iran*, DEV. NEWS FROM AFG (May 1, 2007), <https://www.afghandevnews.wordpress.com/2007/05/01/afghans-protest-eviction-of-refugees-by-iran/>.

298. Janne Bjerre Christensen, *Guests or Trash: Iran's Precious Policies Towards the Afghan Refugees in the Wake of Sanctions and Regional Wars*, DANISH INST. FOR INT'L STUD. Ed. 32 (2016).\*

299. *Afghan Parliament Flexes Its Muscles: Fm Spanta Loses No-Confidence Vote*, WIKI LEAKS (May 14, 2007, 11:22 AM).

300. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 92.

five votes were declared invalid.<sup>301</sup> As a result, the speaker of Wolesi Jirga announced the dismissal of the Minister of Refugees.<sup>302</sup>

The voting results for the Minister of Foreign Affairs followed an interesting round. Of all votes counted, 124 votes favored dismissal of the Minister, sixty-seven votes were in support of the Minister, three votes were declared invalid, and one vote was declared “suspicious” because the voter had marked both ‘Yes’ and ‘No’.<sup>303</sup> Controversy began when some MPs believed that Wolesi Jirga fell short of unseating Spanta by one vote, since Wolesi Jirga must consider the “suspicious” vote void following the prior treatment of such votes, while others argued that the “suspicious” vote indicated disagreement of the voter.<sup>304</sup> At the end of the session, the Speaker of Wolesi Jirga postponed the decision on the “suspicious” vote for the next meeting.<sup>305</sup> The next plenary session of Wolesi Jirga did not happen until after the weekend. The vote of no confidence against the ministers created exciting discussions in the media during the weekend, and thus some members of Wolesi Jirga, who had been absent in the impeachment session, attended the second session. The number of MPs present in the session reached 217.<sup>306</sup>

After some discussions, Wolesi Jirga decided to vote for a second time to determine the fate of the Minister of Foreign Affairs. In the second round of voting, seventy-three votes were in Spanta’s favor, 141 votes were against him and while three votes were left blank; the result indicated a no-confidence vote.<sup>307</sup> While accepting the impeachment of the Minister of Refugees, (who had a “direct working relation” to the issue of repatriation of the refugees), the President of Afghanistan, Hamid Karza, asked the Supreme Court to decide on the constitutionality of the Wolesi Jirga’s no-confidence vote on the Minister of Foreign Affairs.<sup>308</sup> The press release by the President’s Office in the related section said:

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301. Ramin Anwari, *Raa 'edem a'etamad bh wezar mhajeran afghanistan [No-confidence Vote to Afghan Refugee Minister]*, BBCPERSIAN.COM (May 10, 2007), [http://www.bbc.co.uk/persian/afghanistan/story/2007/05/070510\\_k-ram-spanta-parliament.shtml](http://www.bbc.co.uk/persian/afghanistan/story/2007/05/070510_k-ram-spanta-parliament.shtml) (Afg.).\*

302. *Afghan Parliament Flexes Its Muscles: Fm Spanta Loses No-Confidence Vote*, *supra* note 299.

303. *See generally* Anwari, *supra* note 301.\*

304. *Id.*

305. *Id.*

306. ROSE LEDA EHLER ET AL., *supra* note 176, at 81-86.

307. Gall, *supra* note 296.

308. ROSE LEDA EHLER ET AL., *supra* note 176, at 81-86.

With respect to the case of Minister for Foreign Affairs, given tremendous and non-stop efforts of Dr. Spanta concerning this compulsory repatriation of Afghan refugees from Iran, the President requested the Islamic Republic of Afghanistan's Supreme Court to shed light and to provide its expert opinion on the following two issues:

I: Is this vote of no confidence [on the question of forced repatriation of Afghans from Iran] which has no direct relation with the mandate of the Ministry of Foreign Affairs, justified or not? What does the Constitution of the country prescribe in this particular issue?

II: What stance does the Afghan Constitution take on the legality of holding two consecutive rounds of voting on the single issue of impeaching the Minister of Foreign Affairs? Taking into account the previous treatment of disputed cards by the Afghan Parliament [which automatically treated such cards as void] which of the two [round of voting] should be accepted?<sup>309</sup>

Another question was asked of the Supreme Court that did not appear in the above press release. The question was: "how to treat the votes of those members of Wolesi Jirga who were not present in the interpellation session, but voted in the second round?"<sup>310</sup> The Council of Ministers also supported the President's request from the Supreme Court.<sup>311</sup>

In light of these issues, the press release said the President will decide on the case of Afghan Minister of Foreign Minister as soon as he receives the decision of the Supreme Court, which is the legal authority to interpret the Afghan Constitution.<sup>312</sup> Until then, it added Dr. Spanta remains Afghanistan's Minister of Foreign Affairs.<sup>313</sup>

While Wolesi Jirga was on its summer recess, the Supreme Court answered those questions.<sup>314</sup> However, neither the Supreme Court, nor any other governmental organization published the decision.<sup>315</sup> Only the

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309. *Id.*

310. *Id.* at 81-86.

311. Council of Ministers Decision, May 14, 2007 (Afg.) (on file with author).

312. ROSE LEDA EHLER ET AL., *supra* note 176, at 81-86.

313. *Id.* at 81-82.

314. Babak Khalathari & Abdul Samad, *Parliamentary Bulletin 06/2007*, KONRAD ADEDAUER STIFTUNG, (2007).

315. The author received an unofficial English translation of the case through a colleague working on a legal project in the Supreme Court. Both the Supreme Court and the government were hesitant to publish the decision. The decision was published by unofficial sources many years later.



spokesperson of the Ministry of Parliamentary Affairs spoke, although briefly, about the decision and said that the Supreme Court, in a seven-page opinion (hereinafter *Spanta*), decided that the decision of no-confidence vote of Wolesi Jirga was unconstitutional.<sup>316</sup>

The decision of the Supreme Court in *Spanta* was brief and the legal arguments were not intricate. In the first paragraph, the Court articulated how the case reached the Court.<sup>317</sup> The Court did not discuss whether or not it had jurisdiction over the case.<sup>318</sup> Instead, the court directly quotes the three questions of the government.<sup>319</sup> Interestingly, the Supreme Court then emphasized the independence of the Supreme Court and the role of the National Assembly,<sup>320</sup> a practice that cannot be seen in the ordinary decisions of the courts in Afghanistan. The Supreme Court, in the opinion, used language that appeared to establish itself as the interpreter of the Constitution and clarified the role of each of the branches.<sup>321</sup> Like a primary court, the Supreme Court requested the Ministry of Foreign Affairs, Ministry of Parliamentary Affairs and the Office of the Secretariat of Wolesi Jirga to submit relevant documents to the Court.<sup>322</sup> The Court requested the diplomatic letters exchanged between the governments of Afghanistan and Iran regarding refugees and the attendance sheet listing the members of Wolesi Jirga on the days of voting.<sup>323</sup>

In response to the first question, the Supreme Court explained that Wolesi Jirga was similar to a national court that makes inquiries on the performance of ministers.<sup>324</sup> The Supreme Court added that Wolesi Jirga adjudicates the guilt of the ministers, and may either tolerate the minister or cast a vote of no confidence if they find the minister guilty.<sup>325</sup> The Court added that the decision of the national court is final only if the decision is based on relevant and justifiable reasons.<sup>326</sup> Moreover, the Court noted that the decisions should be explicit and clear, directly relevant to the minister's non-performance of a specific duty, and should not have resulted from the actions of persons or

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316. See Scott Worden & Sylvana Q. Sinha, *Constitutional Interpretation and the Continuing Crisis in Afghanistan*, UNITED STATES INSTITUTE OF PEACE, (2011).

317. ROSE LEDA EHLER ET AL., *supra* note 176, at 81-86

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

sources whom the minister does not have control over.<sup>327</sup> The Court concluded that the Minister of Foreign Affairs was not competent and did not have control to prevent, prohibit, nor stop the government of Iran from expelling Afghan refugees; thus the reasons for the vote of no confidence were not justified.<sup>328</sup>

In response to the second question, the Supreme Court argued that one suspicious vote could not invalidate the rest of the votes and it did not constitute the majority as required by the Constitution.<sup>329</sup> In the opinion of the Court, the question of the validity of the suspicious vote was already resolved because of precedent set by Wolesi Jirga in similar circumstances, which had considered such votes void.<sup>330</sup> The Court in its argument was not actually addressing a constitutional matter. Conversely, it was referring to internal procedures of Wolesi Jirga. Reference to sources other than the Constitution creates doubt as to whether the Supreme Court can go that far and act like an ordinary court in addressing issues of constitutional interpretation.

Respectively, the Court, in response to the third question, ruled in favor of the President by arguing that the first round of the vote was valid and there was no place to reconsider the vote on the same subject matter.<sup>331</sup> The Court referred to Article 65 of the Rules of Procedures of Wolesi Jirga, which states that after the announcement of the voting results on a subject matter, no further debate shall take place.<sup>332</sup> The Court also noted the increase in the number of members of Wolesi Jirga in the second round of voting and questioned the vote of those members who were absent at the time of speeches of the ministers.<sup>333</sup> In the eyes of the Court, the members who were not present at the time of the speech and related responses were not in a position to judge the performance of the ministers.<sup>334</sup> A simple interpretation of this argument is that the Supreme Court meant that the members who were absent during the questioning and interpellation process should not have participated in the voting process. If this argument is accepted, many decisions of Wolesi Jirga, and for that matter Mishrano Jirga, would be invalid because many members do not participate in the discussions but do participate in the voting process.

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327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* at 85.

334. *Id.* at 83.

Eight members of the Court signed the decision,<sup>335</sup> without mentioning any dissenting opinion. Mohammad Alim Nasimi's signature, the ninth member of the Court, was missing; however, interviews with Supreme Court officials showed that dissent does not happen in cases of judicial review and interpretation and the Court has decided unanimously thus far.<sup>336</sup> As discussed in Part II, lack of dissent is not a sign of strength of the Court; rather, it may evidence lack of independence of the Court members in their opinions and impact of political influence. *Spanta* illustrated how the constitutional arrangement in Afghanistan has changed and how the judiciary is playing a critical role in this new order. It was also a cautionary note to the new and inexperienced parliament of Afghanistan not to use its power improperly and incautiously.<sup>337</sup>

The reaction of Wolesi Jirga to the Supreme Court's decision was unsurprisingly negative.<sup>338</sup> In the discussions that followed in the plenary sessions of Wolesi Jirga, several members challenged the authority of the Supreme Court on making decisions on a political matter that does not fall under jurisdiction of the Supreme Court.<sup>339</sup> Several members of Wolesi Jirga believed that Supreme Court works in favor of the executive branch.<sup>340</sup> There were also views that the Supreme Court has trespassed on its constitutional authority by deciding a case of political nature.<sup>341</sup> What they meant was that the case of *Spanta* was not justiciable and that the Supreme Court should not have accepted it in the first place.<sup>342</sup> Besides, attention soon turned to the subject of constitutional interpretation. Scholars and members of the National Assembly posed the question of whether the Supreme Court is the appropriate constitutionally recognized entity to interpret the Constitution.<sup>343</sup>

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335. Interview with Mohammad Sediq Zhobl, *supra* note 48 (on file with author).

336. *Id.*

337. ROSE LEDA EHLER ET AL., *supra* note 176, at 81-86.

338. *Id.* at 85.

339. JOHN DEMPSEY & J. ALEXANDER THIER, *Resolving the Crisis Over Constitutional Interpretation in Afghanistan*, UNITED STATES INSTITUTE OF PEACE 3 (2009).

340. *Ray Manfi Parlamen Bah Yak Namzad Shurai Aali Estera Mahkama (Parliamnet's Negative Vote to a Nominee of the Supreme Court)*, BOKHDI NEWS AGENCY, (June 2, 2012), <http://www.bokhdinews.af/>.

341. Interview with Ghizaal Haress, *supra* note 127 (on file with author).

342. ROSE LEDA EHLER ET AL., *supra* note 176, at 171.

343. John Dempsey & J. Alexander Thier, *Who Has the Power In Afghanistan?* CHRISTIAN SCI. MONITOR (March 2, 2009), <http://www.csmonitor.com/2009/0302/p09s01-coop.html>.

Despite successive protests of Wolesi Jirga against the continuance of the work of the Minister of Foreign Affairs,<sup>344</sup> the President insisted that the Supreme Court's decision stand and be implemented.<sup>345</sup> *Spanta* was an alarming case to the National Assembly and, as we have seen in Part II, the National Assembly proceeded to give the authority of constitutional interpretation to the newly established ICOIC.<sup>346</sup> However, the Supreme Court circumvented that move by declaring certain articles of ICOIC Law unconstitutional.<sup>347</sup>

The epicenter of the controversy in *Spanta* was again Article 121 of the Constitution which says: "The Supreme Court on the request of the Government or the courts shall review the laws, legislative decrees, inter-state treaties and international covenants for their compliance with the Constitution and provide their interpretation in accordance with the law."<sup>348</sup> President Karzai believed that this article authorizes the Supreme Court to interpret the Constitution."<sup>349</sup> In a letter to Wolesi Jirga after he vetoed the Law on Structure and Authorities of ICOIC, President Karzai's government argued that the phrase "their interpretation" in Article 121 of the Constitution indicated the intent of the founders of the Constitution to give the interpretation of laws, legislative decrees, treaties and international conventions and the constitution itself to the Supreme Court.<sup>350</sup>

Farsi and Pashto grammar conventions suggest the word "their" in Article 121 is a possessive adjective and does not cover the constitution itself.<sup>351</sup> If the textual interpretation of Article 121 is considered, the Supreme Court does not have the authority to interpret the constitution, though it does have the authority to interpret the laws, legislative documents, inter-state treaties and international conventions. However, merely defining a term from a grammatical point of view may be misleading. It is of equal importance to study the historical development of this article and examine the intent of the drafters. The Supreme Court extensively explained how Article 121 came into existence when it

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344. In February 2009, before the Afghan delegation chaired by Spanta headed to Washington D.C for key strategic talks with American officials, Wolsi Jirga declared that Spanta cannot be part of this delegation since he is not a minister.

345. ROSE LEDA EHLER ET AL., *supra* note 176, at 171.

346. KAMALI, *supra* note 196, at 11.

347. Supreme Court of Afghanistan Opinion No. 5, AFGHANISTAN OFFICIAL GAZETTE NO. 986.\*

348. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 121.

349. Letter from Ministry of Parliamentary Affairs to Wolsi Jirga, Official Letter No. 945 (May 12, 2008) (on file with author).

350. *Id.* (on file with author).

351. KAMALI, *supra* note 196, at 12.

struck down Article 8 of ICOIC Law.<sup>352</sup> The Supreme Court also disregarded any opinion that stated it does not have the authority to interpret the Constitution but firmly mentioned that in addition to judicial review of laws, legislative decrees, inter-state treaties and covenants, it has the authority to interpret these legislative documents and the Constitution.<sup>353</sup> In 2018, the draft Law on Jurisdiction and Organization of Judiciary, outlined one article with separate clauses that clarified the interpretation of the Constitution is a task of the Supreme Court.<sup>354</sup> The reaction of the National Assembly is yet to be seen.

The decision of the Supreme Court in *Spanta* raised some serious questions about the flaws of the constitutional interpretation mechanisms in Afghanistan. These questions can be summarized as below:

- (i) Is the Supreme Court the right legal body to interpret the Constitution?
- (ii) Presume the answer to the first question is “yes”. Impeachment of a minister is not a legal or legislative decree, nor is it an inter-state treaty or international treaty. So how can the Supreme Court decide a case like this? By interpreting the Constitution, can the Supreme Court invalidate the decisions made by the Wolesi Jirga, or any other executive entity?
- (iii) The Supreme Court is referring to Internal Procedures of the Wolesi Jirga, Sharia Law principles, and criminal law concepts in *Spanta*. Referring to those instruments is only possible if a case is adjudicated in the lower courts or if one has appealed to the Supreme Court. By examining other legal documents, did the Court not expand its scope of jurisdiction?

*Spanta* is not the only case of constitutional interpretation in Afghanistan. There are a number of other occasions that the Supreme Court interpreted the Constitution. In the following subsection, some key cases of interpretation are outlined.

### *B. Other Cases of Constitutional Interpretation*

#### 1. Addition of Name of Ethnicities in the National Identification Cards

In 2017, President Ashraf Ghani requested his Administrative Office ask the Supreme Court whether it is constitutional to add more

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352. Supreme Court of Afghanistan Opinion No. 5, AFGHANISTAN OFFICIAL GAZETTE NO. 986.\*

353. *Id.*\*

354. Draft Law on Jurisdiction and Organization of the Judiciary (2018) (Afg.) (on file with author).

ethnicities to the list of fourteen ethnicities already mentioned in Article 4 of the Constitution regarding National Identification Cards.<sup>355</sup> The Supreme Court argued there is no restriction to add more ethnicities.<sup>356</sup>

## 2. Interpellation of Ministers over Budget Expenditure

After reviewing the 2015 expenditure report of the government, the Wolesi Jirga decided to impeach ministers who could not spend more than 70% of their development budget in 2015. As a result, seven ministers were disqualified.<sup>357</sup> In the midst of the impeachment process, the government was quick to request the Supreme Court decide whether the decision of the Wolesi Jirga was constitutional or not.<sup>358</sup>

Despite a lot of speculation that Supreme Court has endorsed Wolesi Jirga's decision,<sup>359</sup> the Supreme Court never provided a response to this request. Given the political nature of the request, it has been difficult for the Supreme Court to make such a decision though the case resembles that of *Spanta*.

On a number of other occasions, the government asked the Supreme Court to make a political breakthrough when the elections were not organized at their constitutionally recognized timetable<sup>360</sup> or when government asked the Supreme Court to find a solution how to fill in one third of seats of Meshrano Jirga which were vacant because elections for district councils were not held. The basis for these decisions was the authority of Supreme Court to interpret the Constitution.

## 3. Wolesi Jirga Request for Interpretation of Article 16 of the Afghan Constitution

Based on Article 121 of The Afghan Constitution, the Wolesi Jirga is not entitled to request for judicial review or interpretation of the

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355. Letter from Admin. Office of the President to the Supreme Court, No. 6922 (n.d.) (on file with author).

356. *Stera Mahkama Afghanistan* [Supreme Court of Afghanistan] Judicial Ruling No. 27 (2017) (Afg.).\*

357. *T'edad wozraa salb selahyat shodeh az soy Wolesi Jirga bh 7 tan resid* [Number of Dismissed Ministers by Wolesi Jirga Reaches Seven], AZADI RADIO (Nov. 15, 2016), <https://www.da.azadiradio.com/a/28118321.html> (Afg.).

358. *Id.*

359. Anisa Shaheed, *Supreme Court Upholds Parliament's Move To Dismiss Ministers*, TOLO NEWS, (Dec. 22, 2016), <https://www.tolonews.com/afghanistan/supreme-court-upholds-parliament%E2%80%99s-move-dismiss-ministers>.

360. GHIZAAL HARESS, JUDICIAL REVIEW IN AFGHANISTAN: A FLAWED PRACTICE 25 (Afg. Research & Evaluation Unit ed. 2017).

Constitution;<sup>361</sup> however, the Wolesi Jirga filed such a request for interpretation of Article 16 of the Constitution that emphasizes the preservation of scientific and administrative terminologies.<sup>362</sup> The Supreme Court subsequently argued that the specific terms used for university professor titles and names for universities or departments have been in use for decades and they should be preserved since Article 16 of the Constitution requires preservation of such terms.<sup>363</sup>

#### 4. Interpretation of Laws, Legislative Decrees and Inter-State Treaties

The Supreme Court uses three words to address the subject of explaining articles of the laws: (1) *Towjih* (justification), (2) *Towzih* (explanation), and (3) *Tafsir* (interpretation).<sup>364</sup> The way the Supreme Court justifies or explains law articles is not different from interpretation. Considering that the language of Article 121 only mentions interpretation,<sup>365</sup> it would have been more useful to only use *Tafsir* and avoid using other terms that create confusion.

Cases involving the interpretation of ordinary laws have never been quite the issue that interpretation of the Afghan Constitution has been. This is due to the clear language used in Article 121 on authorizing the Supreme Court to interpret laws, legislative decrees, inter-state treaties and international covenants.<sup>366</sup> Like cases of judicial review, the Supreme Court has been inconsistent and unpredictable in receiving and interpreting those documents. In the following paragraphs, an examination of a few cases of interpretation will illustrate the inconsistency featured in Supreme Court decisions.

Other examples of statutory interpretation by the Supreme Court are outlined below:

- (i) Article 44 of the Law on Defense Lawyers regarding the validity of licenses issued before enactment of that law.<sup>367</sup>
- (ii) Article 5 of the Law on Defense Lawyers about the difference between a Defense Lawyer and a Dispute Lawyer.<sup>368</sup>

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361. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 121.

362. *See* Qaza, *supra* note 161.

363. *Id.* at 82-83.\*

364. *Id.* at 77.\*

365. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 121.

366. *Id.*

367. *Id.* at 77.\*

368. *Id.* at 77-78.\*

(iii) Articles 10, 24, and 25 of the Nationality Law, about individuals born of an Afghan and a non-Afghan parent outside the country.<sup>369</sup>

(iv) Article 39 of the Law on Elimination of Violence against Women, about crimes against women that take place outside the family environment.<sup>370</sup> This Law is in force as a legislative decree.

(v) Request of Civil Society Organizations to decriminalize cases of women escaping from home due to violence.<sup>371</sup>

(vi) Request of the Ministry of Justice to interpret the need, or lack thereof, to have a Family Law when the terms are addressed in the Civil Code.<sup>372</sup>

(vii) Request of the Ministry of Commerce and Industry to clarify the monetary punishments based on the articles of the Constitution.<sup>373</sup>

(viii) Request of the Ministry of Defense to authorize military courts to consider issues of corruption committed by military personnel.<sup>374</sup>

(ix) Request from the Central Bank, Pashtany Bank, and Bank Melli to permit the sale of collateral if the Court did not come to a decision within twenty days, per Article 27 of the Law on Mortgage of Immovable Properties in Banking Transactions. The Supreme Court found that Article 27 of this law was contrary to the Constitution, and the Court announced it as invalid.<sup>375</sup>

(x) Requests from Lower Courts to interpret ordinary laws. Some examples may be found below:

- Kunduz Appellate Court's request to interpret different Articles of the Land Management Law.<sup>376</sup>
- Kapisa Appellate Court's request for clarification on articles related to differentiating criminal and civil aspects of cases when the Government is involved.<sup>377</sup>
- Badakhshan Appellate Court's request for clarification on Article 8 of the Land Management Law.<sup>378</sup>

369. *Id.* at 78-79.\*

370. Qaza, *supra* note 161, at 80.\*

371. *Id.* at 80-81.\*

372. *Id.* at 85-86.\*

373. *Id.* at 87-88.\*

374. *Id.* at 89-90.\*

375. SUPREME COURT OF ISLAMIC REPUBLIC OF AFGHANISTAN, *supra* note 174, at 303-306.\*

376. *Id.* at 248-51.\*

377. *Id.* at 585-87.\*

378. *Id.* at 593-96.\*



- Takhar Appellate Court's request for guidance regarding the consideration of public service work, instead of imprisonment for criminal convictions, after approval from the Minister of Justice.<sup>379</sup>
- Badakhshan Appellate Court's request for clarification on the difference between a "protest" and an "appeal" under the Government Cases Law.<sup>380</sup>

While the Supreme Court had accepted a request from Civil Society Organizations to interpret an article of law, the Government did not channel a request by the Wolsi Jirga for interpretation of Article 46 of the Higher Education Law to the Supreme Court.<sup>381</sup> The Wolsi Jirga had sent a letter forwarding a complaint by a university professor on the misinterpretation of his promotion to the Administrative Office of the President, which asked it to request the Supreme Court to interpret Article 46 of the Higher Education Law.<sup>382</sup> The Administrative Office of the President wrongfully asked the ICOIC for an interpretation. The ICOIC rejected the request, arguing interpretation of ordinary laws is within the authority of the Supreme Court.<sup>383</sup> The Administrative Office of the President then asked the Supreme Court to interpret Article 46 of the Higher Education Law.<sup>384</sup> The Supreme Court rejected the request, arguing the cabinet should approve the request first.<sup>385</sup> The President did not know about the request and when he realized the matter, instead of referring the question to the Supreme Court, he asked the Ministry of Higher of Education to resolve the issue. A comparison of the process of how requests by Civil Society Organizations and the Wolesi Jirga were handled is proof that this mechanism can be arbitrary, subjective, and inconsistent.

The Supreme Court has yet to receive a request for interpretation of treaties; however, the above examples show how government agencies, ordinary courts, and even Civil Society Organizations have been able to file their requests for an answer from the Supreme Court. The mechanisms in use have been inconsistent and contradictory to the

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379. *Id.* at 718-20.\*

380. *Id.* at 721-23.\*

381. Letter from Wolsi Jirga to Admin. Office of the President (July 24, 2016) (on file with author).

382. *Id.*

383. Letter from ICOIC to Admin. Office of the President (Sept. 17, 2016) (on file with author).

384. Letter from Admin. Office of the President to the Supreme Court, *supra* note 108.

385. Letter from Supreme Court to Admin. Office of the President, *supra* note 110.

prior practice of the Supreme Court. A law describing the eligibility criteria to file cases and procedures would prevent such inconsistencies.

##### 5. Role of Independent Commission on Overseeing Implementation of Law

In the Constitutional Loya Jirga, Hamid Karzai pushed for a strong presidential system while non-Pashtun ethnic representatives campaigned for a parliamentary system with a constitutional court in which they could share power.<sup>386</sup> Although the President succeeded in establishing a strong presidential system, the opposition factions succeeded in establishing the ICOIC on the last day of the Constitutional Loya Jirga.<sup>387</sup> Thus, ICOIC is a result of compromise and last minute dealings in Loya Jirga.

In its last day of work, the Loya Jirga hastily introduced and agreed to Article 154 of the Constitution. Thus, it did not have the time to stipulate to the authorities and duties of the ICOIC. Instead, it was foreseen that authorities of the ICOIC would be articulated by ordinary law.<sup>388</sup> As Vikram Parekh, a senior analyst with the International Crisis Group in Kabul, one day after approval of the Constitution in January 2004 stated in an interview: "The main challenges, I think, that lie ahead when it comes down to implementing the constitution—one will be just simply clearing up a lot of the ambiguities in the constitution."<sup>389</sup> He continued, "I mean, the draft—there is a last-minute compromise in it that had a sort of commission for the implementation of the constitution, but it doesn't clarify at all what the powers of that commission are going to be. Conflicts between secular sources of law, like international human rights law and Islamic law, also need to be clarified, as well."<sup>390</sup> It was not until June 2010 when the ICOIC was established.<sup>391</sup> Moreover, as we have seen in previous sections, the Supreme Court butchered the ICOIC Law by invalidating selected articles.<sup>392</sup> Not introducing replacement articles further added to the problem. Considering the Supreme Court verdict on ICOIC Law, this entity has the following functions:

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386. See generally Thier, *supra* note 8.

387. *Id.* at 556-67.

388. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, at art. 157.

389. Golnaz Esfandiari, *Loya Jirga Approves Constitution, But Hard Part May Have Only Just Begun*, RADIO FREE EUR. RADIO LIBERTY (Jan. 8, 2004), <https://www.rferl.org/a/1340558.html>.

390. *Id.*

391. HARESS, *supra* note 5, at 31.

392. See *supra* Section III.A.

- (i) Oversight on observance and implementation of the Constitution by the President, Government, National Assembly, Judiciary, Offices, and both Governmental and Non-governmental agencies;
- (ii) Provision of legal advice to the President and National Assembly on issues related to the Constitution;
- (iii) Provision of specific proposals to the President and National Assembly to improve legislation related to the Constitution;
- (iv) Provision of reports to the President on violations of the Constitution; and
- (v) Adoption of internal procedures for the ICOIC.<sup>393</sup>

The ICOIC Law extended the list of officials who can request legal advice related to the Constitution to include the President, both houses of the National Assembly, the Supreme Court, the Independent Human Rights Commission, the Independent Election Commission, and the Administrative Reform and Civil Service Commission.<sup>394</sup> Despite being the authority to conduct judicial review, there are instances where the Supreme Court has sought opinions from the ICOIC on certain issues, although these instances have been informal.<sup>395</sup>

The ICOIC Law sets forth the two main functions of the ICOIC: (1) oversight of implementation of the Constitution, and (2) provision of legal advice related to the Constitution.<sup>396</sup> Neither the Constitution nor the ICOIC Law defines “oversight,” which also contributed to the weakening of the ICOIC’s authority.<sup>397</sup> Recognizing this flaw, a number of amendments, including a definition of “oversight,” is under consideration by the ICOIC.<sup>398</sup>

Given the fact that judicial review is within the authority of the Supreme Court, the existence of the ICOIC is unique. The advisory job of the ICOIC is somewhat similar to the advisory functions of the State Council in France with one difference: the French State Council advises the government on issues that may not be necessarily constitutionally related, while the ICOIC advises all branches of the State on issues relevant to the Constitution.<sup>399</sup>

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393. Law on Independent Commission on Overseeing the Implementation of the Constitution, (Afg.).\*

394. *Id.*\*

395. Interview with Ghizaaal Haress, *supra* note 127 (on file with author).

396. HARESS, *supra* note 5, at 13.

397. Interview with Ghizaaal Haress, *supra* note 127 (on file with author).

398. *Id.*

399. VISSER, *supra* note 4, at 13; Law on Independent Commission on Overseeing the Implementation of the Constitution, (Afg.).\*

The Kenyan Constitution of 2010 also established an entity with similar authorities to the ICOIC.<sup>400</sup> Kenya established the Commission for Implementation of the Constitution, the main job of which was to make sure the necessary legislation was in place for the implementation of the Constitution after its approval in 2010.<sup>401</sup> The Kenyan Commission for Implementation of the Constitution was only in place for five years when it met all the benchmarks for implementation of the Constitution.<sup>402</sup> In Kenya, a concern that the different factions comprising the National Unity Government would infringe on Kenyans' rights helped spur the establishment of the Commission for the Implementation of the Constitution.<sup>403</sup> The same concern about implementation of the constitution that existed in Afghanistan in 2004 exists even today. This concern justifies an oversight body to provide reports on implementing the constitution, which should remain the main purpose of an entity like ICOIC.

As discussed in previous sections, judicial review is not an inclusive process in Afghanistan. It is particularly criticized for being limited to requests of only the government or the courts.<sup>404</sup> For this reason, ICOIC is playing an important role in providing an alternative remedy that is available to more institutions.<sup>405</sup> ICOIC has issued eighty-six legal opinions and interpretation decisions in a span of eight years.<sup>406</sup> Legal advice from the ICOIC does not have the same weight and value as Supreme Court decisions under Article 121; however, it still provides a chance to hear alternative views.<sup>407</sup>

The ICOIC has undergone several phases throughout its short life. In the initial years after its establishment in 2010, the ICOIC played a critical role and, though the Supreme Court challenged its authorities, it continued to issue decisions on constitutional interpretation and legal advice related to the Constitution.<sup>408</sup> The Supreme Court's decision to declare certain articles of ICOIC Law invalid has affected the ICOIC's ability to maneuver.<sup>409</sup>

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400. CONSTITUTION art. 262, § 5(6) (2010) (Kenya).

401. *Id.*

402. CONSTITUTION art. 262, § 5(7) (2010) (Kenya).

403. CIC KENYA, <https://www.cickenya.org/> (last visited Oct. 11, 2018).

404. *See supra* Section III.C.

405. HARESS, *supra* note 5, at 38.

406. Ghizaal Haress, *Questions on ICOIC* (Feb. 21, 2018).\*

407. HARESS, *supra* note 5, at 36.

408. INDEPENDENT COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION, *supra* note 164, at 18.

409. HARESS, *supra* note 5, at 35.

The start of the ICOIC's second term in 2016 coincided with internal conflicts between ICOIC members.<sup>410</sup> These conflicts resulted in the other six members of the ICOIC unseating the Chairperson of the ICOIC.<sup>411</sup> That decision and other claims triggered a period of instability, resulting in an intervention by the President of Afghanistan, who appointed a delegation to investigate the work of the ICOIC.<sup>412</sup> Merely assigning an outside delegation to investigate the work of the ICOIC was a big blow to its independence and political clout.<sup>413</sup> For a long period of time in 2017 and 2018, the internal conflicts prevented the ICOIC from focusing on its main tasks of constitutional oversight and providing legal advice.

The ICOIC published one report on the violation of the Constitution,<sup>414</sup> indicating it has been unsuccessful in performing its main job of constitutional oversight. After a simple look into the activities of the ICOIC in recent years, it is not difficult to realize the ICOIC has given more attention to their role as a provider of legal advice compared to constitutional oversight.<sup>415</sup>

In addition to the ICOIC's ability to provide legal advice at the request of entities based on law, the ICOIC has exceeded its authority by continuing to interpret the Constitution at the request of Wolsi Jirga.<sup>416</sup> For example, in 2011, Wolsi Jirga asked the ICOIC to interpret Article 106 of the Constitution, a demand that the ICOIC did not reject and, instead, provided a legal response.<sup>417</sup> Respecting the decisions of the courts is a key element of democratic societies; however, the competition for getting more power has undermined this key aspect of democracy in Afghanistan. The ICOIC, which should act as the controller of implementing constitutionalism, has itself trespassed its scope of authorities.

The ICOIC has also accepted requests for legal advice from entities that are not entitled to make such requests. The Ministry of

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410. Ali Yawar Adili & Ehsan Qaani, *The Constitutional Oversight Commission in a Standoff with President Ghani: Defending Their Independence or Covering up Mistakes?*, AFG. ANALYSTS NETWORK (Aug. 4, 2017), <https://www.afghanistan-analysts.org/the-constitutional-oversight-commission-in-a-standoff-with-president-ghani-defending-their-independence-or-covering-up-mistakes/>.

411. *Id.*

412. *Id.*

413. *Id.*

414. Ghizaal Haress, *Questions on ICOIC* (Feb. 21, 2018).\*

415. HARESS, *supra* note 5, at 38.

416. Pasarlay, *supra* note 96.

417. INDEPENDENT COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION, *supra* note 164, at 71.\*

Justice, the Ministry of Finance among other agencies have made such requests, but the ICOIC did not deny them.<sup>418</sup> Only once did the ICOIC remind the Administrative Office of the President that the President must directly authorize its Administrative Office to ask the ICOIC for legal advice.<sup>419</sup> Despite the caution, the ICOIC still provided legal advice for the sake of cooperation.<sup>420</sup> The ICOIC has also provided opinions *sua sponte*.<sup>421</sup> Since this is not barred by the Constitution or ICOIC Law, ICOIC members believe there is no legal limitation that stops them from providing opinions on their own motion.<sup>422</sup> As seen in the above examples, the ICOIC has been inconsistent in dealing with legal advice on constitutional matters by accepting requests from unauthorized organizations.

The ICOIC has not only provided advisory opinions on articles of the Constitution, it has also provided its legal interpretation of articles of ordinary laws—something that is unauthorized by the Constitution. For instance, while providing an opinion on the invalidation of certain government contracts by Wolesi Jirga, the ICOIC quoted articles of the Procurement Law and gave its interpretation.<sup>423</sup> International treaties are not spared either. The Ministry of Finance, in an official letter, asked for an interpretation of Article 7 of the Constitution about applying international treaties.<sup>424</sup> In its legal advice, the ICOIC opined that the ordinary laws of Afghanistan are preferred over executive military agreements, and they are required to be approved by the National Assembly.<sup>425</sup> These examples illustrate the competition between the ICOIC and the Supreme Court. However, neither organization has established a consistent constitutional interpretation or judicial review mechanism within its sphere of authority.<sup>426</sup> Even if the requests did not fall under the authority of either the ICOIC or the Supreme Court, each provided its opinion hoping to gain more power in the political apparatus/structure/forum of Afghanistan.

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418. *Id.* at 68, 130, 155.\*

419. *Id.* at 166-167.\*

420. *Id.*\*

421. *Id.* at 146.\*

422. Interview with Ghizaal Haress, *supra* note 127 (on file with author).

423. INDEPENDENT COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION, *supra* note 164, at 120-23.\*

424. *Id.* at 130-131.\*

425. *Id.*\*

426. HARESS, *supra* note 5, at 3.

The ICOIC has asserted that it has the authority to resolve conflicts between the branches of the State government.<sup>427</sup> This authority is not mentioned in ICOIC governing law, but it seems that the ICOIC feels there is a gap that it needs to fill. In one case where it provided legal advice, the ICOIC proposed changes in the law and suggested amending an article of a law.<sup>428</sup> Nevertheless, the ICOIC has failed to act as a mediator between the Afghan government branches. There is a strong need for such an independent mediator on political matters, particularly those which are non-justifiable.<sup>429</sup> The ICOIC could have played a more positive role in that respect. However, internal conflicts have downgraded the ICOIC to a symbolic entity that is not seriously considered by the state branches.

Despite the flaws in the ICOIC's functional mechanisms and approaches, a comparative study of the legal opinions provided by the Supreme Court and the ICOIC shows that the ICOIC has been more professional and intricate in its reasoning. Particularly, in recent years, the ICOIC has followed a standard format, and published its opinions in printed and digital form on its website,<sup>430</sup> which has been helpful in providing clarity to its opinions. Another critical difference is that ICOIC opinions reveal how its members have decided, while such a distinction is not possible in Supreme Court decisions. On a number of opinions published on the ICOIC website, some members have not signed on, evidencing their dissent.<sup>431</sup> These little steps can help bring consistency to issues of judicial review, interpretation, and constitutional oversight.

Given the availability of two venues for constitutional interpretation, the executive government and legislature have been cherry picking favorable responses to their questions, deferring to the Supreme Court on some occasions and to the ICOIC on others.<sup>432</sup> For example, in 2011, the Council of Ministers asked for interpretation of Article 7 of the Constitution from the Supreme Court.<sup>433</sup> Around the same time, the Ministry of Finance made a request to the ICOIC on a

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427. INDEPENDENT COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION, *supra* note 164, at 218-22.\*

428. *Id.* at 80-81.\*

429. HARESS, *supra* note 5, at 17.

430. The ICOIC website regularly publishes its decisions in original format at <http://www.icoic.gov.af/fa>.

431. Independent Commission on Overseeing the Implementation of the Constitution [ICOIC] opinion No. 5, Jul. 31, 2016 (Afg.).\*

432. HARESS, *supra* note 5, at 16.

433. Qaza, *supra* note 161, at 83-85.\*

similar matter.<sup>434</sup> However, since the ICOIC is authorized to provide only non-binding legal advice, the requesting agencies, including the President and the National Assembly, simply ignored the opinions of the ICOIC in some cases.<sup>435</sup> This trend can negatively affect the credibility of the ICOIC and can even drive the ICOIC members toward a politically-influenced decision-making process in order to attract more attention from the government and other parties. In addition, the competition between the Supreme Court and the ICOIC should finish and each entity should focus on its own mandate. There needs to be a clear legal framework negotiated by the two institutions.

### *C. Role of Ministry of Justice*

While judicial review is embedded as one of the powers of the Supreme Court, the Regulation on Organization of Activities of Ministry of Justice authorizes this Ministry to provide legal advice and explanations on legislative documents at the request of ministries and other government agencies.<sup>436</sup> The Ministry of Justice responds to the requests of government agencies merely by identifying the relevant articles of the laws or other legislative documents. The Ministry of Justice does not provide detailed explanations of the law, since it does not want to be held accountable for encroaching on the Supreme Court's jurisdiction under Article 121 of the Constitution.<sup>437</sup>

## IV. PART FOUR: THE NEED TO REFORM JUDICIAL REVIEW

The analysis of how judicial review and constitutional interpretation are conducted in Afghanistan highlights the need for reformed practices. Inconsistency is a common element of judicial review and constitutional interpretation, which has created confusion and prompted a strong desire for reform. Judicial review has the potential to reinforce institutionalization and rule of law in the young constitutional governments. It not only helps ensure the separation of powers, but also acts as a mechanism to protect citizen's fundamental rights.<sup>438</sup> Judicial review was not a familiar phenomenon in Afghanistan

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434. INDEPENDENT COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION, *supra* note 164, at 130.\*

435. HARESS, *supra* note 5, at 37.

436. Regulation on Organization of Activities of Ministry of Justice, AFGHANISTAN OFFICIAL GAZETTE No. 350, art. 4.7 (2019) (Afg.)

437. Interview with Abdul Majid Ghanizada, Dir. of Legislation Inst. (Mar. 10, 2018).

438. *Id.* at 30; *see also* Marbury v. Madison, 5 U.S. 137 (1803).



when the Constitution was drafted and approved in 2003 and 2004.<sup>439</sup> However, lessons have been learned and a redesigned model of judicial review to bring clarity and consistency is necessary.

In his speech after approval of the Constitution in January 2004, Hamid Karzai—the then Head of Transitional Government—pointed out the need to revise the Constitution in the future.<sup>440</sup> Afghanistan has experienced challenges in implementing its Constitution since 2004.<sup>441</sup> The number of times the Constitution failed to answer complicated questions cannot be ignored. Judicial review and constitutional interpretation are among those failures.<sup>442</sup> If opportunity avails, the ambiguities and inconsistencies of judicial review and constitutional interpretation in Afghanistan should be resolved through the constitutional amendment process. However, other solutions should be sought for the short term.

#### *A. Designing a Workable Model of Judicial Review for Afghanistan*

As argued in this article, judicial review requires close attention and reform. The following section offers two models of judicial review: The Supreme Court Model and the European Model. Reforming the current setup is necessary and applying either of the models above would lead to a better system of judicial review in Afghanistan.

##### 1. Model One: The Supreme Court Model

The current model of judicial review in Afghanistan only gives the highest organ of the judiciary, the Supreme Court, the authority of judicial review and interpretation of laws, legislative decrees, international covenants and inter-state agreements. Unless some important aspects of the current model are reformed, judicial review will remain a contentious and inconsistent subject. The following subsections outline aspects that need special attention and aim to introduce a model of judicial review that adapts to the contemporary context in Afghanistan and that is feasible to apply.

Article 121 clearly establishes the authority of the Supreme Court to conduct judicial review of laws and legislative decrees.<sup>443</sup> However,

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439. HARESS, *supra* note 5, at 9.

440. Hamid Karzai, Head of Transitional Gov't, Speech (Jan. 4, 2004), in SECOND VICE PRESIDENT OFFICIAL WEBSITE (Afg.).

441. KAMALI, *supra* note 196, at 34-35.

442. FARID HAMIDI & ARUNI JAYAKODY, SEPARATION OF POWERS UNDER THE AFGHAN CONSTITUTION: A CASE STUDY 1-2 (Kabul: Afghanistan Research and Evaluation Unit, 2015).

443. ROSE LEDA EHLE ET AL., *supra* note 176, at 175.

there are not elaborate procedures in place on how to conduct judicial review in a consistent way. Additionally, the issue of interpretation is not straightforward. In *Spanta*, the Supreme Court referred to the historical records of constitution drafting and concluded that the Supreme Court possessed the authority to interpret the Constitution.<sup>444</sup> However, based on the textualism model of interpretation, which primarily considers the basic meaning of a text, the Supreme Court does not have the authority to interpret the Constitution.<sup>445</sup>

One solution is to keep the current model of judicial review but to make substantial clarifications. This would be made possible by amending the Constitution.

The following are some of the specific points that must be considered:

(i) Amend Article 121 in a way that clarifies that the Supreme Court has jurisdiction over interpretation of the Constitution. Additionally, it would make sense to add clear language that shows the ICOIC has the authority to interpret the Constitution as well.

(ii) It is of great importance to highlight the ability of the Supreme Court to conduct a priori review of international treaties.

(iii) The right to petition the Supreme Court to conduct judicial review needs to be extended to more institutions. Unlike some other countries in which all courts have the authority to review the constitutionality of laws, the judiciary is weak in Afghanistan.<sup>446</sup> There are very few judges in Afghanistan who are intimately familiar with constitutional concepts.<sup>447</sup> Therefore, it is not practical to expand this authority beyond the Supreme Court. However, it is important to make judicial review accessible to more officials and citizens. Institutions such as the National Assembly, the Independent Human Rights Commission, the Provincial Councils, and the ICOIC should be able to directly petition the Supreme Court for judicial review and to interpret the Constitution, laws, treaties, and conventions. In addition, it should be clarified that citizens can file their constitutional review cases in the ordinary courts, and if the court confirms that there is a real constitutional question, then the court may

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444. ROSE LEDA EHLER ET AL., *supra* note 176, at 81-86.

445. HARESS, *supra* note 5, at 14, 24-25.

446. *Id.* at 4-5.

447. *Id.* at 4,16.

refer the case to the Supreme Court. In other words, courts should apply concrete judicial review.

(iv) The Supreme Court should urgently propose a law to the National Assembly that regulates the procedural aspects of judicial review. Passing a law on this subject will bring consistency to the decisions concerning judicial review and raise awareness on how judicial review can preserve constitutional rights of individuals and institutions.

(v) Whether the Supreme Court can review compliance with Sharia Law needs to be clarified. Article 3 of the Constitution prohibits the adoption of any law that is against Sharia; however, it does not specify the mechanism for compliance with Article 3.<sup>448</sup> It seems there is no better option except for the Supreme Court to ensure compliance of laws with Sharia.<sup>449</sup> This should also be clarified so controversy is avoided in the future.

(vi) The judges in all levels of judiciary should receive training on issues of constitutionality.<sup>450</sup> This would enable the citizens to raise issues of constitutionality at the lower courts, and would allow the lower courts to effectively refer cases of constitutional review to the Supreme Court.

(vii) The judicial review and interpretation decisions should be available to the public. Moreover, the Supreme Court should publish its decisions immediately after a decision is made.

(viii) Under this scenario, the ICOIC can still survive and would be given even more responsibilities. The Supreme Court would not be able to answer political questions.<sup>451</sup> The amendments of the Constitution should be designed in a way to allow the ICOIC to review political questions and make binding decisions on those matters. To ensure the independence of the ICOIC, members should serve for limited, non-extendable terms, and neither the President nor the National Assembly should have removal power. It is paramount that the ICOIC gives equal attention to its oversight role. Constitutional oversight is usually a complex and controversial subject; therefore, it is necessary to enumerate and clarify the ICOIC's constitutional role. It is critical that the

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448. HARESS, *supra* note 5, at 12; 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 12, § 3.

449. HARESS, *supra* note 5, at 13.

450. HAMIDI & JAYAKODY, SEPARATION OF POWERS UNDER THE AFGHAN CONSTITUTION: A CASE STUDY, *supra* note 442, at 36.

451. HARESS, *supra* note 5, at 14, 21.

current ICOIC law is substantially revised and amended to accommodate the proposed changes.

(ix) The Constitution should also be amended so as to explicitly delegate constitutional review authority to an institution to ensure that regulations comply with the governing statutes and the Constitution. Article 76 of the Constitution prohibits any regulation that runs against the body or spirit of the laws; however, it does not identify which institution should ensure the legality of the regulations.<sup>452</sup> In many countries, administrative courts hold this authority.<sup>453</sup> Afghanistan is in the process of establishing administrative courts as part of the judiciary. If established, administrative courts are the most suitable entities to ensure the legality of regulations.

## 2. Model Two: The Establishment of a European Model of Constitutional Review

The second and more preferred option for implementing judicial constitutional review is to establish a Constitutional Court in Afghanistan. Establishing an independent body not only rescues the judiciary from deciding political disputes, it also ensures that a specialized body addresses issues of constitutional compliance. The recent example of the Supreme Court's hesitation in deciding the faith of seven ministers, whom Wolesi Jirga impeached, is proof that a Constitutional Court can do a better job when it comes to political matters.

The Constitution must be amended to establish a specialized Constitutional Court. If a specialized court is instituted to decide constitutional matters, there will be no need for the ICOIC. It could be dissolved, and its responsibilities could be assigned to the Constitutional Court. Certain Articles, like those under the first draft of the 2004 Constitution, could be used as the foundation for the Constitutional Court.

Professional legislators should draft unambiguous provisions into the Constitution, creating the Constitutional Court without leaving any room for guesswork or interpretation. The Constitutional Court should be the only entity authorized to hear constitutional review matters. Furthermore, it should be mentioned clearly that the Constitutional Court not only has jurisdiction to review the constitutionality of laws,

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452. *Id.* at 13.

453. VISSER, *supra* note 4, at 59-61

legislative decrees, acts of the government, regulations, and international treaties, but that it also has the responsibility to interpret the Constitution.

Access to the Constitutional Court is also of utmost importance. As described under the first scenario, it is important that access to judicial review mechanisms be expanded and more institutions, and even individuals, be able to bring their claims. At a minimum, the primary branches of government, a certain number of parliamentarians, provincial councils, the Human Rights Commission, and other important agencies should have access to request that the Constitutional Court review or interpret the Constitution and other legislative documents. A simplified method should also be available for individuals to file their cases directly with the Constitutional Court or other courts able to exercise concrete review by submitting questions to the Constitutional Court.

Furthermore, it should be recognized that Afghanistan is experiencing many new constitutional questions and sometimes, whether due to security or financial reasons, it is not able to comply with all the terms of the Constitution. For instance, the government has not been able to hold timely elections.<sup>454</sup> While not encouraging deviation from constitutional provisions, questions such as delay in elections, oversight of elections or abolishing political parties could also be addressed under the authority of the Constitutional Court.

The proposed tasks assigned to the Constitutional Court can impact the constitutional and political structures of Afghanistan. Thus, it is essential that the members of this Court: (1) receive a vote of confirmation from the elected parliament and (2) have their terms of the members be restricted to fixed and non-extendable terms.

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454. *Id.* at 24.