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The Relationship Between Executive and Parliament and the Problem of Constitutional Interpretation and Adjudication During the Karzai Years

Abstract

This article advances an enquiry into President Hamid Karzai's (r. 2001-2014) constitutional legacy with special reference to relations between the executive and legislature during his presidency. Before engaging in that enquiry, a brief account is given in the introduction of the developments during the months following Karzai's exit from office. What happened during this period tends to accentuate the unresolved issues of Karzai's presidency and put Afghanistan's commitment to constitutionalism to the test. The events of the past six months also point to the need for clarity regarding the status of constitutional interpretation and judicial review, two necessary ingredients of constitutionalism that ensure the conformity of laws and government action with the constitution. Dysfunctional executive-legislature relations and ambiguities over matters of interpretation have often meant that disagreement over issues did not find prompt and effective solutions.

This article is structured with an introduction and six sections. The introduction takes a look, as already mentioned, at the developments after Karzai left office. The first section discusses the presidential system Afghanistan has adopted under the 2004 Constitution, and the succeeding two sections address constitutional interpretation and the question as to who has the power to interpret the Constitution. Sections four and five are devoted to a discussion of judicial review, and the conflict of jurisdiction over who has the power of judicial review in Afghanistan respectively. The last section looks into the parliamentary powers with special reference to the use of the no-confidence vote by the *Wolesi Jirga*. This article concludes with a brief reflection back on the post-Karzai developments, the hitherto unmet challenges over constitutional issues Afghanistan is faced with, and the way forward toward solutions.

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Introductory Remarks

Several events of constitutional importance took place in the months before and after President Hamid Karzai left office: presidential election and its rerun in June 2014, coalition talks between the teams of the leading candidates Ashraf Ghani (who won the presidency) and Abdullah Abdullah, formation of a National Unity Government (henceforth as NUG), and introduction of a new cabinet. This series of events may veritably be described as a narrative of political deadlocks Afghanistan has been running into, which almost totally preoccupied the new government at a time of growing public expectations as to when it will actually start to govern the country and turn to its dauntingly mounting agenda of urgent callings. The deadlocks were partly the result of the mistakes that were made and the problems that were not solved during Karzai's presidency, with the addition of a new set of issues that arose due mainly to the creation of extra-constitutional

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portfolios and structures, such as the chief executive officer and a council of ministers, in addition to a constitutionally mandated cabinet.

President Ghani's attempt to subsume these new developments under the various articles of the 2004 Constitution, as explained below, has been less than effective. The dysfunctional relationship between the executive and legislature, and the lack of clarity over who had the authority to interpret the Constitution were among the unresolved issues that made the task of putting the pieces of a new NUG together particularly challenging. Almost all of these developments took place during the time of a sitting parliament, which was, however, not involved and to all appearances was not consulted in the process. This lack of communication further exacerbated the already fractured pattern of relations between the executive and parliament that Karzai had left behind. Parliament became only involved during the final stages of the formation of a cabinet when the proposed cabinet had to obtain the constitutionally mandated vote of confidence. On 28 January 2015, when the *Wolesi Jirga* (Lower House – henceforth as WJ) actually voted on the nineteen minister-designates the President had proposed for various portfolios, only nine obtained the required vote of confidence whereas the other ten were given a vote of no-confidence. This is certainly not an indication of good working relations between the executive and legislature.

The first Afghan Legal Studies Conference in Kabul (1-3 December 2014), where this paper was presented, was held at a time when the Ghani-Abdullah teams were engaged in coalition talks, spelling out the *modus operandi* of the NUG and the composition of a new cabinet. In his inaugural speech, Abdul 'Ali Mohammadi, Ghani's senior legal advisor, who officiated the conference, drew attention to some of the unfinished tasks of the NUG, issues of clarity in constitutional interpretation, and need for greater refinement over executive-legislature relations. He called upon the conference participants to reflect over these issues and make recommendations on how the foundations of constitutionalism in Afghanistan can be strengthened.

Reflection over these topical issues of concern to Afghanistan will hopefully stimulate further research on the new path Afghanistan is taking, in particular, the shift that the NUG has itself proposed from concentration of power in the president toward a power-sharing arrangement between the president and the chief executive officer.

How did the NUG come about? After months of negotiations, the two election front runners, Ghani and Abdullah, entered a historic agreement on 20th September 2014 (henceforth as the Agreement) to form a NUG, which builds on two previous documents, namely the Joint Declaration of 8 August 2014 (17 Asad 1393, AP), and its annex, the Technical and Political Framework of July 2014. This latter document expressly states that "the winner of the election will

serve as President".[1] This Agreement in many ways overrides the boundaries of constitutionalism and the existing institutional framework as elaborated below.[2]

The Agreement commits the parties to the creation of a new post of chief executive officer (henceforth as CEO), who will act as *ad hoc* prime minister. This is to be done through a presidential decree that will also create a series of new posts, which will then be endorsed through necessary constitutional amendments by the *Loya Jirga* (Grand Assembly, henceforth as LJ) to be convened within two years.[3] Key elements of the role and authorities of the CEO that the Agreement specifies include carrying out administrative and executive affairs of government; exercising specific administrative and financial authorities, implementing and proposing reform programmes; implementing, monitoring, and supporting the policies, budgetary, and financial affairs of the government. The CEO is also a member of the National Security Council, and is given the responsibility to establish working relationships of the executive with the legislative and judicial branches.

In specifying the functions and powers of the CEO, the Agreement refers to Articles 50, 60, 64, 71, and 77 of the 2004 Constitution, without however elaborating as to how these Articles sustain these new additions. Briefly, Article 60 of the Constitution vests the president with executive, legislative, and judicial powers, and is to be assisted, in turn, by two vice presidents. Article 64 provides a 21 item list of extensive presidential powers – Item 16 in this list includes the "signature of laws and legislative decrees". Article 71 specifies that "the government shall be composed of the Ministers who perform their duties under the leadership of the President. The number and duties of Ministers shall be regulated by law". This Article is apparently not open to the formation of an additional Council of Ministers, which is created under the Agreement as distinct from the Cabinet. This extra-constitutional arrangement would appear to override the terms of Article 71 of the constitution. Finally, Article 77 specifically renders the ministers responsible to the president and the WJ: are the CEO and his two deputies also responsible to the WJ?

Article 50 is perhaps more relevant as it provides that the "state shall adopt the necessary measures to create a strong and sound administration and to implement the reforms in the administrative

[1] The three documents referred to appear in the Afghanistan Research and Evaluation Unit Blog, <http://www.areu.org.af> accessed 30 September 2014.

[2] The main stakeholders in the NUG and their teams remained reticent throughout in making any reference to Karzai's legacy or precedent – thus exhibiting a certain lack of confidence in the institutions of state under him.

[3] During the first week of his inauguration in early October 2014, President Ghani issued the expected decree appointing Abdullah as the CEO. Engineer Mohammad Khan and Mohammad Mohaqiq were also introduced as the first and second Deputy CEOs during the signing ceremony. On 29 December 2014, President Ghani issued a nine-item presidential decree specifying the role and duties of the CEO as an ad hoc prime minister. The present writer heard the Kabul TV1 announcement and exposure of the full text of the decree, which was evidently indicative of a credible power-sharing arrangement between the two leading figures.

system of the country". This Article repeats "administration" twice, and if strictly interpreted it would imply executive functions under the existing legal status quo, thus precluding major political changes of a constitutional order. Only a liberal interpretation of the word can perhaps sustain a wider and more inclusive reference to the government generally.

That said, it is not clear whether the presidential decree that appoints the CEO is subject to parliamentary approval, and whether the CEO is also subject to obtaining the parliamentary vote of confidence. This is all the more relevant since the changes under review took place during the tenure of a sitting parliament.

On another and more controversial note, the 2014 Presidential Election results were not released before the signing of the Agreement. Surprisingly, neither the United Nations, who assumed responsibility for conducting a 100% audit of the votes cast, nor the Independent Election Commission (henceforth the IEC) saw it fit to release the election results. Media reports indicate that both the international community and the Abdullah campaign team were reluctant to have the results released before the signing of the Agreement.[4] Ambiguity and suspense left the general public askance over the arbitrary handling of the election results – there were excessive delays and repeated promises in between that the election results will be announced, but which were never actually announced – although it became common knowledge that Ghani had won 55% of the vote. The results were not declared on the ground that doing so would allegedly lead to conflict and possible violence.

Another instance of delay and frustration the Afghan public witnessed was over the formation of the NUG cabinet that was not announced for a period of more than three months after Ghani's inauguration. The Ghani-Abdullah teams apparently had difficulties agreeing on the modalities of power sharing and nomination of individuals to cabinet positions. On 20 December the WJ alerted the government to introduce the cabinet and espoused its warning with a condition that it will not give a vote of confidence to any proposed minister who held a dual nationality.[5] Finally, on 13 January 2015, the names of the 25 future ministers were announced. Eleven of them are holding dual citizenship, which means that the WJ could veto them.[6]

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[4] Cf., Aruni Jayakody, 'Constitutional Implications of a National Unity Government' (*Afghanistan Research and Evaluation Unit Blog*) <http://www.areu.org.af/BlogDetails.aspx?ContentId=1000&BlogId=968789162> accessed 10 November 2014. A fundamental issue that is bound to cast doubt on any election count is irregularity in the distribution of National Identity Cards (*tazkira*) in Afghanistan. Countless numbers of people, especially the nomadic and rural populations, lack ID cards. Hence it is theoretically possible for a person to cast a vote in a different electoral zone than his own. Even foreigners who speak local languages and look alike could do the same. This would explain why Section (A) of the Agreement commits the NUG to "complete the distribution of electronic identity cards to all the citizens of the country at the earliest possible opportunity".

[5] Kabul 1TV news the present writer heard on two occasions: on 20th and 27th December 2014.

[6] President Ghani agreed to comply with the WJ stipulation. A few of the minister-designates consequently renounced their foreign citizenship to clear the way for their candidacy; some withdrew their candidacy;

Other points in the Agreement that relate to the basic organisation of state and relations between its principal organs, as already mentioned, are over the creation of a new Council of Ministers (*shura-e waziran*) in addition to Cabinet. According to section B(9) of the Agreement, the president as the head of state leads the Cabinet, which is now to be expanded, however, to include, in addition to the ministers, the CEO, his two deputies, and the chief advisor (*ra'ees al-mushawir* – as in the Dari version, no further specification provided). The CEO "will chair regular weekly meetings of the Council of Ministers, consisting of the CEO, deputy CEOs, and all ministers". The Council of Ministers will implement "the executive affairs of the government". A presidential decree will introduce and define the new council of ministers. All of these new portfolios will stand, in the present writer's opinion, as ad hoc extra-constitutional additions, until such a time when adopted by constitutional amendments. Given persistent delays and disagreements over a variety of issues, it is advisable for the proposed constitutional amendments to be expedited as a matter of urgency and not delayed for another two years.

The next section explains the introduction of a presidential system in Afghanistan and the Bonn Agreement that proposed it, together with many new initiatives that were then incorporated in the 2004 Constitution.

I. Executive Presidency

Karzai supervised the introduction of the 2004 Constitution, which was a more systematic articulation of a presidential system that replaced the parliamentary structure of the 1964 Constitution. These two constitutions stand out, in many ways, as milestones in the midst of a myriad of other constitutions Afghanistan has had in the course of about a century, which were marred for the most part, however, with *coup d'etat*s and violent regime changes that lacked the consultative input and refinement of these two constitutions. Whereas every other regime change in Afghanistan has been espoused with foreign intervention, disturbance and violence, and then a new constitution to follow, the two constitutions mentioned also stand out for the fact that they were introduced in peacetime. It is significant that Afghanistan witnessed a peaceful transfer of power through general election for the first time in its recent political history while also retaining the 2004 Constitution.

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while the President also proposed some new names. Yet even after all this, the WJ turned down no less than ten names among the proposed ministers. The WJ broke up for its winter recess on 28 January 2015. It remains to be said that President Ghani can appoint ministers during this time through presidential decrees, which would later have to be submitted to the WJ for its vote of confidence.

Yet Karzai, who was an active participant of the new constitutional architecture and supervised the various stages of its development, left behind a fractured legacy of poor relations between the executive and parliament – which also negatively impacted relations between the parliament and the judiciary. This was the persistent scenario of an over-imposing president who pressured the judiciary to support him in his confrontational encounters with the WJ. The early years of Karzai's tenure in office were relatively unproblematic as the country was undergoing transition and preparing for its new constitution under the Bonn Agreement. There was no parliament until 2005. This early period was also marked by a degree of public enthusiasm that followed the formation of a new government after over two decades of foreign invasion, civil war, and millions of Afghan refugees who could finally hope to return home and start a new life. Yet Karzai had also inherited the daunting legacy of the war years, the aftermath of the Taliban ouster by months of American air bombardment of Afghanistan that destroyed the meagre infrastructure of Kabul and suspected Taliban hideouts. Afghanistan was already in ruins following ten years of Russian invasion and civil war, and now had to bear the brunt of the American war machine.

The 2004 Constitution was preceded by the Bonn Accord of December 2001 on the political reconstruction of Afghanistan, which began with the formation of a Transitional Government in Kabul headed by President Karzai. The Bonn participants opted for a centralised government and a powerful executive president, a sentiment shared by the international parties, President Karzai and his allies, who maintained that due to the political instability of Afghanistan, the country could not afford a weak and fragmented central authority.[7]

The 2004 Constitution was thus designed and formulated on that premise. A strong presidency and a parliament with reduced powers compared to that of its 1964 antecedent meant that the president had powers to issue decrees that are "next to impossible to challenge because of barriers to political party formation and to coalitions in parliament".[8]

As already mentioned, Article 60 of the current constitution confers on the president the traditional prerogatives of the head of state, such as being the supreme commander of the armed forces, powers to appoint government ministers and ambassadors, and promulgate laws passed by parliament. The president also appoints one-third of the members of the *Meshrano Jirga* (Upper House – henceforth as MJ) and is in a position as such to influence the composition of one of the two houses of parliament by bringing his supporters to the MJ.[9] While this power may have

[7] Cf., International Crisis Group, *'Afghanistan: the Constitutional Loya Jirga*' (International Crisis Group 12 December 2003) <http://www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/B029%20Afghanistan%20 The%20Constitutional%20Loya%20Jirga.pdf> accessed 13 October 2014.

[8] International Crisis Group, '*Afghanistan*: *The Long, Hard Road to the 2014 Transition'*, Asia Report No. 236, Kabul/Brussels, 8 October 2012, p. 2.

[9] Note for instance how the MJ wanted to compliment Karzai: during the final days of his leaving office and amidst a mixed legacy that Karzai was leaving behind, the MJ passed a motion that the Kabul International Airport should be re-named as Hamid Karzai International Airport.

seemed innocuous in the hands of a constitutional monarch, who was somewhat removed from the political frontline, as under the 1964 Constitution, they acquire a different meaning in a head of state who also leads the government and actively pursues his political and legislative agenda.[10]

The necessary democratic legitimacy for the conferment of these powers derives from presidential election and a vote cast of over 50 per cent in a free and fair election (Art. 61). The two vice-presidents are elected on the same presidential ticket but have no independent decision-making powers of their own; their main function being to assist the president in the performance of his duties.

The president is empowered to issue decree laws, especially during parliamentary recess, with only narrow legislative input, thus enabling him to influence parliament and align its work agenda with political interests favourable to his government (Arts. 64 and 79). He promulgates (or vetoes under certain circumstances) parliamentary bills (Art. 94), calls for constitutional amendment and referendum, and decides whether to submit constitutional issues for interpretation or judicial review to the Supreme Court (Art. 121). It is not clear, however, whether the president has similar flexibility, veto or abstention options, with regard to the resolutions of the LJ. A case in point was President Karzai's refusal to sign the LJ resolution that approved the Bilateral Security Agreement (henceforth as BSA) with the United States in late November 2013. Barely a day after Ghani's inauguration in office, the new government signed the BSA on 30 September 2014.[11] To prevent similar incidents of ambiguity and suspense, a constitutional amendment is needed to specify the president's position with regard to LJ resolutions. The proposed constitutional amendment should also proscribe the convening of the LJ by the president outside its stipulated constitutional framework. Article 101 of the 2004 Constitution spells out the composition of the LJ, which President Karzai did not observe, and persistently convened instead the traditional LJ of tribal elders and notables he could personally select and approve, which was evidently *ultra vires* the constitution.

Article 69 of the 2004 Constitution begins by a declaration that "the President shall be accountable to the nation and the WJ," yet a closer look at the relevant text reveals that this accountability is much more limited than that of his ministers, who can be interpellated and censured by the WJ. The president cannot be interpellated nor removed from office for political misconduct or failure of his policies, but only for activities that amount to crimes against humanity, national treason or other crime. It is only in this connection that the WJ can pass a motion, with a two-thirds majority, to convene the LJ to lay charges against the president and refer his case to a special court.

The government's position under the 2004 Constitution is also weaker than it was under that of the 1964 Constitution. The current Constitution leaves little room for a politically autonomous government. The ministers are not only appointed by the president, they are also answerable to

[10] Cf., Rainer Grote, *'Separation of Powers in the New Afghan Constitution*' [2004] ZaöRV 64 906.

[11] Atmar Haneef, Chief National Security Advisor, and James Cunningham, the United States Ambassador in Kabul signed the BSA on behalf of their respective governments.

him (Art. 77), which to all intents and purposes means they can be sacked unilaterally by the president. At the beginning of their term in office, the ministers need the approval of the WJ, and during their tenure of office, they are also subject to interpellation by the WJ.

The functions of government are primarily of an administrative nature and include execution of constitutional and statutory provisions, maintenance of law and order, preparation of budget, and reporting to the WJ at the end of the fiscal year about their activities (Art. 75). The main policy setting functions are, on the other hand, reserved for the president, who does not depend on approval of the cabinet, nor even that of the WJ (Art. 64).

In a televised presidential debate[12] before the election, Ghani observed that the power of the presidency should no longer be concentrated around the president but vested in carefully constructed institutions of the executive branch. He added that the power currently vested in the president should be distributed both to specialised agencies within the executive branch, and where appropriate, to regional bodies that could develop policies tailored to the needs of their regions.[13] Ghani further observed that people's participation in government promotes transparency and efficiency, also adding that by statute or executive order, some policy-making powers should be transferred to the local administration. Yet certain other types of decisions, such as ones involving nation-wide economic projects, need to be taken by the central government. Ghani was thus saying that some power sharing and devolution need not involve a constitutional amendment and can be done by other means.[14] On his part, Abdullah also concurred by saying that under President Karzai, Afghanistan had moved from a participatory political culture in which decisions were made through consultation in a cabinet or national security council to a culture in which one person decided the destiny of a nation.[15] Even though Abdullah favoured Afghanistan's transition from a presidential to a parliamentary system, he still maintained that the provinces should be empowered within a formally unitary structure. Abdullah added that the Afghans' biggest complaint about their government is corruption. Devolution and power sharing would allow people better oversight and thus help in combating corruption.[16] Both frontrunners thus concurred on the need for a more inclusive government while professing also a twin commitment to both territorial integrity, and regional sensitivities that recognise the needs and aspirations of people in different regions.

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[12] The full televised presidential debate can be viewed online at <https://www.youtube.com/watch?v=f0r-Vi8y52c>.

[13] Clark Lombardi and Shamshad Pasarlay, University of Washington School of Law, (*Might the Afghans Amend the 2004 Constitution? Hints from a Televised Presidential Debate*) <http://www.iconnectblog.com/2014/04/might-afghan-amend-the-2004-constitution-hints-from-a-televised-presidential-debate/> accessed 4 April 2014.

[14] Ibid, p.5.

[15] Abdullah may have been referring to President Karzai's refusal to sign the BSA with the United States.

[16] Ibid., p.6.

The next section advances an analysis of constitutional interpretation, its varieties, and the manner it is understood in the world leading traditions, to be followed, in turn, by the challenges constitutional interpretation has posed in the recent encounters between the various organs of government in Afghanistan.

II. Constitutional Interpretation

The framers of a constitution who want to make it a charter of rights and liberties and not just a set of constitutive rules face a difficult choice. They can write specific provisions and thereby doom their work to rapid obsolescence, or they can write general provisions, thereby allowing substantial discretion to the authoritative interpreters. Most constitutions are a mixture of both specific and general provisions. If the constitution had to consist entirely of specific provisions, it would introduce rigidity, which is why many constitutional provisions are drafted in general terms. This creates flexibility in the face of unforeseen changes, but it creates the possibility also of differential interpretations. The constitution is not expected to say, "read me broadly," or, "read me narrowly". The decision to do one or the other must be made in light of values and principles one wishes to uphold. If democracy or justice is the end, originalism (i.e., heavy reliance on original text and sources) may be a clumsy framework, and may even put the issue outside the boundaries of rational debate.[17]

Constitutional interpretation is guided by five sources: (1) the text and structure of the constitution; (2) intentions of those who drafted and ratified the provision in question; (3) prior precedents (usually judicial); (4) the social, political, and economic consequences of alternative interpretations; and (5) higher law, such as God's law, international law and natural justice. There is general agreement on the first three of these as appropriate guides to interpretation, with considerable disagreement, however, as to the relative weight that should be given to each when they point in different directions. Natural law (higher law, God's law) is now only infrequently suggested as an interpretive guide, even though some jurisdictions may give it greater weight than others. Many of the framers of the American constitution recognised its appropriateness. Persons who favour heavy reliance on originalist sources (text and intentions) are commonly called "originalists". Those who favour giving a more substantial weighting to precedent, consequences, or natural law are called "non-originalists". In practice, disagreement between originalists and non-originalists arises on issues as to whether a heightened judicial scrutiny should be accorded to certain "fundamental rights" that are not explicitly protected in the text of the constitution.[18]

The Islamic tradition on interpretation is mainly concerned with the reading of scripture (Qur'an or hadith) and in so doing it can broadly be characterised as originalist, although it does clearly

[17] Richard A. Posner, 'Theories of Constitutional Interpretation' (*Exploring Constitutional Conflicts*) <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/interp.html> accessed 13 October 2014.
[18] Ibid.

recognise the need for interpretation and construction. The main line of division here is between *tafsir*, which is interpretation that is confined to the words and sentences of a text, and *ta'wil* (allegorical or constructive interpretation), which is attempted when *tafsir* fails to meet the desired ends of equity and justice. *Tafsir* or *ta'wil* are in principle attempted only when the text is open to interpretation in the first place. The text or speech is, in other words, not absolutely clear and self-contained on what it means. Interpretation of any kind should not be attempted with regard to a text or speech that is so clear as to be in no need of interpretation. The main purpose of *tafsir* is to explain the meaning of a given text and deduce a ruling (or *hukm*) from it within the confines of its words and sentences. On the other hand, *ta'wil* goes beyond the confines of words and sentences and reads into them a hidden or a remote meaning that is often based on speculative reasoning and *ijtihad* (independent interpretation).[19]

That said, *tafsir* itself is not a monolithic concept as it occurs in different genres and varieties that are well known to Islamic hermeneutics and jurisprudence. Without wishing to delve into details, the main varieties of *tafsir* known to Islamic jurisprudence are:

a) Interpretation based on valid precedent (*tafsir bi'l-ma'thur*);

b) Interpretation based on considered opinion (*tafsir bi'l-ra'y*);

c) Interpretation based on symbols, indications and allusions in the text (*tafsir al-ishari*);

d) Interpretation based on an overall reading of related references in the same text or source (*tafsir mawdu'i*); and

e) Ideological interpretation based on a certain philosophy and mindset, such as Sufi-oriented interpretation (*tafsir mutasawwifah*), Sunni or Shi'i *tafsir*, and even among the Sunnis, certain ideologues such as Sayyid Qutb (d. 1966) and Abul A'la Maududi (d. 1979) have written *tafsirs* that fall under this category.

It thus appears that the Islamic approach to interpretation is not confined to the semantics and phraseology of text but is open to wider structure of values. A good interpretation should also be adequately informed by people's welfare objectives, justice, and the quest for well-moderated and balanced responses to issues.

The 2004 Constitution makes many references to Islam but also to such other sources as the Universal Declaration of Human Rights, the UN Charter, the rule of law, Afghanistan's own valid traditions, as well as Afghanistan's treaty obligations – all of which would appear to constitute

[19] Cf., Mohammad Hashim Kamali, *Principles of Islamic Jurispru*dence (3rd, Islamic Texts Society, Cambridge 2003) 118-120.

valid reference points and need to be carefully considered in order to provide a balanced reading of the text, provided in each case that the text itself allows room for interpretation in the first place.[20]

Clarity is indispensable with regard to constitutional clauses that make references to Islam and Shariah side by side with the rule of law and other values. When application of Islamic injunctions is mandated, as is the case in Articles 3 and 130 of the 2004 Constitution, there may be "dangers in here in imprecise constitutional wording and in misconceived governmental power structure".[21] Since the Islamic approach to interpretation is inclusive of a variety of considerations, the role that each of these is intended to play must be clarified and not left to speculation.[22] The text in Article 130, for instance, requires contextualisation of Islamic norms as aids to interpretation and delivery of "justice in the best possible manner". Justice is thus clearly identified as a cardinal concern and objective of interpretation by the courts.

The Islamic revivalism of the 1970s influenced public opinion in Egypt, Pakistan and elsewhere so as to include justiciability of Shariah clauses in their constitutions, and in the 1980s and 1990s courts in Egypt and Pakistan began to perform Islamic review. In both countries the courts have distinguished between two types of Islamic rules: 1) rules based on the unambiguous text of the Qur'an or hadith; and 2) rules that were developed through interpretation and *ijtihad*. The courts of Egypt and Pakistan held that two scriptural principles are particularly important: a) that Muslims act with justice (*'adl*); and b) that Muslims act to promote the public interest (*maslahah*). With regard to *ijtihad*-based rules, it was further concluded that the bulk of *fiqh* rules were of this variety, and that the state is free to enact laws inconsistent with the *ijtihadi* rules of *fiqh* provided they are consistent with scriptural principles and promote justice and public interest. In both countries, the courts have also made references, especially in the context of their modernist interpretations, to the Islamic public law doctrine of *siyasah shar'iyyah* (Shariah-oriented policy).[23]

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[20] Cf., Mohammad Hashim Kamali, "*Afghanistan's Constitution 2004: An Islamic Perspective on Interpretation*" United States Institute of Peace Paper (2008), p. 2.

[21] Andrew Finkleman, "The Constitution and Its Interpretation: An Islamic Law Perspective on Afghanistan's Constitutional Development Process, 2002-2004,"*al-Nakhlah* (The Fletcher School Online Journal for issues related to Southwest Asia and Islamic Civilisation), Spring 2005, p.6.

[22] Ibid.

[23] Cf., Clark B. Lombardi (of the University of Washington School of Law), "*The Challenges and Opportunities of Islamic Review: Lessons for Afghanistan from the Experiences of Other Muslim Countries*," USIP Position Paper, 2012, p.2. The paper is based on a workshop held on the Afghan constitution, September 20-21, 2011. *Siyasah shar'iyyah* authorises the government to initiate policy measures that facilitate justice and good government even if no specific ruling is found in their favour in the established Shariah. See for details Mohammad Hashim Kamali, *Shari'ah Law: An Introduction*, Oxford: Oneworld Publications, 2008, chapter 11 entitled "Beyond the Shari'ah; an Analysis of Shari'ah-oriented Policy (*Siyasah Shar'iyyah*)".

III. Who Has the Power to Interpret the Constitution?

The first constitution of Afghanistan, the Nizamnama-e Asasi (lit. code of fundamental regulations) of 1923/1301, provided for a State Council (*shura-e dawlat*), with powers to interpret the constitution. The State Council, composed of appointed and elected members, was authorised to "interpret and elaborate any article of this Nizamnama-e Asasi and other government regulations as and when it deems appropriate". The interpretation so provided became authoritative after the approval of the State Council and the Council of Ministers and its publication by the government (Art. 71). It was further provided that government action which had given rise to complaint by aggrieved parties, especially "when it raised questions about a law (*qanun*)," was to be referred to the State Council for consideration.[24] The result of its consideration was to be enforced following its approval by the Council of Ministers and the King (Arts. 43 and 46). Additionally, the State Council was granted review powers of all treaties, contracts and agreements Afghanistan had concluded with foreign parties and governments (Art. 49). This was the genesis of constitutional review in Afghanistan. By contrast, the 1931/1310 and 1964/1343 Constitutions were silent on interpretation. The 1976/1355 Constitution, promulgated under President Mohammad Daud, explicitly mandated constitutional interpretation to the Supreme Court. The 1987/1359 (Mohammad Najibullah's) Constitution provided for an eight-member Constitutional Council (*shura-e qanun-e asasi*), with its main task being to ascertain constitutionality of the laws, legislative decrees, international treatises, and international conventions for their compliance with the constitution. It was to advise the president on issues pertaining to the constitution, and "make recommendations to the president on developments in legal affairs under the constitution". (Arts. 123 and 124). The president appointed the Council members for a period of six years. Other procedures and organisational matters of the council were "to be regulated by law" (Art. 127). President Najibullah's Constitutional Council was basically a political body that advised the president, rather than a judicial review organ for making authoritative decisions on matters of constitutional interpretation.

From 2004 to 2007 it appears that the Supreme Court (henceforth as SC) and the executive acted on the assumption that the former was granted exclusive jurisdiction to interpret the constitution in addition to ascertaining the conformity of laws and other legal instruments with it. In actual fact, the constitutional clause on this subject was not sufficiently clear as to whether the entity entrusted with the power of constitutional interpretation was the SC or the Independent Commission for Overseeing the Implementation of Constitution (henceforth as ICOIC). To quote the 2004 Constitution:

[24] It is of interest to note that the text which occurs in a Nizamnama actually use the word *qanun*, probably a new expression coming into the picture then. Afghanistan traditionally used such other terminologies as *nizamnama* and *usulnama*, but not *qanun* at that time, which signifies a higher status vis-à-vis the venerated Shari'ah. Nowadays *qanun* is commonly used for almost all statutory laws passed by parliament.

> The Supreme Court has the competence to review, upon request of the Government or the courts, laws, legislative decrees, international treaties and conventions on their compliance with the constitution and to interpret them in accordance with the law. (Article 121)

The issue came to a head in May 2007 when the WJ passed a no-confidence vote against the Minister of Foreign Affairs, Dadfar Rangin Spanta, and the Refugees Repatriation Minister, Mohammad Akbar Akbar, when questions were raised over the SC's constitutional review powers. Both ministers were summoned and questioned by the WJ under Article 92 of the constitution for their apparent failure to prevent massive expulsion of some 50,000 Afghan refugees from Iran.[25] The WJ passed a no-confidence vote on both, but confusion arose when two blank voting slips were discovered in Spanta's ballot box and this put the vote count split evenly on both sides.[26] The vote count would have gone in favour of Spanta had the blank slips been discounted altogether. The House decided, however, to vote a second time within the week, and the result of the second round tilted the balance against Spanta. Article 92 has specified that the no-confidence vote against a minister shall be explicit, direct and based on convincing reasons, but it does not specify the consequences of that vote as to whether or not the minister concerned had to resign.

President Karzai questioned the second voting on Spanta and referred the matter to the SC to determine its constitutionality. Karzai accepted, in the meantime, the no-confidence vote against the minister Akbar.[27] The question as to whether there were convincing reasons was also debated and the WJ finally held that the alleged failure of the minister was convincing enough to warrant the no-confidence vote.[28] The SC ruled, on the other hand, that the no-confidence vote was not based on convincing reasons, hence unconstitutional. It was stated that preventing the expulsion of Afghan refugees was beyond the minister's rational control. Spanta was allowed as a result to retain his position.[29] Angered, several members of the WJ stated that the SC did not have jurisdiction to hear this case, as it was not related to the consistency of a law or other legal documents with the constitution, adding that the WJ did not recognise the decision.

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[25] Article 92 provides: "Based on a proposal by one-fifth of its members, the *Wolesi Jirga* may interpellate the Minister, if the responses are not satisfactory, the *Wolesi Jirga* may consider a vote of no confidence. The vote of no confidence against a Minister shall be explicit, direct and well-founded. The vote of no confidence shall be passed by a majority vote of all its members".

[26] Of the total of 248 votes cast on 10 May, both for and against stood at 124, which is perhaps why the WJ proceeded to a second round of voting on 12 May 2007.

[27] Mohammad Qasim Hashimzai, 'The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan' in Rainer Grote and Tilmann Röder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (1st, Oxford University Press, 2012), p. 679. In the first round the no-confidence vote against Spanta stood at 124 whereas this figure went up to 141 in the second round. See also Abdul Jameel Na'imi, 'Wolesi jirga wa tasamim-e ghayr-e maslaki wa kar-nashenasana (WJ and its unprofessional and unwarranted resolutions)' (2007) <http://www.afghanasamai.com/afghanasamai8/New/Naimi.html> accessed 25 October 2014.

[28] See for details Ahmad Hijrat 'Asim, 'Qanun-e Asasi-e 1382-2004' <http://psir.blogfa.com> accessed 26 October 2014, p. 1.

[29] Hashimzai, "Separation of Powers," p. 680.

Yet due to a certain ambiguity in Article 92, it was not clear whether the censured minister should be allowed to remain in office, must resign, or be terminated.[30]

In response, the executive and SC each proposed legislation that would resolve the jurisdictional questions. The SC attempted to clarify its jurisdiction through a proposed amendment to the Law on the Organization and Jurisdiction of the Courts (2005), revising the previous Article 24 of this law so as to read:

> The Supreme Court High Council shall have the following jurisdiction within the scope of drafting, organising, proposing and interpreting laws:
>
> 1. Assess the conformity of laws, legislative decrees, international treaties and conventions with the constitution upon a request from the government or courts and issue the necessary decisions.
> 2. Interpret the constitution, laws and legislative decrees upon request from the government or courts.
> 3. (…)
> 4. Resolve disputes stemming from the implementation of law and exercise of legal authority between the National Assembly and the Government.

At the same time, the executive drafted a law, based on Article 157 of the 2004 Constitution for the formation of the ICOIC. This Article, which appears in Chapter 11 under Miscellaneous Provisions of the Constitution, lay at the centre of the executive-parliament controversy that followed the Spanta episode. Article 157 simply provided that:

> An Independent Commission for Overseeing the Implementation of the Constitution shall be established by law. Members of this Commission shall be appointed by the President with the approval of the National Assembly.

The executive proposal was merely intended that the ICOIC should review draft legislation "prior to the endorsement of the President" and express an opinion on the constitutionality of the draft (before it became law)". It was meant to provide legal advice to the president on "issues arising from the Constitution" and "[study] previous laws for their inconsistency". The ICOIC had no powers to issue binding decisions on any subject, nor to interpret the constitution.[31]

[30] Article 92 provided: "Based on a proposal by one-fifth of its members, the *Wolesi Jirga* may interpellate the Ministers. If the responses are not satisfactory, the *Wolesi Jirga* may consider a vote of no confidence. The vote of no confidence against a Minister shall be explicit, direct and well-founded. The vote of no confidence shall be passed by a majority vote of all its members".

[31] Cf., John Dempsey and J. Alexander Thier, "*Resolving the Crisis over Constitutional interpretation in Afghanistan*," USIP Peace Briefing, United States institute of Peace, March 2009, p. 4.

However, the WJ amended the draft legislation by inserting language that gave the ICOIC the expansive power of "interpretation of the Constitution on the request of the President, the National Assembly, the Supreme Court, and the Executive".[32]

President Karzai vetoed this legislation on the ground that it violated Articles 121, 122, and 157 of the 2004 Constitution. The primary argument of his veto message was that: 1) Article 121 of the Constitution implies broad constitutional interpretation powers for the SC, which has historically had this power; and 2) that the ICOIC was meant to be a supervisory body for the implementation of the Constitution, not a body for interpretation.

In September 2008, the WJ overrode Karzai's veto and subsequently passed the ICOIC Law 2009 by a two-thirds majority, making it enforceable law under Article 94 of the Constitution. The main problem now is that two different authorities, namely the SC and the ICOIC, have conflicting jurisdictions on constitutional review and interpretation.

On 12 June 2011, a similar incident to that of Spanta occurred when the WJ passed a no-confidence vote against the Attorney-General Mohammad Ishaq Aloko, the Acting Chief Justice Abdul Salam Azimi, and six of the nine justices of the SC. This was following the decision of a special tribunal the SC had set up to look into the results of the 2010 Parliamentary Elections and the numerous complaints that were received over widespread rigging. But when the tribunal disqualified 62 MPs, within days the WJ summoned the named officials for questioning; they refused to comply, and were consequently slapped with no-confidence votes.[33]

Then in February 2013, the WJ censured the Interior Minister, Mujtaba Patang, over his apparent inefficiency in the face of the deteriorating security situation in the country, and also over appointment of inefficient officials to sensitive security posts. The WJ summoned and questioned Patang and then passed a no-confidence vote against him. Patang approached the SC to ascertain whether the vote was based on convincing reasons. The SC declined his request on the ground that it had to come from the executive or the president himself. It seems that Patang did not pursue the matter, and in the meantime, Karzai appointed Mohammed Omar Daudzai to replace Patang as Interior Minister in September that year.

Those who believe that constitutional interpretation is within the jurisdiction of the SC argue on linguistic grounds that the Dari pronoun "their (*aanha*)" in the text of Article 121 includes the constitution as well. This seems to be incorrect as the linguistic structure of the Article does not sustain inclusion of constitutional interpretation within the purview of the SC jurisdiction. Yet if one looks beyond grammar and understands Article 121 by its intention and purpose, while also

[32] Ibid., p.5.

[33] See for details, International Crisis Group, *Afghanistan: The Long Hard Road*, p. 4. Even before this then Minister of Defence Abdul Rahim Wardak, and the Interior Minister Bismillah Khan Muhammadi were interpellated by the WJ in August 2012and both were slapped with no-confidence votes. See for details Farid Hamidi and Aruni Jayakody, "A Case Study on Powers in Practice: The No Confidence Vote Against Minister Spanta," (conference paper received in Draft form from AREU on 19 November 2014)

taking into consideration the country's history and precedent, it is reasonable to say that constitutional interpretation is within the SC's jurisdiction- for the following reasons:[34]

a) Constitutional interpretation goes hand in hand with judicial review and may well involve the issuance of binding decisions, which is an inherently judicial task, and "constitutional best practices require the courts be empowered to exercise judicial review".[35]

b) If Article 121 explicitly assigns the tasks of ascertaining the conformity of laws, decree laws, international treaties and international conventions with the constitution to the SC, then it would be a logical extension of the same to say that drafters of the Constitution had intended to also include constitutional interpretation within the purview of the SC jurisdiction.

c) The 2004 Constitution (Art. 122) explicitly declares that no law in Afghanistan may take away a case or dispute from the jurisdiction of the SC to another authority or tribunal (Art. 122).

d) Article 157 assigns to the ICOIC a supervisory role over implementation of the constitution in a broad sense, which does not include interpretation, as already explained. It is only the ICOIC Law 2009 that created a parallel jurisdiction by assigning the power of constitutional interpretation to the ICOIC.

e) Constitutional precedent in Afghanistan assigns interpretation of both the laws and the constitution to the SC. Article 35 of the 1976 Constitution was explicit to that effect. Moreover, the 1986 Constitution clearly assigned constitutional interpretation to the SC, notwithstanding the fact that it provided for a constitutional council (Art. 125).

f) Even though the 1964 constitution was silent with regard to constitutional interpretation, in actual fact the first SC that became operational in 1967 and actively engaged in the country's legal affairs also interpreted the constitution.[36]

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[34] At a workshop on the constitution in Kabul (24-25 August 2008) in which the present writer also took part along with several members of the Constitution Review Commission, there was a difference of opinion on the precise import of this pronoun 'their – *aanha* in Dari.' The minister advisor Ashraf Rasooli, and Habibullah Ghalib (the late minister of justice) were of the view that grammatically this pronoun (for third persons/objects in plural) immediately follows the reference in Article 121 to four named items. Then comes '*aanha* –their' which can only refer to the named items preceding it, and does not include 'constitution,' which succeeds it, especially when the preceding and the succeeding elements are in a state of contradistinction. Sarwar Danesh, also a former member of the CRC and later minister of justice, thought that Article 121 was somewhat hastily added at a late stage and it was not accurately worded. Mohammad Qasim Hashimzai, the then deputy minister of justice, commented that the drafters of Article 121, who were all alive, intended to include constitutional interpretation within the purview of that Article and a part therefore of the SC jurisdiction. Rasooli and Ghalib were correct in their grammatical analysis. But the present author believes that Danesh and Hashimzai were right to maintain that grammatically '*aanha*' may not include 'constitution' in the text of Article 121 but the correct position is that constitutional interpretation rightly belongs to the SC. The former held on to their grammatical analysis whereas the latter to intention and meaning; the former were originalists, and the latter non-originalist.

[35] Clark Lombardi, "Designing Islamic Constitutions: Past Trends and Options for a Democratic Future," (2013) CON, Vol. 11 No. 3, 615-645 at p. 628. Also available at doi:10.1093/icon/mot038

Even if President Karzai and the WJ felt justified in asserting their respective positions, their confrontational decisions clearly damaged the fragile political stability of Afghanistan. In the present writer's opinion, President Karzai made an error of judgment to ignore the wishes of WJ and its initial vote of no confidence against Minister Spanta. It was President Karzai's role, indeed a calling on his leadership acumen, to calm down the situation over Spanta at its early stage by not taking the case any further. By involving the SC, the President also sowed the seed of a potential rift between the judiciary and WJ, which did in fact happen. President Karzai occupied himself with protecting his position, which can hardly be justified at the expense of the country's need for unity and cooperation between the president and parliament.

The WJ also overplayed its hand by acting on a forced interpretation of Article 121 and exaggerating the role that the constitution had assigned to the ICOIC. It is fairly obvious from the reading of Articles 121 and 157 that the ICOIC was not meant to act as interpreter of the constitution, yet the WJ conferred that very power on it by means of a separate law that actually gave rise to a conflict of jurisdiction that the country is faced with to this day.

Constitutional interpretation and review powers are normally entrusted into an impartial judicial authority that can deliver authoritative interpretation. However, a closer look at the common law, American, and continental legal system reveals variations in the theory and practice of judicial review. This is what we turn to next.

IV. Judicial Review

Judicial review refers to the power of the courts of a country to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the constitution. Actions judged inconsistent are declared unconstitutional and, therefore, null and void. Judicial review in this sense depends upon the existence of a written constitution. It allows the apex court to take an active role in ensuring that the other branches of government abide by the constitution.[37]

Judicial review could be more accurately described perhaps as *constitutional review*, because there also exists a long practice of judicial review of the actions of administrative agencies that need not

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[36] See for details Mohammad Hashim Kamali, *'Afghanistan's Constitution Ten Years On: What are the Issues*?' (Afghanistan Research and Evaluation Unit) <http://www.areu.org.af/EditionDetails.aspx?EditionId=770&ContentId=7&ParentId=7&Lang=en-US> accessed 26 October 2014.

[37] <http://www.law.cornell.edu/wex/judicial_review> accessed 26 October 2014.

refer to the constitution as such, but use the test of reasonableness. Judicial review proper thus refer to acts that are deemed violative of the constitution.[38]

Constitutional review proper refers to the power to examine statutes and government actions for their conformity with the constitution. From its origins in the American experience, the institution has spread around the world to become part of the standard institutional architecture of democracy. Some countries, such as the United States and Pakistan give the function of constitutional review to their ordinary courts at certain levels; some give it to the Supreme Court but not to lower courts; whereas some countries in the French constitutional tradition have designated 'constitutional councils.' The main trend in the past few decades has been to create separate constitutional courts for the purpose.[39]

Judicial review in its broader sense is an instrument of checks and balances in a modern government, which is best realised in a regime where there is a separation of powers.[40] Judicial review is, however, understood differently in the civil law and common law traditions. Common law judges are seen as sources of law, capable of creating new legal principles, and also capable of rejecting legal principles that are no longer valid. In the civil law tradition, judges are expected to apply the law, with no power to create or invalidate legal principles.

Separation of powers is based on the idea that no branch of government should be able to exert power over any other branch without due process of law; each branch of government should have a check on the powers of the other branches, thus creating a regulative balance among the three organs of state. In the United States, judicial review is considered a key check on powers of the other two branches of government by the judiciary.[41]

Common law jurisdictions and those stressing separation of powers are the most likely to utilise judicial review. Nevertheless, many countries whose legal systems are based on the idea of legislative supremacy have learned the possible dangers and limitations of entrusting power exclusively to the legislative branch of government. Many countries with civil law systems have also adopted a form of judicial review to stem the tyranny of the majority. Yet there are variations within systems and countries. Though a common law system wherein the courts make law is present in the United Kingdom, the country still has a strong attachment to the idea of legislative supremacy; consequently, judges in the United Kingdom do not have the power to strike down primary legislation.

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[38] <http://global.britannica.com/EBchecked/topic/307542/judicial-review> accessed 26 October 2014.

[39] Tom Ginsburg, "Comparative Constitutional Review," p.1: A United States Institute of Peace position paper at www.usip.org.

[40] Separation of powers was first introduced by Charles Montesquieu, in his renowned The *Spirit of laws*. It was later institutionalised in the U.S Supreme Court's landmark decision *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). It was the first Supreme Court decision to strike down an act of Congress as unconstitutional. Chief Justice John Marshall wrote the opinion for a unanimous Court.

[41] <http://en.wikipedia.org/wiki/Judicial_review> accessed 26 October 2014.

Two different organisational models of constitutional review can be ascertained: centralised and diffused. In a centralised model, one that is used by most European countries, including France, Germany, and Italy – a dedicated body, a constitutional court, or a constitutional council – is the only state organ granted the power to make authoritative decisions on the constitutionality of a law or government action. When constitutional questions arise in cases before lower courts, they are referred to the constitutional court for adjudication.

Diffused or decentralised constitutional review, the model used in the United States and Pakistan, grants all courts in the judiciary the power of constitutional review. A Supreme Court at the apex addresses questions of constitutionality when they arise in cases appealed from lower courts. In Pakistan, Article 203D of the amended Constitution of 1973 specified that the Federal Shariat Court, at the request of a citizen or the government, may examine any law and rescind it if it finds that the law contravenes any injunction of Islam. The lower courts decide in individual cases wherein doubts arise on the constitutionality of an action, or statute on which such action may be based. If the latter is found to be unconstitutional, the court will refuse to apply it. The last word on this matter rests with the Supreme Court.

With regard to the powers of the SC, the decentralised model may be further divided into two types: 1) the SC has the power to invalidate the law upon its ruling as in the United States and Pakistan, and 2) the law is suspended by the SC but remains on the statute books until replaced or amended by parliament. This latter type of judicial review is practiced in Yemen, the United Arab Emirates, Malaysia, Nigeria, and arguably Afghanistan. Egypt, Turkey, Indonesia, and Bahrain belong with countries wherein constitutional review is centralised entirely in a separate constitutional court.[42] One commentator went on to observe that Article 121 of the 2004 Constitution "transforms the Supreme Court of Afghanistan into a constructional court".[43] And as such, the SC will also have the competence not only to interpret the constitution but also to ascertain the compatibility of laws and decrees with the beliefs and provisions of Islam.[44]

Many countries in the French constitutional tradition in North Africa, including Tunisia, Algeria, Morocco, Mauritania, Senegal, and Lebanon have designated 'constitutional councils' with more limited review powers. France itself requires its constitutional council to review all statutes which implement or elaborate constitutional provisions and all private member's bills before they are enacted. This kind of abstract, or *a priori,* constitutional review is generally initiated by political officials, members of the legislature, the executive or regional governments. Constitutional councils are limited in scope due partly to their predominantly political, rather than judicial, character, and the tendency also that they issue advisory, rather than binding, decisions – although this may vary in particular cases and jurisdictions.

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[42] Grote, "Models of Institutional Control," in Grote and Röder (eds.), *Constitutionalism in Islamic Countries*, 224.

[43] Said Mahmoudi, *'The Shahria in the New Afghan Constitution: Contradiction or Compliments?*' [2004] ZaöRV 64 867, 872.

[44] Ibid.

The decentralised model allows the court to review a law's constitutionality after it has been in effect for long enough for its real world impact to be seen. This type of *concrete* review, also known as *a posteriori* review, is typically judicial in character, broadly based and often carries binding force.[45] The main trend now, as already noted, is to create separate constitutional courts. This is known as the German model and is widely adopted in many new democracies.[46] According to an informed observer, France is also likely to move toward a centralised constitutional court model.[47]

Constitutional review courts do many other jobs. They may hear cases related to presidential impeachment, supervise elections, settle disputes between the organs of state, and even rule on the constitutionality of political parties. A constitutional court can hear disputes arising out of concrete cases, just as it can also consider constitutional issues in abstract, even before a case arises or a law is put into effect. An abstract review also occurs when political institutions ask the court to provide an authoritative interpretation of the constitutional text outside of a real dispute.[48]

A constitutional court offers a relatively more efficient method of determining the constitutional validity of laws and decrees. In a decentralised system, by contrast, multiple courts may issue decisions regarding a law's validity, and these decisions may conflict with each other. Only after cases have worked out their way through the judicial system to the country's highest courts will there be a degree of certainty, which is likely to materialise when appellate courts or the supreme court pass a ruling. A constitutional court in contrast is the only designated authority that can conduct constitutional review, and its decisions will then be followed by the rest of the judiciary. Furthermore, in systems in which the constitutional court can be accessed without first having to approach the lower courts, the constitutional court can issue a decision more quickly than is possible in a decentralised system.[49]

Another argument in support of separate constitutional court centres on the nature of cases that the court will hear. Disputes over constitutional provisions often involve the most sensitive political

[45] Cf., Katherine Glenn Bass and Sujit Choudhry of NYU Law Center for Constitutional Transition: Democracy Reporting International, Briefing Paper 40, September 2013, p. 8 at www.democracy-reporting.org (accessed 26 October 2014).

[46] Cf., Tom Ginsburg, "Comparative Constitutional Review," p.1: A United States Institute of Peace position paper at www.usip.org. See also Thierry Le Roy, "Constitutionalism in the Maghreb," in eds., Grote and Röder (eds.), *Constitutionalism in Islamic Countries*, 111f. Of the three North African countries, Morocco has the most developed case law on constitutional review, whereas in Algeria and Tunisia the record has been very modest.

[47] Rüdiger Wolfrum's conversation with Afghan parliamentarians in the presence of this author, Kabul, 30 November 2014.

[48] Ibid.

[49] Katherine Glen Bass and Sujit Choudhry, *Democracy Reporting international*, Briefing Paper 40, September 2013, p. 2. See also Victor Ferreres Comella, "The Rise of Specialised Constitutional Courts," in Tom Ginsburg and Rosalind Dixon eds., Cheltenham, UK and Northampton, MA, USA*:* Edward Elgar Publishing Limited, 2011, p 268.

issues, including review of the country's electoral laws and election results, powers of the various branches of government and other questions. Decisions on these issues will have a major impact on the country's politics. Some observers thus argue that due to the political nature of constitutional cases, it is best to create a specialised body of judges that can develop expertise in constitutional jurisprudence and insulate the rest of the judiciary from politicisation.[50]

Countries and jurisdictions also tend to vary over some key questions pertaining to constitutional review: who can bring a claim, what it can be based on, and what the effects of the court decisions may be. These questions may be addressed in the constitution, in statutes on the organisation of the courts, or in subsequent interpretations by the constitutional court. In the absence of a clear path to settle constitutional disputes, there is a risk that the system becomes deadlocked.

V. Problematics of Judicial Review in Afghanistan

In Afghanistan, the case of the former Foreign Minister Spanta illustrated the uncertainties regarding the locus of judicial review. When the WJ acted to dismiss the Foreign Minister through a no-confidence vote, the President questioned the power of the WJ and asked the SC to rule. When the SC issued a decision in the case, the WJ did not recognise the power of the SC to make a decision in that case.

Disputed election results have also become a recurrent problem for Afghanistan and the damaging effects of lack of clear guidelines on competencies were nowhere more evident than during the 2014 Presidential Election and in its aftermath. This has sharpened the awareness that needed formulas must be found, and that the constitution needs to provide them, not only on electoral matters, but also on the newly created post of the CEO, who acts as an executive prime minister without a constitutional mandate.

Neither Article 121 nor Article 157 of the 2004 Constitution expressly empowers the SC or the ICOIC to rule whether actions by a branch of government violate the constitution. The Constitution's silence on this crucial aspect of judicial review has left both the SC and the ICOIC vulnerable to interference by both the president and parliament and has greatly distorted the balance of power.

The ICOIC has thus far been engaged with the executive branch to review and vet proposed laws and policies for constitutional validity. Responding to a request by the ICOIC for constitutional review of draft legislation, Presidential Decree No. 11371, dated 14 November 2010, instructed that "draft laws after decision of the cabinet and prior of sending to National Assembly shall be sent to the Independent Commission for Overseeing the Implementation of the Constitution". [51]

[50] Bass and Choudhry, Democracy Reporting, 2.
[51] United States Institute of Peace, Peacebrief 113, November 7, 2011, p. 3. Available also at www.usip.org.

Despite the passage of the ICOIC Law 2009, the approach to solving constitutional questions have been increasingly ad hoc and politicised. During the 2010 Parliamentary Elections, parliament sent letters to both the SC and the ICOIC asking their interpretation of the election law concerning the manner by which fraudulent votes might be disqualified. The IEC also repeatedly questioned both bodies on the validity of President Karzai's Special Electoral Tribunal. The SC and the ICOIC were also consulted on how the Speaker of the WJ should be elected. It is clear that simultaneous requests are being submitted to both the SC and the ICOIC in the quest for securing better and more favourable solutions to institutional concerns.[52]

At present, the ICOIC appears to be responding mainly to queries it receives from government departments. These queries focus not so much on constitutional interpretation, but on departmental action, especially when the department in question seeks effective solutions to issues. The ICOIC has received questions, for instance, from the Cabinet Secretariat over the status of Afghan prisoners convicted for 25 years or more in neighbouring Tajikistan – whereas the maximum imprisonment under Afghan laws is 20 years. Another query received was from the office of the Minister for Parliamentary Affairs seeking clarification of a certain conflict of jurisdiction between the police and the Anti-Corruption High Office as to whether the latter should have a role in the investigation and collection of evidence. Yet another query was received from the Defence Affairs Committee of the WJ over the status of defence contracts that the WJ had ruled as null and void – whether such a ruling was actionable without a court judgment on the matter. The Independent Human Rights Commission also addressed a query to the ICOIC over the legality of non-judicial detention of individuals in the Bagram and Pol-e Charkhi prisons under the Afghan-US Memorandum of Understanding. The ICOIC has responded and its responses are often based on provisions of the Afghan statutes. No Shariah issue was addressed to the ICOIC, as the files show, nor has the lCOIC referred to any Shariah sources or provisions in any of its responses that the present writer was able to consult.[53]

A constitutional amendment is clearly required to identify the constitutional review authority and thus remove the confusion that has arisen as a result of conflicting laws and rulings on the issue. The present writer proposes the formation of a separate constitutional court in Afghanistan in the manner that was formulated in the initial draft of the 2004 Constitution, but which was hastily removed by the Karzai regime and the LJ at the final stages of the LJ debates, based on the apparent apprehension that the proposed constitutional court might turn out to be like the Guardian Council (henceforth as GC) of the Islamic Republic of Iran (henceforth as IRI), which had become problematic at the time until the IRI took action to establish the Shura-e Maslahat (public interest

[52] Ibid.

[53] Trans. and summary by the present writer of the ICOIC documents in Dari all roughly dated for various months of the Afghan year 1391/2012-2013.

council) that can override the GC resolutions. That fear was evidently unfounded and most likely exaggerated by Karzai's foreign advisors at the time.[54]

VI. Parliamentary Powers with Special Reference to No-Confidence Votes

The 2004 Constitution has retained the bicameral parliamentary model of the 1964 Constitution and assigns to parliament two main functions: to legislate and to monitor the president and executive branch in the exercise of their powers. Notwithstanding the constitutional declaration designating the National Assembly (henceforth as NA) as the "highest legislative organ" of the Islamic Republic of Afghanistan, the legislative powers of the NA have actually been reduced when compared to that of the 1964 Constitution. This is because the Constitution places the legislative process in parliament under the government control: parliament is obliged to give priority attention to bills and treaties introduced by the government (Art. 97) – even more so with regard to budgetary and financial matters. The WJ can delay neither the approval of the budget for longer than one month, nor the decision to grant or take a loan the government may have proposed for longer than 15 days. The proposal is considered as approved otherwise if the WJ does not take a decision within the prescribed periods (Art. 98). When parliament adopts a bill at its own initiative that the government does not like, the president can use his veto power, and the veto in question cannot be overruled except by a two-thirds majority in the WJ (Art. 94).

The president can also circumvent the legislative competence of parliament through the organisation of a referendum, or by convening the LJ on important national issues (Art. 64 and 65). President Karzai has not held a referendum but has convened the LJ on more than one occasion under the rubrics of *emergency* or *consultative* LJs, usually without consulting the WJ and often by-passing it. Further, the LJs he convened did not comply with the terms of the constitution. Apart from asserting his prerogative in this fashion, Karzai made no serious effort to close ranks and establish a better climate of understanding with the WJ. The latter has also been inclined to respond in kind in two areas, namely the formation of the ICOIC as already reviewed, and the use of its no-confidence vote, which will be further discussed below.

The no-confidence vote is an instrument of the checks and balances that parliament exercises against the two other organs of state. Parliaments are normally empowered to approve the appointment of ministers, ranking judges of the SC, heads and/or members of independent constitutional commissions, and other leading officials in the first place. Parliaments are also empowered, under democratic constitutions, to take back that approval, so to speak, when the officials in question are deemed to be guilty of serious violation and neglect. To balance this out,

[54] See for details on the Guardian Council, Mohammad Hashim Kamali, *'Afghanistan's Constitution Ten Years On: What are the Issues*?' (Afghanistan Research and Evaluation Unit) <http://www.areu.org.af/EditionDetails.aspx?EditionId=770&ContentId=7&ParentId=7&Lang=en-US> accessed 26 October 2014, p. 31.

the head of state is often empowered to dissolve the parliament, and veto a legislation parliament may have passed – all under specified circumstances and procedures.[55]

Within this basic framework, different countries and constitutions may adjust and modify their respective inter-organ relations according to their particular requirements. For instance, the 1971 Constitution of Egypt authorises the People's Assembly to withdraw its confidence from the prime minister, his deputies, or any of the ministers and their deputies if the motion is supported by a minimum of twenty members and then passed by an absolute majority. The prime minister's deputies and the ministers in question shall resign and the prime minister shall submit his resignation to the president (Arts. 126-129).

A censure or interpellation is different from a no-confidence vote in that a censure needs to state the reasons for the motion while no-confidence motions do not require reasons to be specified.[56] The Afghan constitution authorise the WJ to interpellate the ministers based on a proposal supported by 20 per cent of its members. If the responses are not satisfactory, the WJ may consider a vote of no confidence. The vote of no confidence against a minister must, however, be "explicit, direct, and well-founded" (Art. 92).

The parliamentary no-confidence vote became problematic in Afghanistan due mainly to the manner and frequency of its exercise, under both the 2004 and the 1964 Constitutions, though for different reasons. Under the 1964 Constitution, the prime minister and other members of a new government could only be appointed by the king after they had received a vote of confidence in the WJ on the presentation of their policies (Art. 89). A no-confidence vote under that Constitution could be passed, not only against individual ministers, but also the government as a whole, which had a binding effect in both cases and the minister or government had to resign as result (Arts. 91-94). Yet in practice, the democratic process was hampered by the absence of political parties in parliament, which could have secured support for government policies in the WJ. Government policies did not get the needed support and a persistent rift developed between the executive and legislative branches. The WJ of the 1960s used its powers in a predominantly negative way, by indulging into questionable political manoeuvres, and taking an assertive stance in the frequent exercise of its no-confidence vote, which led to the collapse of four successive governments within a short pace of five years.[57] The 1964 Constitution was assertive perhaps on the separation of powers, but did not take sufficient safeguards to ensure co-ordination and checks and balances between the three organs of state.

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[55] The current constitution does not, however, empower the president to dissolve the parliament. See for details Mohammad Hashim Kamali, 'Afghanistan's Constitution Ten Years On: What are the Issues?' (Afghanistan Research and Evaluation Unit) <http://www.areu.org.af/EditionDetails.aspx?EditionId=770&ContentId=7&ParentId=7&Lang=en-US> accessed 26 October 2014.

[56] <http://en.wikipedia.org/wiki/Motion_of_no_confidence> accessed 27 October 2014.

[57] Rainer Grote, "Separation of Powers in the New Afghan Constitution," ZaoRV 64 (2004), 899.

Political parties did not feature in the electoral process under Karzai due to "President Karzai's unwillingness to allow candidates to appear on the ballot with party labels".[58] This meant that elected officials owed nothing to a party and had little incentive to work collectively. A democratic government cannot operate effectively if likeminded individuals cannot group together and run for office on a common platform. Moreover, Afghan MPs are elected on the basis of the single non-transferable vote system, which does not encourage the formation of political parties or alliances within parliament.

The 2004 Constitution opted for a presidential system and consequently changed the more rigorous provisions of the 1964 Constitution on the use of no-confidence vote, yet the text of the 2004 Constitution is not free of ambiguity over the consequences of that exercise. The WJ may interpellate a minister if 20 per cent of its members propose a motion to that effect (Art. 92). If the minister fails to provide a satisfactory explanation, the WJ may pass a no-confidence vote against him with an absolute majority provided that it is based on convincing reasons.[59]

Our review of the constitution and the specific instances of no-confidence votes the WJ has passed on several ministers show that the consequences of such a vote must be clearly stated in the text – hence our proposal that the Constitution should be amended on this point to provide that clarification.

In modern times, the successful passage of a no-confidence motion is relatively rare in two-party democracies. This is because party discipline is usually sufficient to allow a majority party to defeat such a motion, and if faced with possible party defections, the government is likely to change its policies rather than risk a vote of no confidence. The cases in which a no confidence motion has passed are generally those in which the government party has a slim majority, which is eliminated by either by-elections or defections, such as the 1979 vote of no confidence in the Callaghan government in UK, which was carried by one vote, forcing a general election then won by Margaret Thatcher's Conservative Party.

Motions of no confidence are far more common in multi-party systems in which a minority party must form a coalition government. This can result in a situation in which there are many short-lived governments because the party structure allows small parties to break a government without the means to create one. Instances of this have been seen in Italy, Israel, and Japan.

Conclusion

[58] Thomas J. Barfield, "Fundamentals of Governance in Afghanistan," A Conference Summary, The American Institute of Afghanistan Studies and the Hollings Center, 2009, p. 4. Also at www.hollingscenter.org.

[59] Mohammad Hashim Kamali, *'Afghanistan's Constitution Ten Years On: What are the Issues*?' (Afghanistan Research and Evaluation Unit) <http://www.areu.org.af/EditionDetails.aspx?EditionId=770&ContentId=7&ParentId=7&Lang=en-US> accessed 26 October 2014.

The forgoing analysis of ex-President Karzai's pattern of relations with the WJ and the SC is indicative of imbalances in his handling if issues with both, but perhaps more so with the WJ. Karzai engaged himself in politics of confrontation more than that of engagement and compromise. Yet one also finds that, his assertive manner in the exercise of power notwithstanding, he could hardly be characterised as a strong president. It was clear that the central government under him had limited control in the provinces where many local leaders refused to cede power and kept themselves in positions of unfettered and often abusive power. Warlordism and parallel governments emerged and developed during his time.[60] Karzai was not, however, alone in the unprecedented emergence of warlordism in Afghanistan. The West is also responsible for supporting warlords from the early days of the war. [61] Karzai's decision-making capabilities were limited, issues with the WJ, administrative malpractice and corruption proliferated during his government, and he is not known to have taken to task or confronted notorious drug dealers and corrupt officials. Corruption has eaten into the fabric of society and economy under Karzai such "that was never before experienced in the country's modern history",[62] which naturally undermined the ability of his government to engage in any meaningful way in strengthening the foundations of constitutionalism and separation of powers in the country.

Some of these issues can be explained, of course, by reference to security problems, weak army and police, and Afghanistan's near total dependency on foreign aid. Yet the manner in which President Karzai preoccupied himself in reactive politics of self-preservation did little to compliment his leadership. He showed scant initiative to change the status quo or to enlist public support for important reforms.

It may be too hasty to draw definitive conclusions, but judging by the terms of the September 2014 Agreement over the formation of a NUG, a strong presidency of the kind designed by the architects of the Bonn Accord and the 2004 Constitution may have seemed good in 2001, but it does not suit the conditions of Afghanistan 13 years later. The country is also known for its strong traditions of consultation (*jirga*, *shura*) and the underpinnings of a popular culture of negotiated

[60] Afghanistan became subject to about four parallel and autonomous government systems: the United States, the United Nations, the Taliban at least in some areas, and the Afghan central government. Non-governmental organizations (NGOs) were yet an additional sector that were not subject to effective governance by any of the four. Cf., Barfield, "Fundamentals of Governance in Afghanistan", p. 3.

[61] Siddiq Noorzoy "Afghanistan's Wartime Economy (2001-2014): the Devastating Impacts of IMF-World Bank Reforms," (p.5) thus wrote that "the role of warlords being paid by the US government is acknowledged even by the Pentagon in a 65 page report which revealed the fact that a warlord protection racket had been created:" http://www.globalreach.ca/afghansitan-wartime-economy-2001-2014-impacts-of-imf-word-bank-reforms/5393141 (accessed 26 August 2014). See also Sanjay Kumar's interview with Bette Dam, an author and journalist based in Kabul over the last eight years. Her most recent book is a biography of Afghanistan's outgoing president, Hamid Karzai – titled *A Man and His Motorcycle: How Hamid Karzai Came to Power*. Bette Dam also confirmed the western patronage of warlords: http://thediplomat.com/2014/10/interview-bette-dam/ (accessed 30 October 2014)

[62] Noorzoy, "Afghanistan's Wartime Economy," p. 6.

decision-making– hence the decision of the NUG to move in the direction of a semi-presidential system and power sharing.

Electoral democracy and constitutionalism also suffered setbacks in Afghanistan in the aftermath of the 2014 Presidential Election. The six months delay in the announcement of election results placed the country in political and financial uncertainties and suspense. There are complaints over the politicisation of the electoral process. The IEC came under heavy public criticism, indeed, public anger, for its failure to announce the election results independently of political negotiations between the two frontrunners. The technical aspects of computation of votes and the timely announcement of the results was the primary duty of the IEC, tasks in which it had apparently failed. Ghani and Abdullah should not have allowed the politicisation of the election results with their protracted negotiations. Why should the people's trust and mandate be undermined and marginalised in this way? The election results should have been announced independently of coalition talks and predilections of personalities and partisan interests.

The 2014 Presidential Election and its problematics were obviously not a good exercise for democracy. People are now more sceptical about any future elections. The audit of the vote recount did not achieve its desired objectives due mainly to mismanagement and possibly even corruption. The good news is that the transition took place without violence, and there was no serious eruption of conflict.[63] The coalition government has hitherto held together, notwithstanding its internal differences, and there are talks of a UN-mediated peace negotiation with the Taliban, which is a difficult yet necessary step for restoring peace to the war-torn country, in view especially of the imminent withdrawal of the United States forces from Afghanistan.[64]

The new arrangements regarding the positions of the CEO, his deputies, Council of Ministers, and the Cabinet are indicative of a haphazard combination of competing institutions with no clear constitutional basis. It is questionable whether the constitutional provisions cited in support of the formation of this new executive branch can actually support such extensions, even if adopted by presidential decrees. The 2004 Constitution does not entrust unlimited powers in the president to issue decrees. The president can issue decrees only in specific circumstances (i.e., when parliament

[63] Sanjay Kumar's interview with Bette Dam, an author and journalist based in Kabul over the last eight years of Karzai's presidency: <http://thediplomat.com/2014/10/interview-bette-dam/> accessed 30 October 2014.

[64] According to a BBC World Service TV interview with Nicholas Haysom, the United Nations Secretary-General's Special Representative and head of the United Nations Assistance Mission in Afghanistan on 28 December 2014 that the present writer watched, the UN-mediated talks between Kabul and the Taliban were in progress but had yet to yield its desired outcomes. In a related report of a meeting between the Afghan Speaker of Parliament, Abdul Rauf Ibrahimi, and the CEO Abdullah shown on Kabul 1TV news, 29 December 2014, it was mentioned that the delay in the cabinet line-up was probably due to President Ghani's on-going negotiations with the Taliban and the Hizb-e Islami groups on their prospective representation in the anticipated cabinet line-up. Following President Ghani's trip to China in January 2015 and the media announcements that followed, Afghanistan solicited Beijing's mediation and involvement in peace talks with the Taliban, to which Beijing had agreed, and it was generally seen a most welcome development.

is in recess, in emergency situations and when there is an immediate need for legislation), and the decrees so issued require parliamentary approval within 30 days.

The Agreement of 20th September 2014, and the NUG that it created as a result, have side-lined the country's existing institutions from having any role in their composition. It is remarkable what the Agreement provides under its section on Dispute Resolution that "any disputes concerning the interpretation and application of this Agreement shall be resolved through consultation between the parties," there being no reference either to the SC, the ICOIC,[65] or the WJ. The NUG was thus driven not by constitutionality or concern for checks and balances among the organs of state, but by the exigencies of reaching a political solution to the disputed election results. What is lacking now is a sense of unity and consensus among the main stakeholders, and there is a need also for a concerted effort to restore constitutionalism back to the politics of Afghanistan.

[65] The present writer's personal conversation with the Acting Head of the ICOIC, Lutfurrahman Saeed in Kabul (December 2, 2014), confirmed that the previous head (Gul Rahman Qazi) and two members of the ICOIC failed to obtain the WJ vote of confidence for renewal of another term in office. The ICOIC was currently left with only two members, far less than the total of legally stipulated seven.