

Introduction

Afghanistan's Constitution of 2004 embodies more mechanisms of checks and balances compared to its predecessors. Among others, it embraces judicial review, a key element of constitutionalism and rule of law, and an entrenched component of modern constitutions. Under the Constitution, Article 121 of the Constitution, for the first time in the constitutional history of Afghanistan, authorises the Supreme Court to examine the constitutionality of laws, uphold the supremacy of the Constitution, and exercise judicial check over the Executive and Legislative branches of the State. Furthermore, article 157 of the Constitution creates the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) to ensure orderly implementation and step-by-step supervision of implementation of the Constitution.¹

Despite this ground-breaking progress, the practice of judicial review has been marred with various flaws and challenges in the last 12 years, hindering the development and practice of judicial review, and the emergence of a strong and effective system of judicial checks and balances. Judicial review not only remains broad and imprecise in the text of the Constitution, it also proves a difficult practice to institutionalise, as the two institutions granted these new powers had never exercised judicial review.

This policy note aims to present the current practices and major obstacles regarding judicial review in Afghanistan as well as formulate policy recommendations that will address the current problem and contribute to the formation of an effective judicial review system in Afghanistan.

Methodology

This research was conducted through desk review and primary data collection through expert interviews. The paper is a combination of theoretical study of judicial review, its purpose, and the practice in other countries, and empirical study of judicial review in the constitutional history of Afghanistan, as well as the practice of judicial review under the Constitution of 2004.

Key Findings

1. Practicing Judicial Review

A number of challenges have affected the emergence of a strong system of judicial review in the past 12 years in Afghanistan. Lack of experience of such a practice in Afghanistan, further augmented by textual vagueness in the Constitution, insufficient legal framework and lack of interest by the Judiciary for advancement of this practice, are some of the major constraints that have hindered the development and practice of constitutional review and the emergence of a meaningful system of constitutional checks and balances.

1.1 Lack of Legal Framework

In the last 12 years, the Supreme Court never attempted to propose a law for judicial review. Hence, judicial review has endured as one of the general authorities of the High Council of Supreme Court.² This practice, without any rules and regulations, gives enormous discretion to the High Council of the Supreme Court to practice judicial review. Consequently, the manner in which the Court exercises judicial review gives rise to inconsistency and lack of objectivity in the decisions of the court.

1.2 Referrals for Judicial Review

Judicial review, in accordance with Article 121, is limited to referral by the government and courts. The Constitutional text on referral of cases by government and lower courts does not provide details. In the absence of a statutory framework, there are no further rules on how the courts could refer a case to the Supreme Court. Hence, in the last 12 years of the practice of judicial review, no questions were raised by the lower courts on the constitutionality of a statute. The courts have only asked for clarifications and interpretations of certain articles of the Constitution.³

1 Kamali, "Afghanistan's Constitution 2004 : An Islamic Perspective on Interpretation."

2 "Law on Organization and Jurisdiction of Judiciary," Official Gazette 1109 § (2013). articles 24 and 28.

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

The second authority to request judicial review is the government. In the last 12 years, the Supreme Court has primarily and exclusively exercised its judicial review powers at the request of government. However, the few cases that are referred to the Supreme Court by the President show that judicial review was used as a means by the President to succeed in policy disagreements with the Parliament. The President, on several occasions, had used judicial review against Parliament after exhausting all constitutional remedies to ensure his policy options are well reflected in the law.⁴

Furthermore, there have been inconsistencies in determining what constitutes the government. As a result, on several occasions, the President himself has initiated requests made to the Supreme Court. In other occasions, ministries have assumed to have the authority to independently presented a case for the review of Supreme Court.

The limitation caused by the Constitution does not allow any other institution to challenge the constitutionality of the laws.

1.3 The Imbalance Between Legal and Political Reasoning

For a judicial decision to be considered independent, of high quality and be effectively enforceable, it must be the outcome of accurate application of law, a fair trial, proper evaluation of facts and legal reasoning.⁵ Among these, however, the court's reasoning in a judicial decision is of utmost importance. Unfortunately, many of these virtues have been missing from the Supreme Court's rulings. The way the Court has made its decisions on judicial review cases exhibits its inclination toward political, rather than legal, reasoning and its lack of balance in presenting the two.

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

Modern constitutions generally incorporate clauses for adoption and observance of international treaties into the state's internal legal order. Under the Afghan Constitution, the state is required to "observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has acceded, and the Universal Declaration of Human Rights." Article 90 (5) empowers the National Assembly to ratify⁶ "international treaties and agreements, or abrogation of membership of Afghanistan in them." Successively, Article 121 requires the Supreme Court to review international treaties and covenants for their compliance with the Constitution and also to interpret them.

The Supreme Court is expected to conduct judicial review of international treaties and covenants under the same circumstances mentioned above, and thus similar challenges are foreseeable. In fact, since the Supreme Court has never faced a question for such review,⁷ the problem here is more complicated, given the lack of familiarity of the judges to international documents.

1.5 Judicial Review and Protection of Constitutional Rights

Judicial review is an essential tool for the courts to review the constitutionality of the legislation and executive actions that may violate the fundamental rights of the citizens. Article 121 is comprehensive and allows review of all laws, including those that may violate constitutional rights. Nevertheless, the mechanism for requesting such a review, either through the government or courts, is hardly convincing or convenient for protection of these rights.

The major challenge is the lack of standing for the citizens to challenge a statutory law that has violated their constitutional rights. There are no procedures through which citizens could bring a lawsuit against a legislation that violates their constitutionally recognised and guaranteed fundamental rights. Unfortunately, due to the lack of legal framework and procedures on judicial review, lack of experience on the side of the judges and lack of awareness on the side of citizens, this practice has never been used as an opportunity to protect fundamental rights.⁸

2. Overseeing Constitutional Implementation

During the creation of the Constitution of 2004, ICOIC was envisaged to supervise the creation of new state institutions and their execution of their mandate as defined by the Constitution. It is clear that such an institution would be most crucial in the early years of implementing the Constitution; however, the establishment of ICOIC never became a priority for the government. ICOIC was established in June 2010 as one of the last institutions foreseen in the Constitution.⁹

4 Examples include: The Media Law of 2009, the ICOIC law of 2009, the Law on Diplomatic and Consular Employees of 2013, and the law on the salaries of the high governmental officials.

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

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

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

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

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

The Constitution did not provide details on the powers of ICOIC, and deferred it to the statutory law. Before its establishment, ICOIC became a victim of a political fight between the three institutions, and therefore, the powers ascribed by the law to the ICOIC remained broad and ambiguous.

The ICOIC was also engrossed with the question of whether or not it had the power of interpretation. Although the ICOIC had a constitutional power, that is, oversight, and a disputed power, that is, interpretation, it was not able to maintain a balance between the two and has frequently exercised the latter, without much effort to develop oversight mechanisms to better perform its principal mandate.

The following present the challenges that ICOIC has faced in fulfilling its mandate.

2.1 Fulfilling the Oversight Mandate

One of the major issues seen in the powers of the ICOIC is the fact that Parliament did not grant the power of issuing decisions or rulings to the ICOIC, but rather opinions and advice.¹⁰ What we see in practice is a state of confusion over whether the opinions, legal advice or interpretive opinions of the ICOIC are binding or not. In certain circumstances, the President and the National Assembly have turned a blind eye to the legal opinions (*nazar-e-huqqi*) of the ICOIC.

2.2 Political Environment

The ICOIC, from its inception, suffered from a power battle between the three institutions. Once formed, the ICOIC was not accepted as an institution with authority to conduct constitutional oversight. Examples include when the ICOIC requested the Judiciary to allow its staff to attend and oversee Court proceedings. The response was that since the Judiciary is an independent branch, institutions should not be allowed to potentially influence it by observing the proceedings of the court. Likewise, when the ICOIC wanted to supervise the timeline within which laws were passed, Parliament did not provide any information, basically questioning ICOIC's oversight authority over the Parliament.¹¹

2.3 Lack of Respect to the Constitutional Oversight Body

The ICOIC has been subject to pressure from other branches of the government. For instance, in September 2016, the Parliament summoned members of the ICOIC for interpellation regarding an opinion ICOIC had issued. As an independent institution, ICOIC is not accountable to any institution for the opinions it presents and refused to appear. As a result, Parliament intimidated the ICOIC by giving it a vote of no confidence, making major cuts in its budget, and amending the ICOIC law to reduce its powers.¹²

Hence, the ICOIC did not play as effective a role in upholding constitutional values and principles, and protecting them from violation by state institutions, as it was expected to do.

Recommendations

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

Current debates over the role of the Judiciary in Afghanistan revolve around Judiciary's independence, internal capacity and integrity and its accessibility in far-off parts of the country. The Judiciary needs extensive reforms to address these concerns. In addition, Afghanistan's constitutional reform should focus on methods for judicial accountability, transparency and fair trial, as well as citizens' access to judicial review.

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

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

¹⁰ Article 8(3) of the law regarding its competencies reads: "Providing legal advices (Mashwara hai Huqqi) in matters pertaining to Constitution to the President and to the National Assembly." On the other hand, article 9 reads: "The following high authorities are competent to refer the issues arising from the provisions of the Constitution to the Commission for the purpose of requesting legal opinion (Nazar-e-Huqqi): The President, the Houses of National Assembly, Supreme Court, Independent Human Rights Commission, Independent Election Commission and The Administrative Reform and Civil Services Commission." Neither of the words—Mashwara and Nazar—have a binding effect, and might be used as synonyms.

¹¹ Correspondence between the ICOIC and Supreme Court, and Parliament. Available at ICOIC, Department for Oversight of Governmental institutions.

¹² Wolesi Jirga proceedings discussing the interpellation of Commission Members, broadcasted by Wolesi Jirga TV.

In the long term:

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

In the immediate future:

The State institutions, specifically the Executive, Legislative and Judicial branches, must respect and observe the independency of the Supreme Court and ICOIC, so as to allow them to function without any external influences.

The Supreme Court, in complying with Article 121 of the Constitution, should take immediate action to draft the law defining the scope and procedure for judicial review, and present it to the National Assembly for approval.

The Supreme Court should ensure that judges at all levels of the Judiciary are trained on the concept and theoretical aspects of judicial review; and on the referral guidelines and procedures for constitutional questions.

The Judiciary's legal reasoning in all cases, and, in particular, in the cases of judicial review must be strengthened, and be based on legal reasoning, not political motives. The Supreme Court must ensure that judicial decisions are well reasoned, consistent, and publicly available.

The Judiciary must make additional efforts to enhance judicial independence, and its internal capacity and integrity. The Supreme Court must take measures to ensure the court's impartiality, in particular with the judicial review cases, to ensure this is a mechanism to check and not a means to advance executive interests.

The Supreme Court and the ICOIC should engage in greater collaboration and coordination so as to ensure they uphold the supremacy of the Constitution and contribute to rule of law in Afghanistan. Negative competition between the two institutions is only going to weaken the constitutional order. The two institutions should agree, in writing, on the respective powers of the Supreme Court and the ICOIC on constitutional interpretations and constitutional review.

The ICOIC should present amendments to the statute that defines its mandate so as to better define the scope of its powers. The three branches of the Government must reach a mutual agreement on the powers of the ICOIC.

The ICOIC must create more effective mechanisms to oversee the implementation of the Constitution, or its violation thereof. The ICOIC must act more proactively on constitutional violations and regularly communicate with the state institutions to ensure better constitutional implementation.

The information and views set out in this publication are those of the author and do not necessarily reflect the official opinion of AREU.

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