

AN INTRODUCTION TO THE
CONSTITUTIONAL
LAW OF AFGHANISTAN



Stanford
LawSchool

An Introduction to the

Constitutional Law of Afghanistan

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PREFACE & ACKNOWLEDGMENTS

Stanford Law School's Afghanistan Legal Education Project (ALEP) began in the fall of 2007 as a student-initiated program dedicated to helping Afghan universities train the next generation of Afghan lawyers. ALEP's mandate and goals are to research, write, and publish high-quality, original legal textbooks, and to build an equally high-quality law curriculum at the American University of Afghanistan (AUAF).

An Introduction to the *Constitutional Law of Afghanistan* is ALEP's fifth textbook. ALEP has previously published: *An Introduction to the Law of Afghanistan (3rd Edition)*; *Commercial Law of Afghanistan (2nd Edition)*; *Criminal Law of Afghanistan (2nd Edition)*; and *International Law from an Afghan Perspective (1st Edition)*. ALEP's sixth and seventh textbooks—*Professional Responsibility* and *Civil Obligations*—are forthcoming. ALEP and AUAF are currently implementing a full, five-year integrated Bachelor of Arts and Laws degree program at AUAF with an energetic and capable Afghan and international faculty in AUAF's recently established Department of Law, as well as AUAF students eager to learn. The objective of the new B.A.-LL.B. degree program is to train Afghan students to think, write, speak and act as professional lawyers who can provide much-needed legal services and training, and become leaders who will help realize the aspirations of the next generation of Afghans.

The ALEP team would like to acknowledge those individuals and institutions that have made this project possible. ALEP has obtained generous and dynamic support from the Bureau of International Narcotics and Law Enforcement (INL) at the U.S. Department of State. Current Stanford Law School Dean Elizabeth Magill, former Dean Larry Kramer, and Deborah Zumwalt, General Counsel of Stanford University and member of AUAF's Board of Trustees, were instrumental in helping to establish the project in its early years and have provided continuing support. ALEP's partnership has deepened over the last six years with the AUAF law faculty, affiliated members of the political science faculty, and with the strong collaboration of AUAF's leadership: Dr. Sharif Fayez (Founder), Dr. Michael Smith (President), and Dr. Dawn Dekle, (Provost). I, in turn, would like to thank all of the extraordinary students of ALEP who contributed to this volume, including Jane Farrington, who worked tirelessly to finalize the book for publication.

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Erik Jensen, Faculty Advisor, ALEP
Palo Alto, California, April 2013

CHAPTER 1: AN INTRODUCTION TO CONSTITUTIONALISM

I. CONSTITUTIONALISM

“Over the past two centuries, we have moved from a situation where almost no country had a written constitution to one where almost every country has one.”¹

Why does almost every country have a constitution? Is it because constitutions guarantee democracy, peace, and economic prosperity? Surely not. Many unsuccessful nations have constitutions. Indeed, the world is “full of written constitutions, many of which do not mean what they say, while others do not accomplish what they mean.”² It seems more accurate to say that constitutions have become a sort of credential for countries, both domestically and internationally, that may or may not have effect in practice.³ This gap between what a constitution says and how a country actually operates illustrates that there is a difference between having a constitution and *constitutionalism*.

This chapter will explore that gap and more. In Part I we examine the historical origins of modern constitutional theory and its reflection in the Constitution of Afghanistan. Part II looks at the functions that constitutions serve, both generally and in Afghanistan specifically. In Part III, we review Afghanistan’s constitutional history, up through adoption of the 2004 Constitution. In Part IV, we present several methods of constitutional interpretation, providing you with analytical frameworks to use as you study the Constitution. Finally, we review the process of how to amend the Constitution.

A. Defining Constitutionalism

We begin this chapter by defining what we mean by “constitutionalism.” At the most general level, constitutionalism can be defined as “limited government.”⁴ Put differently, constitutionalism is the concept of limiting the arbitrariness of political power,⁵ of having “a government of laws and not men.”⁶ This notion of limited government has evolved over the centuries, and it is useful to consider how scholars have come to today’s understanding.

Why Government?

One of the most influential thinkers about the limits of state power and the purpose of government is John Locke, the 17th century English philosopher. Locke’s political theory is

¹ Donald S. Lutz, *Principles of Constitutional Design* 4 (2006).

² Gerhard Casper, *Constitutionalism* in Vol. 2 *Encyclopedia of the American Constitution* 479 (Leonard W. Levy et al. eds., 1986).

³ William G. Andrews, *Constitutions and Constitutionalism* 24 (William Andrews ed., D. Van Nostrand Company 1968).

⁴ *Id.* at 13.

⁵ B.O. Nwabueze, *Constitutionalism in the Emergent States* 1 (Farleigh Dickinson University Press 1973).

⁶ Mark Tushnet, *Constitutionalism and Critical Legal Studies*, in *Constitutionalism: The Philosophical Dimension* 150 (Alan S. Rosenbaum editor, 1988). Tushnet argues, in fact, that “rules of law constrain only when, and to the extent that, they are implemented by a group of people who share certain values – that is, the rule of law *must be* the rule of men,” which leads to his conclusion that “constitutionalism, though necessary, is impossible.”

founded on the idea that there is a “social contract” between individuals and government. In his famous *Second Treatise*, Locke explains why he believes people unite in society and form governments:

§4 To properly understand political power and trace its origins, we must consider the state that all people are in naturally.

That is a state of perfect freedom of acting and disposing of their own possessions and persons as they think fit within the bounds of the law of nature. People in this state do not have to ask permission to act or depend on the will of others to arrange matters on their behalf. The natural state is also one of equality in which all power and jurisdiction is reciprocal and no one has more than another. . . .⁷

§123 If man in the state of nature is as free as I have said he is—if he is absolute lord of his own person and possessions, equal to the greatest and subject to nobody—why will he part with his freedom? Why will he give up this lordly status and subject himself to the control of someone else’s power? The answer is obvious:

Though in the state of nature he has an unrestricted right to his possessions, he is far from assured that he will be able to get the use of them, because they are constantly exposed to invasion by others. . . . This makes him willing to leave a state in which he is very free, but which is full of fears and continual dangers; and not unreasonably he looks for others with whom he can enter into a society for the mutual preservation of their lives, liberties and estates⁸

§131 But though men who enter into society give up the equality, liberty, and executive power they had in the state of nature . . . each of them does this only with the intention of better preserving himself, his liberty and property (for no rational creature can be thought to change his condition intending to make it worse). So the power of the society or legislature that they create can never be supposed to extend further than the common good.⁹

Individuals enter into this “social contract” through mutual consent, agreeing to give up sovereignty and abide by certain rules for the good of themselves and others.

Later thinkers, such as the 18th century philosopher Jean-Jaques Rousseau, built on Locke’s work to elaborate how government could best protect individuals’ rights and interests. As Rousseau wrote in *The Social Contract*, “[t]he problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as

⁷ John Locke, *Two Treatises on Government: A Translation Into Modern English* 70 (Industrial Systems Research 2009) (1690).

⁸ *Id.*

⁹ *Id.*

free as before.”¹⁰ Because people do not intend to surrender all freedom when they enter a social contract, the only legitimate form of government is one in which the legislative power belongs to the *people* alone (not to a monarch or dictator). Finally, while the concept of a social contract is distinct from that of a constitution, constitutions logically follow from the social contract. Constitutions are a means of anchoring the organization of government and protecting individuals’ rights and privileges.¹¹

The Historical Context¹²

You may have heard of another English philosopher, Thomas Hobbes, also famous for his ideas about the “social contract.” Hobbes, who lived from 1588-1679, believed that life in the “state of nature” was “solitary, poor, nasty, brutish and short.” As a result, people would enter into a social contract and cede some of their rights so as to be more secure. In contrast to Locke and Rousseau, however (and earlier in time than them), Hobbes argued that it was necessary to have a near-absolute ruler to prevent discord and civil war. Importantly, Hobbes lived and wrote during the brutal English Civil War (1642-1651), a turbulent and particularly deadly period. The war certainly influenced Hobbes’s theories about the role of central authority in securing peace. Is this analogous to how the unstable environment in Afghanistan influenced the form of government articulated in the 2004 Constitution?

Locke’s views, in contrast, were formed after the civil war had ended but during the rule of King James II, whose efforts to secure absolute power as monarch became a source of new insecurities for the general populace. It was within this context that Locke questioned the theory of absolute rule and instead theorized a more limited form of government.

Why Constitutional Government?

With this understanding of why government legitimacy is tied to popular consent and limited government, we can return to the task of defining constitutionalism. Expanding on the definition of constitutionalism as “limited government,” we can say that “under constitutionalism, two types of limitations impinge on government. [1] *Power is proscribed* and [2] *procedures are proscribed*.”¹³

Constitutionalism refers to structural and substantive limitations on government.¹⁴ In practice, a constitution that reflects *constitutionalism* forbids (proscribes) state action in certain areas (such as various individual freedoms), and sets forth (prescribes) rules for how policies will be made, implemented, and challenged. By contrast, a dictator with unlimited power can act without restraint (no proscription of his unlimited power) and on a whim (no prescription for how he must act); thus a dictatorship, no matter how benevolent, is not a constitutional government.¹⁵

¹⁰ Jean-Jaques Rousseau, *The Social Contract* §6 (1762).

http://ebooks.adelaide.edu.au/r/rousseau/jean_jacques/r864s/book1.html#section7

¹¹ Casper, *supra* note 2, at 476.

¹² Thanks to Professor Mohammad Isaqzadeh for his comments on this passage.

¹³ Andrews, *supra* note 3, at 13.

¹⁴ Casper, *supra* note 2, at 479.

¹⁵ Nwabueze, *supra* note 5, at 1.

As one scholar notes, constitutionalism “governs two separate but related types of relationship. First, there is the relationship of government to citizen. Second, there is the relationship of one governmental authority to another.”¹⁶ Another scholar notes:

Government is a creation of the constitution. It is the constitution that creates the organs of government, clothes them with their powers, and in so doing delimits the scope within which they are to operate. A government operating under a [] constitution must act in accordance therewith; any exercise of power outside the constitution or which is unauthorized by it is invalid.¹⁷

Now, it would be a mistake to equate having a constitution with constitutionalism. As mentioned earlier, almost every country in the world has a written constitution. But not all of these countries pass the critical test for constitutionalism: does the constitution limit the power of the government? In some countries, constitutions are nothing more than lofty declarations of goals and descriptions of government in terms that impose no restrictions. Instead of restraining government, they only facilitate or legitimize dictatorial powers.¹⁸

“Constitutional” Dictatorship?

Consider these articles from the Constitution of North Korea,¹⁹ a country with a government widely recognized as one of the world’s most repressive. None of the basic rights articulated in these articles are practiced in reality.

Article 67: Citizens are guaranteed freedom of speech, of the press, of assembly, demonstration and association. . . .

Article 75: Citizens have freedom of residence and travel.

Article 64: The State shall effectively guarantee genuine democratic rights and liberties as well as the material and cultural well-being of all its citizens.

Why do you think that authoritarian regimes such as North Korea choose to establish a constitution? Consider that the former Soviet Union also operated under the façade of a constitution.

It may also be inaccurate to identify constitutionalism with democratic government, although the two concepts are often linked. Some argue that democratic elections and civil liberties protected by independent courts are necessary elements of constitutionalism. Other scholars, however, argue that individual civil liberties are the core element of constitutionalism, not democracy. In this view, a government that protects civil liberties need not be popularly elected to be

¹⁶ Andrews, *supra* note 3, at 14.

¹⁷ Nwabueze, *supra* note 5, at 5.

¹⁸ *Id.* at 2.

¹⁹ Constitution of North Korea, formally known as the Democratic People’s Republic of Korea.
http://en.wikisource.org/wiki/Constitution_of_North_Korea_%281972%29

constitutional.²⁰ For instance, in some versions of constitutional monarchy (a form of government in which the monarch acts within the boundaries of a constitution), the monarch retains substantial governing power but must operate within real limits (e.g. a bill of rights).

Discussion Questions

1. In your own words, what does constitutionalism mean? Do you agree that the most basic definition of “limited government” is accurate, or is there some other element that should be included in any definition?
2. As noted in Footnote 6, Mark Tushnet argues that “rules of law constrain only when, and to the extent that, they are implemented by a group of people who share certain values – that is, the rule of law *must be* the rule of men,” which leads to his conclusion that “constitutionalism, though necessary, is impossible.” Consider how important you think the connection is between a constitution and the people who implement it. Do you agree with Tushnet’s argument?
3. Is the concept of constitutionalism a “Western” notion, or does it apply everywhere? Do you agree with the argument that democracy is *not* an essential element of constitutionalism?

II. CONSTITUTIONS

“Constitutions can inhibit people, but they also can liberate them.”²¹

Constitutions can be “written in broad, even majestic language [] intended to endure through the ages.”²² They can be short (4,400 words like the Constitution of the United States) or long (118,369 words like the Constitution of India).²³ In a few rare countries, such as Great Britain, they are not written at all. The variety of constitutions in form and language is fitting, since they tend to serve many functions. Constitutions do more (and sometimes less) than just embody *constitutionalism*, and so now we turn to a discussion of the specific functions served by a constitution.

Reading Focus

As you read about the purposes of constitutions, consider what substantive provisions or articles would best accomplish the goals of the document and its drafters. For example, if the drafters want to ensure strong protection for human rights, should they include a definitive list of which rights are constitutionally protected or should they include general principles outlining support for human rights and leave it to judges or the legislature to determine which specific rights are protected?

²⁰ Nwabueze, *supra* note 5, at 10-12.

²¹ James T. McHugh, *Comparative Constitutional Traditions* 1 (Peter Lang 2002).

²² Laurence Tribe, *Foreword* to American Constitution Society, *It Is A Constitution We Are Expounding* 7 (2009).

²³ The English translation of the Constitution of Afghanistan has approximately 10,400 words.

A. An Expression of Sovereignty

The first purpose that constitutions serve is as the highest expression of a country's law and political system. A constitution defines what the state *is*, and from what source it draws its *sovereignty*, meaning supreme political power (popular sovereignty, for example, is the doctrine that government is created by and subject to the will of the people). All laws must emanate from the constitution, since it is the highest law of the land. Laws in conflict with the constitution are, by definition, unconstitutional. This is affirmed by **Article 162** of the Constitution of Afghanistan, which states that, “[u]pon the enforcement of this Constitution, laws and legislative decrees contrary to its provisions shall be invalid.”

When writing a new constitution, drafters must consider the source of sovereignty in the new government and how that affects its structure. For instance, does sovereignty lie in the people? God or religion? A particular ruling family?

Consider these provisions from the 2004 Constitution of Afghanistan

Preamble

We the people of Afghanistan: . . . Comprehending that a united, indivisible Afghanistan belongs to all its tribes and peoples;

Article 3

No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.

Article 4

National Sovereignty in Afghanistan shall belong to the nation, manifested directly and through its elected representatives.

No part of a constitution can be ignored, including its preamble. Indeed, the preamble of the Constitution of Afghanistan provides essential information about the source of state legitimacy. The state is “united, indivisible” and “belongs to all its tribes and peoples.” Moreover, the preamble asserts that the intent of the people of Afghanistan is to “Establish an order based on the peoples’ will and democracy.” Article 4 of the Constitution defines the state’s sovereignty as belonging to “the nation” (Clause 1), composed of “all individuals who possess the citizenship of Afghanistan” (Clause 2).

B. Structure and Limits on Power

Constitutions articulate the structure of government and set limits on its power. This includes defining whether the political system is parliamentary or presidential, and through what channels the people may make their voices heard. The Constitution of Afghanistan, for example, calls for a presidential system with direct election of the president (Article 61); but only indirect elections for the legislature, since members of the Meshrano Jirga are either appointed by the president or elected by provincial and district councils (Article 84). A constitution will also define how laws are to be created and passed, and how they can be challenged. It may call for an independent judiciary and set forth inviolable individual rights, such as the freedom of speech.

The role of a constitution in defining governmental structure can be essential for turning the theory of constitutionalism into reality. Bear in mind the definition of constitutionalism as proscribing power and prescribing procedures. How a government is structured affects both of these points. As will be discussed in more depth in later chapters, the “separation of powers” is a central doctrine of good governance. It is the idea that the power of government as a whole can be limited by distributing power throughout the branches government. An additional but related concept is that these various branches can serve as “checks and balances” on each other.

The Constitution of Afghanistan separates power between three branches of government: the executive, which includes the president (Chapter 3 of the Constitution) and the government (Chapter 4), the legislature (Chapters 5 and 6), and the judiciary (Chapter 7). The Constitution also tries to create checks and balances by interconnecting these branches of government with various oversight tools.

In setting restraints on government, a constitution may act both explicitly and implicitly. An implicit method of restraint is the separation of powers: no specific restraints are set on the government as a whole, but the act of distributing powers to multiple branches is intended to protect individual freedom by limiting government power generally. An explicit method of restraint is to specify certain individual rights that are to be protected. The Constitution of Afghanistan does this in its Chapter 2 delineation of “Fundamental Rights and Duties of Citizens.” Or, for example, a constitution could say that all powers not expressly given to the government are reserved for the people.²⁴

With both explicit and implicit restraints, however, certain norms of constitutionalism will remain unwritten. Government will be restrained only where restraint is believed necessary, and rights not endangered will not be overtly protected.²⁵ In other words, the Constitution does not bother to articulate certain accepted rights, such as the right to breath air. On the procedural side, unforeseen institutional problems may develop and the solutions to them will not be incorporated in the written constitution; they simply become unwritten rules (unless adopted via Amendment as discussed in Part VI, *infra*).²⁶ More generally, since no constitution covers every possible scenario, interpretation of the document in later years will play a significant role in government structure, procedure, and power.

C. Principles and Aspirations

In addition to concrete functions such as structuring government or outlining age requirements for presidents,²⁷ constitutions articulate a country’s values and aspirations for the future. This is apparent from the very beginning of the Constitution of Afghanistan, when the Preamble

²⁴ See, e.g., the 10th Amendment of the U.S. Constitution, which states that, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

²⁵ Andrews, *supra* note 3, at 22. See, e.g., the 9th Amendment of the U.S. Constitution, which states that, “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

²⁶ Andrews, *supra* note 3, at 22.

²⁷ Constitution of Afghanistan, Article 62, Clause 2.

declares that the people have written the document in order to, among other goals: strengthen national unity; establish democracy; form a society without oppression, atrocity, discrimination, and violence; and attain a prosperous life and sound environment for all inhabitants. This vision of the future is to be secured through a government built on certain principles and with certain goals.

The Constitution presents at least four constitutional principles. The first two are stated in Article 1: “Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state.” This makes clear that Afghanistan will be an Islamic republic and a unitary, as opposed to a federal, state.²⁸

The third principle is that Afghanistan will be a democracy. This is stated, among other places, in Article 4, Clause 1. The people manifest their will “directly” and through “elected representatives” (which is in accordance with the “republican” form of government). Importantly, this means that while the Constitution “adheres to the principle of a representative democracy, referring to the exercise of state power via representatives of the people, it also foresees” the possibility of direct elections and referenda.²⁹

The fourth principle is that of the rule of law, including an array of fundamental rights. The rule of law is mentioned explicitly in the Preamble, and a number of other articles reinforce the idea that government is not above the law. For instance, Article 121 gives the Supreme Court power to review laws “for their compliance with the Constitution.” And Article 50, Clause 2, declares that, “The administration shall perform its duties with complete neutrality and in compliance with the provisions of the law.”³⁰

In an effort to articulate a vision for the future, a constitution may define specific social and economic goals and require a state effort to achieve them.³¹ This aspirational function is clearly seen throughout the Constitution of Afghanistan. Consider the following provisions:

Constitution of Afghanistan

Article 6

The state shall be obligated to create a prosperous and progressive society based on social justice, preservation of human dignity, protection of human rights, realization of democracy, attainment of national unity as well as equality between all people and tribes and balance development of all areas of the country.

Article 17

²⁸ Ramin Moschtaghi, Max Planck Manual on Afghan Constitutional Law, Volume One: Structures and Principles of the State 21 (2009).

²⁹ *Id.* at 22.

³⁰ Somewhat related, Article 157 requires the establishment of an independent commission to supervise the implementation of the Constitution.

³¹ Andrews, *supra* note 3, at 24-25.

The state shall adopt necessary measures to foster education at all levels, develop religious teachings, regulate and improve the conditions of mosques, religious schools as well as religious centers.

Article 44

The state shall devise and implement effective programs to create and foster balanced education for women, improve education of nomads as well as eliminate illiteracy in the country.

Article 52

The state shall provide free preventative healthcare and treatment of diseases. . .

In these articles you can see both the promise and the challenge of the Constitution. On one hand, there is a goal – such as Article 52’s “free preventative healthcare.” On the other hand, there is ambiguity about how to interpret such a provision: the Constitution does not specify what quality of care must be provided, nor does it say what to do if the state does not have enough money to fund both preventative healthcare and free education (as called for in Article 43).³²

We have outlined three broad purposes of constitutions: defining what the state is (sovereignty), delineating how the state is structured (structure and limits on power), and articulating what the state seeks to accomplish (principles and aspirations). Any drafter would need to consider these broad goals when determining what to include in a new constitution.

Constitutions are not predictors of the future. They are an outline, and a foundation, but their implementation may lead to unexpected outcomes. Constitutions are not perfect. They are the product of compromise and contain ambiguity and imprecision, requiring some flexibility and adaptation to new circumstances over the years.³³ As Thurgood Marshall, a U.S. Supreme Court Justice from 1967-1991, observed about the U.S. Constitution, it “is vastly different from what the framers barely began to construct two centuries ago” and the framers “could not have envisioned these changes.”³⁴ This is true of any constitution that lasts for a substantial length of time. Not only do constitutions change and their interpretation evolve, but they also may be only partially or selectively enforced.

Discussion Question

1. Is the vision of the future that the Constitution of Afghanistan articulates the “right” one? Is it realistic, and in what time frame?

Extra Assignment

³² Article 43: “Education is the right of all citizens of Afghanistan, which shall be offered up to the B.A. level in the state educational institutes free of charge by the state.”

³³ Alan S. Rosenbaum, *Constitutionalism: The Philosophical Dimension* 2-3 (Alan S. Rosenbaum editor, 1988).

³⁴ Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, Volume 101 Harvard Law Review 2, 5 (1987).

One enduring concept in American politics is that the Constitution is not supposed to be a “suicide pact.” This expresses the idea that constitutional limits on government must be balanced against the need for survival of the people and the state – ensuring the country’s survival is more important than strictly following the law if disaster would result. This suggests, among other things, that constitutions must be adaptable, and not blind to practical necessity. Consider these two articles about the flaws in structure and function of the modern state, and what role constitutions can play in creating problems and providing solutions.

A. *California reel in’: Lessons from a place that combines most of the shortcomings of the modern Western state*, The Economist, Mar. 17, 2011.

B. *Go East, Young Bureaucrat; Emerging Asia can teach the West a lot about government*, The Economist, Mar. 17, 2011.

D. A Response to History

All constitutions are written as a response to a particular set of conditions and events, and therefore must be understood in light of a particular historical context.

An Example of Historical Influence on Constitution Making

The U.S. Constitution was written in the wake of revolutionary war against the British Empire. The American colonies had rejected the authority of the British Parliament to govern them without representation (hence the rallying cry of “No taxation without representation!”) and waged war against the powerful British monarch, King George III. These factors are reflected in the U.S. Constitution, which pays close attention to the issues of democratic representation and presidential power.

The Preamble to the 2004 Constitution of Afghanistan notes several influences:

- “Realizing the previous injustices, miseries and innumerable disasters which have befallen our country;
- “Appreciating the sacrifices, historical struggles, jihad and just resistance of all the peoples of Afghanistan, admiring the supreme position of the martyr’s of the country’s freedom;”
- We the people have “approved this constitution in accordance with the historical, cultural and social realities as well as requirements of time. . .”

The 2004 Constitution was written with full knowledge that many constitutions came before it, none of them having worked successfully enough to endure. It was written with awareness of the preceding decades of war and the ongoing turmoil and uncertainty. The Constitution’s drafters made choices that reflected these conditions. For instance, the “constitution creates a completely

centralized state with no political or administrative authority devolved to the provinces.”³⁵ Although there was significant debate on this power structure, ““federal” options were seen as creating too great a danger under existing conditions.” There “was a fear that without an established center, decentralization would simply be a license for continuing fragmentation.”³⁶ Moreover, a presidential system with a strong president was adopted instead of a parliamentary or semi-presidential system because of the belief that the president needed substantial power to assert meaningful authority over other established players.³⁷

III. THE CONSTITUTIONAL HISTORY OF AFGHANISTAN

*“Afghanistan has had both too much and too little experience with constitutions in the past eighty years.”*³⁸

To understand any constitution, including the 2004 Constitution of Afghanistan, you must know something about its historical context, including its drafting process and the any previous constitutions that came before it. The 2004 Constitution makes its own significant innovations, but it also draws heavily on previous constitutions, particularly that of 1964. The historical overview in this chapter is not a comprehensive survey of Afghanistan’s legal history. Rather, it focuses on events that inform our understanding of the 2004 Constitution.

A. The Early Constitutions: 1923 and 1931

King Amanullah enacted Afghanistan’s first constitution in 1923 as part of an ambitious process of centralization, formalization, and secularization. The 1923 Constitution was influenced by many sources, including the French and Turkish constitutions. The 1923 Constitution significantly limited the power traditionally held by religious and tribal elders by concentrating authority in the king. The constitution did not provide for a legislative body and instead vested all of the lawmaking power in the hands of the king. The Constitution also prohibited all courts outside of the formal state courts, greatly reducing the power of the religious courts and informal justice mechanisms. Article 55 stated that no court other than the regularly constituted tribunals sponsored by the state could hear a case. This was the most significant limitation of informal justice systems that Afghanistan has ever heard. At present, there is no constitutional provision or law prohibiting the use of the informal justice system.

Two other important developments in the constitution concerned individual rights and the sovereignty of the state. The constitution protected a range of freedoms, including the press (Article 10), private enterprise (Article 11), education (Article 14), eligibility for state employment (Article 17), and property (Article 19). Torture and forced labor were also prohibited (Articles 24 and 22). Article 1 strongly affirmed Afghanistan’s independence. Aman Allah strongly believed that Afghanistan could not be sovereign unless it was absolutely

³⁵ J. Alexander Thier, *The Making of a Constitution in Afghanistan*, Volume 51 New York Law Review 557, 574 (2006-2007).

³⁶ *Id.* at 576.

³⁷ International Crisis Group, *Afghanistan: The Constitutional Loya Jirga* 3 (Dec. 12, 2003) [hereinafter CLJ].

³⁸ *Id.* at 559.

independent from external forces, namely the British, who had exercised control over Afghanistan until the conclusion of the War for Independence in 1919.

Though the 1923 Constitution lives up to its reputation as ‘progressive’ and ‘liberal’ in some respects, it also illustrated Aman Allah’s efforts to centralize power and assert Afghanistan’s independence from Great Britain – goals that were not always congruent with liberal ideals. Both the content and drafting of the 1923 Constitution illuminated Aman Allah’s heavy-handed approach to reform. He challenged social, political, and legal dynamics with little input from his subjects and re-enforced his personal authority. Though some of the individual articles promoted individual rights and quality, others did not or served the dual purpose of advancing Aman Allah’s vision of modernity while centralizing power.

Aman Allah faced resistance to both the expansion of individual rights and the centralization of power in this constitution. In 1923, he assembled a *Loya Jirga* of 1000 delegates to approve the new constitution. They refused, objecting to the constitution’s limits on the power of the *ulema*, expanded rights for women, call for universal education, and exclusion of any mention of the Hanafi School of jurisprudence. Undeterred, Aman Allah re-convened a smaller group of about 100 supportive delegates to rubber-stamp the constitution.

The concentration of power in the central government provoked strong resistance from the religious leadership at the time. In 1925 the King faced a revolt, and he called another *Loya Jirga* to obtain support from local leaders. They forced him to amend the constitution in return for support against the revolt. Thus began the tradition of calling a *Loya Jirga* to approve a new constitution, a practice that continued. The 1925 amendments focused on reintegrating religion officially into the constitution. The greatest change was to Article 2, which, after the 1925 amendments, read:

The religion of Afghanistan is the sacred religion of Islam and its official religious rite is the sublime Hanafite rite. Followers of other religions such as Jews and Hindus residing in Afghanistan are entitled to the full protection of the state provided they do not disturb the public peace. Hindus and Jews must pay the special tax and wear distinctive clothing.

Despite the 1925 reforms, Aman Allah lost his hold on power and fled the country in 1929. The 1923 Constitution has been hailed as a vision of centralization and formalization, but the cavalier nature with which it addressed the concerns of local and religious leaders ultimately contributed to the regime’s demise. Subsequent governments have been more careful to be in touch with local sentiments before proposing major legal reforms. Despite its limitations, the Constitution of 1923 constrained later regimes because it established the tradition of constitutional rule.

After Aman Allah fled and his immediate successor was killed, a former supporter of Aman Allah seized the throne. Nadir Shah renounced Aman Allah’s reforms and asserted his commitment to the Hanafi School of jurisprudence in order to quell any preference for the former leader. Notably, Nadir Shah still felt constrained to create a constitution because of the precedent set of having a government with limited powers. His 1931 Constitution was based on the Turkish, Iranian, and French constitutions and the 1923 Constitution, plus many aspects of

Hanafi Shari'a and local custom. One scholar called it a "hodgepodge of unworkable elements."³⁹ Unlike Aman Allah, Nadir Shah consulted religious leaders during the drafting process, a nod to his determination that the new constitution not be out of touch with the sentiment of the people.

The 1931 Constitution scaled back some of Aman Allah's secular and social reforms, omitting all mention of women, and more emphatically recognized the role of Hanafi Shari'a jurisprudence.⁴⁰ This constitution declared the religious law of the Hanafi school of Sunni Islam as the official law of Afghanistan and required adherence to Islam and Shari'a in legislative action. In fact, the legislation passed by the parliament as part of the constitutional system was, by law, inferior to the unwritten Shari'a law. Further, in Article 5, the king was required to carry out his duties in accordance with the law of the Shari'a and the dictates of the Hanafi jurisprudence. The courts were also required by Article 88 to decide cases in accordance with the Holy Hanafite creed.

One significant innovation in the Constitution of 1931 was the creation of a national parliament consisting of two houses: the Upper House (majlis-e-ai'yan) and the National Assembly (majlis-e-shura-e-milli). Members of the National Assembly were elected for three years by the people of their district, while members of the Upper House were appointed by the king. In practice, however, "the deputies of the lower house were hand picked by the king just as much as the members of the upper house" and the parliament was a way to keep tribal leaders in Kabul during the summer months when they were most likely to foment trouble in their regions.⁴¹ The legislature had no formally binding lawmaking powers, but it could recommend laws to the king.

Soon after the constitution was enacted, Nadir Shah was assassinated and succeeded by his son, Mohammad Zahir Shah. A period of relative stability and growth followed for the next thirty years, but it was not under *constitutionalism* as such. Only in a few brief years after World War II did free municipal and national elections occur (in 1947 and 1950, respectively).⁴² The parliamentary activism of 1949 is particularly noteworthy, however. Taking their oversight role seriously, reform-minded members began questioning ministers about budgetary matters, exposing and upsetting an entrenched pattern of corruption as a major path to riches and power.⁴³ Some ministers refused to reply to inquiries, creating a confusing dispute about the parliament's constitutional powers.⁴⁴

This liberal period lasted until 1953, when Sardar Mohammad Daoud Khan became Prime Minister and began aggressively suppressing opposition to the regime.⁴⁵ Daoud also opened public education to women and embarked on a major project of codification of the law. The process of codifying Afghanistan's laws was Daoud's lasting legacy. He began the process of developing Afghanistan's civil law system, which has continued to the present.

³⁹ *Id.* at 464.

⁴⁰ Said Amir Arjomand, *Constitutional Development in Afghanistan: A Comparative and Historical Perspective*, 53 *Drake Law Review* 943, 949 (2005).

⁴¹ *Id.* at 949.

⁴² Arjomand, *supra* note 40, at 950.

⁴³ Louis Dupree, *Afghanistan 494* (Princeton University Press 1973).

⁴⁴ *Id.* at 495.

⁴⁵ *Id.* at 499.

B. The Liberal Age: The Constitution of 1964

In contrast to earlier documents, the Constitution of 1964 was the product of extensive negotiations, debate, and public discourse. Drafting began just weeks after Daoud resigned in March, 1963. King Zahir appointed a commission of seven members to write a new liberalized constitution, and this group met almost daily for the next year, seeking opinions from a diverse cross-section of Afghan society.⁴⁶ A draft was completed in February of 1964, reviewed by a second, twenty-nine person commission, and then the King called a *loya jirga* for ratification.⁴⁷

Why, if Afghanistan had experienced relative stability and growth for several decades, was a new constitution adopted in 1964? The answer lies, arguably, in the ten years of Daoud's rule as Prime Minister (1953-1963). Consider the following excerpt from Martin Ewan's book, *Afghanistan*, about the circumstances surrounding Daoud's resignation:⁴⁸

It was not just the need to find a solution to the impasse with Pakistan [over the disputed "Pushtoonistan"], crucial though this was, that brought about Daoud's downfall. For a year or more the royal family had been debating the future of the country and wider considerations had come into play. Partly, they were nervous of the increasing dependence on the Soviet Union that Daoud's policies were entailing. More fundamentally, however, there was the realization that, particularly with the emergence of an assertive educated class, Daoud's excessively autocratic rule was becoming increasingly resented. There was, in fact, a growing incompatibility between the policies of social, educational and economic advance that he was, with some success, pursuing and his determination to keep the levers of power in his own hands. The royal family had taken note of developments in several Middle East countries, where traditional rulers had in recent years been overthrown and replaced by revolutionary regimes. Particularly shocking had been the murder in 1957 of the Iraqi King Feisal and his Prime Minister Nuri Said The general feeling in the royal family was that a move towards a constitutional monarchy and a more democratic style of government was a necessity if they were not to suffer a similar fate. To achieve these objectives, the first requirement was the removal of Daoud...

We now look at some features of the 1964 Constitution, which is widely recognized as an important basis for the 2004 Constitution.⁴⁹ At the time of its passage, the 1964 Constitution was unique in the Islamic world because it accepted a separation between religion and the state's governing institutions. Article 1 of the constitution established a government based on the sovereignty of the people, rather than religion. Islam remained the official religion of the country per Article 2, yet the different role played by religion in the constitution was striking. Other innovative provisions included the formal equality of men and women and all tribes before the

⁴⁶ *Id.* at 566.

⁴⁷ *Id.* at 566.

⁴⁸ Martin Ewans, *Afghanistan: A New History* 117-18 (Curzon Press 2001).

⁴⁹ *See, e.g.,* Thier, *supra* note 35, at 561.

law, freedom of thought and expression, the protection of private property, and the right to form political parties.

Perhaps the most important difference from the 1931 Constitution was the mandated supremacy of the statutory law over Shari'a. In contrast with the 1931 Constitution, the 1964 Constitution made statutory law legally superior to Shari'a once it was passed by the parliament and accepted by the king. Further, courts were required by Article 102 to first apply the provisions of the constitution and the laws of Afghanistan when deciding a case. After the 1964 Constitution was passed, Shari'a was only (officially) used to decide a case in the absence of statutory law on the subject. This structure mirrors the official role of Shari'a in the way courts decide cases in Afghanistan today.

The 1964 Constitution also, for the first time, named the judiciary as a separate, co-equal branch with the executive (the king) and the legislature, laying the foundation for the current separation of powers under the 2004 Constitution. While guaranteed on paper, this equality was not matched in reality. This can be attributed to three problems: 1) too few qualified judges and lawyers to ensure a fair application of the law; 2) entrenched local practices that undermined the formal state system; and 3) preeminence of the King and Prime Minister.⁵⁰

The 1964 Constitution also changed the composition of the legislature to include the Wolesi Jirga (Lower House) and the Meshrano Jirga (Upper House). The members of the Wolesi Jirga were elected by universal adult franchise for four-year terms. One third of the members of the Meshrano Jirga was appointed by the king, another third was elected by the Provincial Council, and the remaining third was appointed by the Chairman of the Provincial Jirga. Both houses were required to pass a bill before it became law. The legislature had broad legislative and executive oversight powers to control the budget (Article 75), ratify treaties (Article 64), and approve or dissolve the executive (Articles 89-93). Like the judiciary, the legislative branch was more powerful on paper than in practice.⁵¹ Its disorganization and ineffective newly elected members meant that the legislature "struggled to accomplish anything."⁵²

The 1964 Constitution ushered in a brief period of democratic governance, with two parliamentary elections,⁵³ a boom in publications, student demonstrations, and political mobilization.⁵⁴ This was the most productive period in the legal history of Afghanistan in terms of codification and centralization. It witnessed the culmination of the codification process started by Daoud and the writing of the criminal code, civil code, and criminal procedure code. Much of the modern law of Afghanistan, which is still in force today, was passed by the parliament during this time. Comprehensive criminal codes defined crimes and punishments, and the judicial system was, for the most part, regularized. The legal system during this period most closely reflects the current modern legal structure of Afghanistan.

⁵⁰ *Id.* at 564.

⁵¹ *Id.* at 563

⁵² Thier, *supra* note 35, at 563.

⁵³ *Id.* at 560.

⁵⁴ Arjomand, *supra* note 40, at 953 (citing Dupree, *supra* note 43, at 587-623).

Yet the ambitious constitution and the parliamentary elections that followed were criticized as irrelevant to the lives of many citizens of Afghanistan, who were uneducated about the new concepts. The parliament was given the ability to legislate to effectuate the new principles in the constitution, but they were without the support of the people.

Discussion Questions

1. Can any constitution, by itself, be “strong,” or does a constitution’s effectiveness always depend on the people who implement it?
2. Afghanistan’s past constitutions failed to usher in lasting “constitutionalism,” but they failed for different reasons. What were the main flaws of the 1923, 1931, and 1964 constitutions?
3. Now try to characterize each of the flaws you identified in Question 2. Analyze each flaw and determine whether it is a structural problem in the constitution itself (for example, a bad idea that could never work); a problem of implementation, meaning that the idea was sound on paper but did not translate into practice; or a broader problem, such as poverty or illiteracy, that is entirely external to the constitution itself?

C. Turmoil after 1973

In 1973, Daoud, with support from elements of Marxist groups, overthrew King Zahir Shah, abolished the monarchy, and named himself President. Daoud formed a Central Committee to advise him, yet he ruled via decree with absolute power over the government. Daoud’s major initiative during this period was to install a system of land redistribution, with compensation to be paid by the government, to expand the reach of private property. In January 1977, the Loya Jirga was called to adopt a new constitution which was adopted on February 24, 1977.

This constitution differed from earlier incarnations. Its two major innovations were the explicit mention of the rights of women and the recognition of the right of every citizen to vote. The role of religion in the constitution was also diminished, as there was no mention of the Hanafi school of Islamic jurisprudence as the official religion. Overall, the constitution reflected the socialist ideology of the time. Indeed, Articles 17 and 18 encouraged government regulation of the economy and Article 13 nationalized all natural resources of the state.

The 1977 Constitution never entered into force because, on April 27, 1978, a coup was launched against the Daoud government. Soon after the coup, the Revolutionary Council of the People’s Democratic Republic of Afghanistan was formed as the new government, headed by Nur Muhammad Taraki, which was soon replaced by a Soviet-style politburo. This government ruled by decree rather than through the legislature, with decrees emanating from the central planning committee without representation of the people.

In December 1979, the Soviet Union invaded Afghanistan. The USSR, which had coordinated the invasion with leading Afghan Marxist Babrak Karmal, assassinated President Hafezullah Amin and installed Karmal as the president of the country. In 1980, the Revolutionary Council issued a provisional constitution, the Fundamental Principles of the Democratic Republic of

Afghanistan. Article 36 named the Revolutionary Council as the sole governing institution in the country. Perhaps in deference to popular sentiment, this constitution did not mention Marxism but gave a prominent place to religion. Article 5 outlined the role of Islam in the new government:

Respect, observance, and preservation of Islam as a sacred religion will be ensured in the Democratic Republic of Afghanistan and freedom of religious rites guaranteed for Muslims. Followers of other faiths will also enjoy full freedom of religious practice as long as they would not threaten the tranquility and security in society. No citizen is entitled to exploit religion for anti-national and anti-people propaganda or other actions running counter to the interests of the Democratic Republic of Afghanistan. The government will help the clergy and religious scholars in carrying out their patriotic activities, duties and obligations.

Religion, overall, was given more deference than in the preceding years. Indeed, during the earlier communist period, the enmity to religion was so fierce that individuals who attempted to practice their religion by going to the mosque or praying were subject to abuse. However, the 1980 Constitution represents the only time in the constitutional history of Afghanistan that Islam was not recognized as the official religion of the country in a constitutional document.

Almost all governing institutions were remade during this period, including the remodeling of compulsory education in the soviet method with required classes in Russian. Religious instruction was supplemented with instruction on Communist ideology. In general, law was modeled on soviet institutions and lawmaking. Local governance was emphasized with a hybrid of the local soviet and the jirga introduced. These local jirgas were supposedly responsible for local economic, political, and social administration; in fact, however, these local organs were required to receive the approval of the central authorities, in effect giving the local jirgas very little control.

Karmal was soon replaced by Dr. Najibullah to help calm the growing insurgency against the communist government. In January 1987, Najibullah formed the Extraordinary Commission for National Reconciliation to draft a new constitution. In November 1987, a Loya Jirga adopted a new constitution. It established a multiparty state with a legislature for which elections were held in early 1988. Further, Article 2 of the constitution named Islam as the official religion of the state and, like the 1931 Constitution, stated that no law shall be made that is contrary to its dictates. There was also a formal legislature in the 1987 Constitution, but all lawmaking authority was concentrated in the politburo. The judiciary was to make its decisions in accordance with the law; however, this constitution did not specify whether that law was the codified law of the state or of the Shari'a.

Facing a rising tide of mujahedeen attacks against the government, the Soviet Union completed its withdrawal from Afghanistan, pursuant to the Geneva Accords, on February 15, 1989. Najibullah, the Soviet backed president, remained in power and in control of the country until 1992, although his followers were now a minority in the legislature.

In 1992, an interim government was formed to lead the Islamic State of Afghanistan. This state was, however, a state in name only, as the interim government could barely exercise control over the city of Kabul. When Burhan al-Din Rabbani seized executive power in 1992, he introduced a new Constitution of the Islamic State of Afghanistan. Departing from all previous constitutions, the 1992 Constitution said that the state was based on the Quranic verse and that sovereignty belonged to God. This contrasted with the 1964 Constitution, which said that the sovereignty of the state rested in the people. The 1992 Constitution also envisaged no role for codified law in the governing of society and the adjudication of disputes. Instead, the law was given solely by an extremist interpretation of the Shari'a. This constitution was never put into force because of the degree of disarray and anarchy within the government of Afghanistan in 1992. The official government in Kabul had no control over the rest of the country and different tribal groups battled to win control over the government.

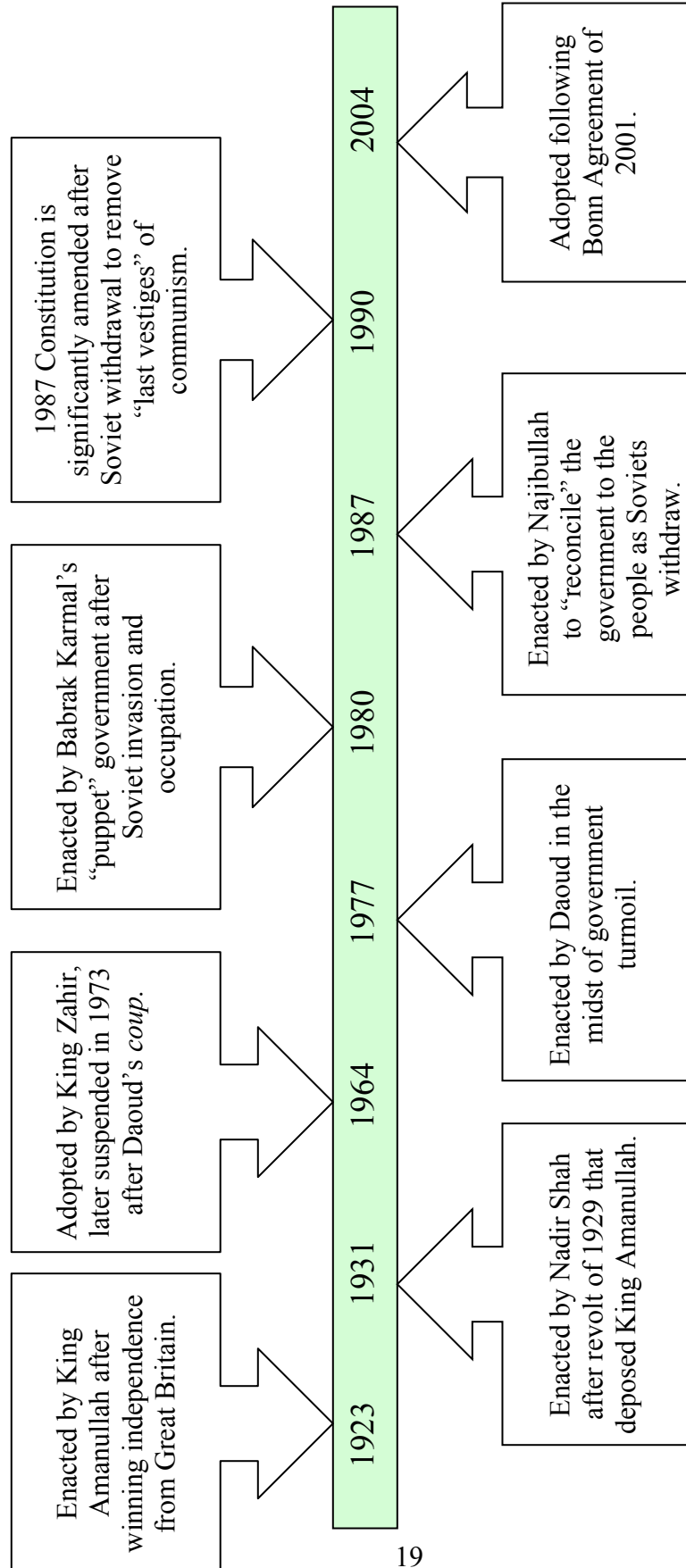
As the civil war continued, another movement began to win battlefield victories and capture many towns outside of Kabul. In 1994, a group of religious students created the Taliban. They were tired of the suffering caused by the in-fighting between mujahedeen groups, the general insecurity in the country, and the kidnapping of women. Led by Mullah Mohammed Omar, the Taliban attracted the support of many refugees and religious students and were financed, reportedly, by the United States, Pakistan, and Saudi Arabia. By September 1996, Kabul had fallen and the Taliban controlled the majority of Afghanistan. Subsequently, the Taliban set up their government in Kabul and Kandahar. Mullah Omar presided over the Supreme Shura. The Taliban professed that their government aimed to free Afghanistan of corruption and to create a pure society in accordance with Islamic principles.

At the beginning of Taliban rule, the government relentlessly rooted out corruption and established law and order. In this they were successful, as the cycle of fighting between mujahedeen was stopped in many parts of the country and trucking routes into and throughout Afghanistan were reopened. However, these goals came at the expense of the creation of a fully staffed modern governing structure. The former institutions of the state, the ministries, schools, and other public services, withered.

To govern through the shuras established in Kandahar and Kabul, the Taliban established an Islamic state with rule by edict based on a radical interpretation of Shari'a. These edicts controlled most aspects of life, from women's clothing to the length of a man's beard to appropriate family activities. These edicts and decrees were posted all around Kabul and Kandahar so that people could be aware of the requirements. The Department for the Promotion of Virtue and the Prevention of Vice enforced these edicts, sometimes through violence.

During this period, women had virtually no legal rights. Girls were unable to attend public school. Foreign aid to the country became minimal amid a flurry of Taliban edicts aimed at driving out foreign workers in non-governmental organizations (NGOs). For example, on July 10, 2000, the Taliban government issued an edict requiring that all foreign aid organizations fire their female Afghan employees. Law was enforced sporadically and unequally. There was little written law and few formal legal processes, such as regularized trials.

Figure 1: The Constitutions of Afghanistan



IV. THE CONSTITUTION OF 2004

A rather remarkable chain of events led to Afghanistan's 2004 Constitution. One way to begin the story is to start with events that happened almost seven thousand miles from Kabul. The terrorist attacks against the United States on September 11, 2001, gave rise to an American-led military campaign that ousted the Taliban government from power within months. With a power vacuum looming in the wake of regime collapse, a group of prominent but unrepresentative Afghans convened in Bonn, Germany, to map out a path for forming a new national government.⁵⁵ The resulting Bonn Agreement of December 2001 articulated a three-stage process of political transition.

First, an Interim Administration (IA) was formed whose duties included running the state in the short term and preparing to reform the judicial sector and civil service. The government was to temporarily operate under the 1964 Constitution, excluding provisions relating to the king, executive, or legislature.⁵⁶ Hamid Karzai was chosen as chairman of the Interim Administration, which operated for six months - at which point the second phase began.

The second stage was the formation of a Transitional Administration (TA) in June of 2002. An Emergency Loya Jirga (organized by the outgoing Interim Administration) elected Hamid Karzai as president of the TA and approved his cabinet. The TA's powers were identical to the powers of the preceding IA,⁵⁷ but its mission was different: the TA was to initiate and oversee the drafting (via Constitutional Commission) and adoption (via Constitutional Loya Jirga) of a constitution within eighteen months. The third phase began once the new Constitution was approved in January of 2004. This phase lasted until the first national election, in October 2004, when Hamid Karzai was elected president.

Importantly, not all of the deadlines initially agreed to in the Bonn Agreement were met. For instance, the Bonn Agreement called for the creation of a Constitutional Commission (to draft a new constitution) within two months of the TA's formation. In practice, the Commission was inaugurated five months after the TA formed (thus three months late). With the Constitutional Loya Jirga still scheduled to occur eighteen months after the TA's formation, the drafting Commission now had only thirteen months in which to work, instead of the sixteen months originally planned.⁵⁸ While this is the outline of the process in broad strokes, the details of what happened provide insight into the Constitution that emerged.

⁵⁵ According to Barnett Rubin, *Crafting a Constitution for Afghanistan*, Volume 15, Number 3, Journal of Democracy 5, 6 (2004), four groups of Afghans were represented, with the two main groups being the Northern Alliance and the "Rome Group" representing exiled King Zahir Shah.

⁵⁶ International Crisis Group, *Afghanistan's Flawed Constitutional Process* 12 (June 12, 2003) [hereinafter ICG].

⁵⁷ Rainer Grote, *Separation of Powers in the New Afghan Constitution*, Max Planck Institute, 901 (2004).

⁵⁸ ICG, *supra* note 56, at 13.

Figure 2: Timeline of 2004 Constitutional Process

As this timeline illustrates, the drafting and adopting the Constitution did not always proceed according to schedule or plan. The top row provides an event, schedule, or process as called for by plan, and the bottom row describes an event or outcome. The two middle rows provide the planned date and the actual date of events that occurred – for some events there was no divergence.

What the plan called for	Planned Date	Actual Date	What actually happened
Bonn Agreement Signed	Dec. 5, 2001		
Prof. Rabbani transfers power to Interim Admin. (IA)	Dec. 22, 2001		H. Karzai selected as Chairman of IA
Emergency Loya Jirga (ELJ) to select Transitional Admin. within 6 months of IA's creation	June 11-19, 2002		ELJ of 1,650 representatives elects Karzai head of TA
Constitutional Commission (CC) to be formed within two months of TA	Aug. 2002	Nov. 7, 2002	King Zahir inaugurates 9-member CC (Karzai announced it on Oct. 5)
Plan as articulated by UNAMA Const. Commission Support Unit (not legally binding)	Jan. 2003	Apr. 26, 2003	Draft constitution presented to Karzai, and CC expanded to 35 members
	June-Aug. 2003		CC travels to provinces for public consultations. No public draft
Plan to release draft of Constitution for public review	Aug. 2003	Late Sep. 2003	Much reworked draft delivered to Karzai
Expectation that Karzai would make draft public (he did not)	Sep. 2003	Nov. 3, 2003	Karzai edits draft and releases it to the public
Constitutional Loya Jirga (CLJ) to convene (as per UNAMA plan)	Oct. 2003	Dec. 13, 2003	CLJ of 502 representatives convenes
CLJ to convene (no later than Jan. 2004, 18 months after TA)	Jan. 4, 2004		CLJ approves Constitution
Elections to be held within 2 years of convening of ELJ	By June 2004	Oct. 9, 2004	Presidential election held, Karzai elected

A. Drafting Process

Hamid Karzai, as President of the Transitional Administration, appointed a nine-member Constitutional Drafting Commission in October 2002.⁵⁹ Composed of seven men and two women,⁶⁰ the commission quickly “fractured into two factions [one led by Shahrani, the other by Marufi], each of which worked on its own draft.”⁶¹ Six months after its creation the Commission was still in disarray and had made little progress; organization and outside support were severely lacking.⁶² Nevertheless, in early April of 2003 it submitted a draft constitution to President Karzai. This draft was not released to the public, but it was reportedly the Shahrani draft, largely “cut and pasted” together based on the 1964 Constitution.⁶³ The government then appointed a larger, 35-member Constitutional Commission to oversee a phase of public consultation, education, and draft finalization.

A Critique of The Constitutional Commission’s Selection Process⁶⁴

The formation of the Constitutional Commission was marked by considerable delay and involved primarily factional bargaining at the cabinet level without significant consideration of the public interest. . . .

Worse, in spite of the promise of “broad consultations” on the commission’s composition, ICG interviews with provincial government officials, jihadi party officials, and civil society figures in Kabul, Mazar-i Sharif, and Jalalabad revealed little understanding of the process, let alone acceptance or buy-in. . . .

[President Karzai’s commission member appointment process] is dominated by powerful officials from the Panjshiri *Shura yi-Nazar* component of the United Front formerly affiliated with the mujahidin leader Ahmed Shah Masoud and is widely seen as having a lock on military and political power at the national level. . . .

The full commission also includes only seven women The experience of the drafting commission suggests that qualified, articulate and effective Afghan women have been passed over in favour of individuals who can be manipulated to serve factional ends. . . .

How this group can be trusted to handle public consultation or create a sense of national ownership in the draft remains unclear.

⁵⁹ It was not inaugurated by King Zahir Shah, and thus able to begin work, until November 2002.

⁶⁰ The men were 1) Neamatullah Shahrani (Vice President of the TA and chairman of the Commission); 2) Qasim Fazili (who, according to the ICG, never attended a meeting); 3) Rahim Sherzoy; 4) Abdul Salam Azimi; 5) Mohammad Musa Ashari; 6) Musa Marufi; and 7) Mohammad Sarwar Danesh. The women were 1) Asifa Kakar and 2) Mukarama Akrami.

⁶¹ ICG, *supra* note 56, at 14.

⁶² Thier, *supra* note 35, at 567.

⁶³ ICG, *supra* note 56, at 15; Rubin, *supra* note 55, at 10.

⁶⁴ ICG, *supra* note 56, at 16-17 (all citations omitted).

In large part simply due to its size, the full Commission “represented a broader political and ethnic spectrum than the first Commission.”⁶⁵ It extensively reworked the draft constitution but at no point released a version to the public. In June of 2003 the Commission initiated two months of public consultations, yet with no public draft to consider the input was generally limited to discussion of general principles. Indeed, from the very start there had been debate over whether the constitution drafting process should involve wide public participation. Some believed that such involvement would enhance legitimacy, while others argued that broad participation could destabilize what was a delicate process or undermine moderation on controversial and sensitive issues.⁶⁶ While by the end of its consultation process the Commission had managed to reach a large number of people (through hundreds of public meetings and the receiving and logging of tens of thousands of public comments),⁶⁷ one author argues that ultimately, “the reluctantly gathered opinions of the public were swept under the carpet in last-minute backroom deal-making.”⁶⁸

The Commission delivered its draft to President Karzai in late September of 2003.⁶⁹ Unhappy with some aspects of this draft, however, members of President Karzai’s cabinet and National Security Council re-drafted sections in an effort to secure greater power in the executive branch.⁷⁰ It was not until November 3, 2003, just five weeks before the Constitutional Loya Jirga (CLJ) was formed, that President Karzai released the draft constitution to the public for the first time. The CLJ convened in Kabul on December 13, 2004. There were 502 participants, mostly elected at the district level by community representatives, representing a wide range of views. Women made up roughly twenty percent of the group.⁷¹ According to observers, the CLJ “was a well organized and civil affair in contrast to its rough and tumble predecessor, the emergency *loya jirga*.”⁷² An outward appearance of civility, however, did not preclude intense debates over the Constitution.

While a number of articles in the Constitution trace their roots to the 1964 Constitution, many important elements are new, the result of intense political jockeying and deal making among various groups and interests. As the International Crisis Group stated, the drafting process was “largely dictated by the perceived need to accommodate competing political actors with autonomous power bases – a situation that was apparent both in the composition and work of the Constitutional Review Commission, as well as in the subsequent deliberations over its draft within President Karzai’s cabinet.”⁷³ Powerful factions clashed over issues including the role of Islam, female and human rights, the number of vice presidents, national languages, and the

⁶⁵ Thier, *supra* note 35, at 567.

⁶⁶ *Id.* at 568.

⁶⁷ Rubin, *supra* note 55, at 10; Michael Schoiswohl, *Linking the International Legal Framework to Building the Formal Foundations of a “State at Risk”: Constitution-Making and International Law in Post-Conflict Afghanistan*, Volume 39 Vanderbilt Journal of Transnational Law 819, 833 (2006).

⁶⁸ Thier, *supra* note 35, at 569.

⁶⁹ *Id.* at 568.

⁷⁰ *Id.* at 568.

⁷¹ Amy Waldman, *Meeting on New Constitution, Afghan Women Find Old Attitudes*, New York Times, Dec. 16, 2003, at A13.

⁷² Thier, *supra* note 35, at 570.

⁷³ CLJ, *supra* note 37, at 11.

structure of government.⁷⁴ For example, President Karzai pushed for a constitution with strong presidential powers, while more fundamentalist groups and non-Pushtun minorities tried to limit the president's authority by arguing for a strong parliament and constitutional court in which they could share power.⁷⁵ And religious conservatives argued that the Constitution should be based on Islamic law, with explicit reference to Sharia, while rights groups challenged such an approach, especially concerned about its impact on women.⁷⁶ Nevertheless, despite heated arguments, walkouts, threatened boycotts, and bitter complaints over backroom deals and government interference,⁷⁷ the delegates approved a new constitution on January 4, 2004.

Looking back now, it is perhaps easy to believe that a peaceful and successful CLJ was never in doubt, or that the current form of the Constitution was inevitable. Yet it is important to remember the context of the times, and that there was tremendous uncertainty and instability.

Comparative Analysis: The South African Constitutional Drafting Process

The current Constitution of the Republic of South Africa was implemented in 1997 after a long, participatory process. The formation of a new constitution was an integral part of the transition to a post-apartheid society. The particular structure of the drafting procedure reflected a compromise between the African National Congress (ANC), representing the majority of South African citizens, and the National Party (NP), one of several smaller, minority parties. The ANC wanted to ensure democratic representation in the new constitution, while the NP wanted to ensure that minority rights were protected.⁷⁸

The ANC and the NP agreed on a three-stage process. First, all political parties were to be included in a constitutional conference where they would unanimously agree upon the structure of an interim government and a set of guiding constitutional principles. Second, an elected interim government would draft the text. Third, a Constitutional Court would determine whether the draft text complied with the previously agreed upon guiding principles. Only then could the constitution be enacted.

Proponents of this process faced many challenges that may have seemed insurmountable. Racially motivated violence continued. Disagreements within the major political parties and between smaller parties threatened the ability of the ANC and the NP to gain consensus. New institutions had to be created along the way. The Constitutional Court, for example, did not yet exist.

The process, which began in November 1991, faced several setbacks. The first attempt to agree on a set of principles failed. Talks broke down by March 1992 and violence increased. Several months later, the ANC and NP again resumed talks and, this time, were able to formulate a set of

⁷⁴ Carlotta Gall, *Chairman Walks Out of Afghan Council*, New York Times, Dec. 31, 2003, at A11 [hereinafter Chairman].

⁷⁵ Thier, *supra* note 35, at 570.

⁷⁶ *Afghans Struggle Over Islam's Role*, CBS/AP News, Dec. 19, 2003, available at <http://bit.ly/nnABeb>.

⁷⁷ *Id.* at 570; Chairman, *supra* note 74; Carlotta Gall, *Afghans Clash at a Conference to Work Out a New Constitution*, New York Times, Dec. 30, 2003, at A10.

⁷⁸ Catherine Barnes and Eldred De Klerk, *South Africa's multi-party constitutional negotiation process*, Volume 13 Accord 26, 26 (2002).

common principles that all parties could agree to. These principles were included in an interim constitution, which also provided for an elected Constitutional Assembly⁷⁹ to oversee the final drafting and created the Constitutional Court.⁸⁰

The Constitutional Assembly sought to engage the public. Through mass advertising and public briefings, the Assembly educated citizens about the drafting process. The Assembly solicited suggestions from all South Africans, resulting in more than 13,000 submissions, most from individuals.⁸¹ After two years of public engagement and private negotiations, the Assembly agreed on a text in May 1996.

The text could not be enacted, however, until the Constitutional Court certified that it adhered to the principles established by the interim constitution. The Court heard extensive arguments in July 1996 and found that several provisions violated the principles; the constitution could not be implemented without revisions. The Assembly changed the necessary provisions and the Court certified the constitution in December 1996. The Constitution was finally implemented on February 4, 1997, more than five years after official talks began.

Discussion Questions

1. Why might the interim government have entrusted a Constitutional Court with the final authority to approve the new constitution instead of, for instance, holding a national referendum among all citizens? What are the advantages of using judicial review to approve a new constitution? Disadvantages?
2. The South African procedure relied heavily on strong political parties. Would such an approach have worked in Afghanistan?
3. Compare the drafting procedure in South Africa with the procedure in Afghanistan. Which elements of each process were effective? Why?

V. METHODS OF CONSTITUTIONAL INTERPRETATION

In preceding sections we have examined the Constitution's basic foundational principles, the purposes that it is intended to serve, and the history of its creation. Now, all of this background information will serve us well as we apply the Constitution to everyday government and civilian life. The Constitution is intended only as a broad guide; it does not provide clear answers to many questions. Moreover, there is rarely only one "correct" answer. Yet this does not mean that judges and others who interpret the Constitution can capriciously decide what they, personally, think the Constitution should mean – such arbitrary power would defeat the purpose of having a

⁷⁹ Interim Constitution of South Africa, Chapter 5, Section 68.

⁸⁰ Interim Constitution of South Africa, Chapter 7, Section 98.

⁸¹ *Id.* at 32.

constitution in the first place.⁸² Consistent, fair, logical, and historically faithful interpretation is key.

Related to the question of *how* to interpret the Constitution is the issue of *who* should, or must, interpret the Constitution. On the *institutional* level, the judiciary and/or the Independent Constitutional Commission have authority to interpret the Constitution. The controversy over which institution has final authority is itself a matter of constitutional interpretation and will be discussed more fully in Chapter 6 on the judiciary. But equally important, if less obvious, is the role of individuals. Lawyers and judges are not the only ones who interpret the Constitution. The President, members of the National Assembly, and government ministers all interact with the Constitution on an almost daily basis.⁸³ Article 63 requires that the President swear to “respect and supervise the implementation of the Constitution” Article 74 requires Ministers to swear to “respect the Constitution.” And members of the National Assembly should, before voting for a law, consider whether it is in accord with the Constitution. If, for example, the National Assembly enacts a law that the President believes is unconstitutional, but that the judiciary has not yet ruled on, should the President enforce the law or not? What do you think “respect and supervise the implementation of the Constitution” means in this situation?

This section will present five different methods of constitutional interpretation: textualism, structuralism, originalism, pragmatism, and precedent. While some may argue that there is only one correct method of interpretation, many more agree that no single method can always take priority or be decisive. While there are sharp differences between these methods, and in theory some are exclusive of others, oftentimes it may be valuable to use several or all of them when analyzing an issue.

Textualism and structuralism are the most basic and uncontroversial methods of interpreting the Constitution. While there is room for disagreement about what certain words mean, or what certain structures suggest, everyone agrees that the words and structure of the Constitution are relevant to its meaning. From this starting point, however, we move to review the more controversial methods of constitutional interpretation, including originalism, pragmatism, and precedent. These three methods become especially important when the Constitution’s text and structure are vague or unclear, or when the text and structure alone do not provide enough guidance. As you can imagine, it is in these gray areas that there is the most argument about what the Constitution “means” or “intends.”

A. Textualism

The least controversial method of constitutional interpretation centers on the text itself. In some cases, the language of the Constitution is clear and provides a quick answer. For example, when the Constitution states that “[t]he capital of Afghanistan shall be the city of Kabul” (Article 21), the text is definitive. Yet while the Constitution is clear on some points, other language is ambiguous or unclear. Moreover, giving priority to the text does not necessarily mean that anything *not* written down is excluded from the Constitution. In other words, “[t]o take text as

⁸² See, e.g., Robert H. Bork, in *The Great Debate: Interpreting Our Written Constitution* 43 (Federalist Society ed., 2005).

⁸³ “Observance of the provisions of the constitution” is also a duty of all citizens (Article 56).

primary, and as ultimately authoritative whenever it speaks to a proposition, is not necessarily to take text as exclusive, and as filling up the available space for constitutional authority.”⁸⁴

Indeed, the Constitution’s authors did not intend the document to be entirely self-contained and therefore exhaustive. Take, for example, Article 27, Clause 2, which provides that “No one shall be pursued, arrested, or detained without due process of law.” Because the Constitution does not define “due process of law,” looking at the text of this Article by itself provides little guidance as to what constitutes a legal pursuit, arrest, or detention. We can call this a kind of “cross-reference” in that the Article requires the reader to look elsewhere, both within and without the Constitution, to understand its meaning.

Only rarely will the constitutional text alone be definitive, making clear when anything that contradicts it cannot be valid. More often, it may be uncertain whether something is contradictory, or there may be several plausible interpretations of the text. In these challenging situations, the text is only a starting point. To understand an ambiguous word or phrase we can look to surrounding language, to how it is used elsewhere in the Constitution, and to how it appeared in prior drafts or earlier constitutions. For example, we find clues to what “due process of law” means in Article 27 by looking at subsequent articles. In the case of detentions, the Constitution provides a basic outline of “due process” protections,⁸⁵ such as the right to appear before a court,⁸⁶ the right to a defense attorney,⁸⁷ and the right to not be tortured⁸⁸ or have a confession coerced.⁸⁹ As you can see, the text is our starting point for understanding the Constitution, but it will frequently be necessary and helpful to view the Constitution through other lenses.

B. Structuralism

The Constitution’s structure contributes to an understanding of what the document means and intends. “Structure,” in this sense, can be thought of as “that which the text shows but does not directly say.”⁹⁰ This includes sentence structure, word choice, word repetitions, and organizational structure. For example, the Constitution does not use the actual phrase “separation of powers,” but it seems to confirm that purpose in its organization and allocation of various powers: articles defining the president, national assembly, and judiciary are separated into distinct chapters.

Professor Lawrence Tribe points out a second interesting example of structural analysis. As he states, “[a] word commonly omitted from the Constitution’s text but frequently understood to be

⁸⁴ Lawrence H. Tribe, *American Constitutional Law*, in *It Is A Constitution We Are Expounding* 22 (American Constitution Society for Law and Policy ed., 2009).

⁸⁵ United Nations Assistance Mission in Afghanistan, *Arbitrary Detention in Afghanistan: A Call For Action* (Volume II) 5 (Jan. 2009).

⁸⁶ Article 31, Constitution of Afghanistan.

⁸⁷ Article 31, Constitution of Afghanistan.

⁸⁸ Article 29, Constitution of Afghanistan.

⁸⁹ Article 30, Constitution of Afghanistan.

⁹⁰ Tribe, *supra* note 84, at 23.

there implicitly is the word ‘only.’”⁹¹ It would be incorrect to attribute deep significance to the absence of the word “only”; it must be recognized as implied due to how it fits in the structure of the Constitution. Although Tribe was writing about the U.S. Constitution, the idea also applies to the Constitution of Afghanistan. For instance, Article 64 declares that “[t]he President shall have the following authorities and duties,” among these being the authority to declare war and peace. The article does not say that “only the President” has this authority, but the word is implied. The Constitution does *not* grant the National Assembly power to declare war, instead it grants it the power to approve the state budget (which is a powerful oversight mechanism that can cut funding for war).

Discussion Questions

1. Many articles in the Constitution seem to require an implied use of “only.” But, sometimes the word is used explicitly as well. In **Article 149**, we see both the implied usage in Clause 1 and an express usage in Clause 2:

(1) The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended.

(2) Amending fundamental rights of the people shall be permitted *only* to improve them. (emphasis added).

(3) Amending other articles of this Constitution, with due respect to new experiences and requirements of the time, as well as provisions of Articles 67 and 146 of this Constitution, shall become effective with the proposal of the President and approval of the majority of National Assembly members.

Analysis: The implied usage of “only” in Clause 1 (as the first word in the Clause) links with Clause 3 to provide that any article in the Constitution can be amended *except for* Articles 1-3. The express usage of “only” in Clause 2 indicates that the “list” of fundamental rights held by Afghans can be expanded but not shortened.

Do you agree with the idea that the use of “only” must be implied in some cases, as in Clause 1, given that the Constitution’s drafters found it valuable to explicitly use the word elsewhere (as in Clause 2)?

C. Originalism

Originalism is an approach to constitutional interpretation that places great weight on the stated or implicit intentions of those who drafted, debated, and voted for the Constitution. Originalism is a common theme in American jurisprudence, though it is not influential in Europe. Originalists argue that understanding what the drafters of the Constitution intended is an important step in trying to be faithful to the Constitution. As Professor Tribe writes, “[a]bsent some extremely

⁹¹ Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harvard Law Review 1221, 1240 (1995).

persuasive justification, it would be nonsensical to begin by treating a phrase in the Constitution as meaning one thing when, to those who wrote or ratified or read it at the time, it would have meant something entirely different.”⁹² Determining what a phrase meant to constitutional drafters is challenging, however, particularly when a constitution was adopted decades or centuries earlier.

Even though the Constitution of Afghanistan was adopted in 2004, the drafting process was so opaque and the ratification Loya Jirga so raucous that it is not entirely clear what the drafters intended for many provisions in the Constitution. The records that are available from this period will inevitably show extreme disagreements in the debate, with solutions of murky compromise rather than clear unity. Thus, when disagreements over constitutional provisions arise, there will often be two or more equally persuasive sides to the argument of what the authors meant, hoped, expected, or feared.

In addition to uncertainty over what the historical record actually shows, there are two different forms of originalism. One branch, when answering a constitutional question, asks: What would the drafters do? This approach promotes the idea that the Constitution should be rock-hard and unchanging – with an understanding fixed at a certain point in time.⁹³ The second branch asks: What were the principles that the drafters had in mind, and how do they apply today? This more flexible approach looks at original understanding to get a general sense of purposes and aspirations. While these two branches may not appear entirely distinct today, as time passes the difference between them may become more apparent and more important. A critical reading of Article 47, Clause 2 helps illustrate the challenge. Clause 2 provides:

The state shall guarantee the copyrights of authors, inventors and discoverers, and, shall encourage and protect scientific research in all fields, publicizing their results for effective use in accordance with the provisions of the law.

What exactly does this mean? In what way will the government guarantee the copyrights of authors, and for how long? Perhaps the founders had specific answers to these questions in mind, and the historical record may provide clues, but by the year 2040 those solutions may no longer be appropriate. Perhaps the period of protection for scientific discoveries will need to be lengthened or shortened, or the rights of authors will need to be expanded or contracted. In 2040, legislators, judges and lawyers may argue about whether the founders meant to lock in a permanent approach (the approach they envisioned in 2004), or whether they cared more about the *principal* of protecting and rewarding scientific discoveries (which may require a new approach in 2040).

Discussion Questions

1. What are the most important words in Article 47, Clause 2, and how would you interpret them? What would you argue is the *principle* that underlies the Clause?

⁹² Tribe, *supra* note 84, at 26.

⁹³ Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela S. Karlan, *Constitutional Law* 718 (5th ed. 2005).

2. Denmark's Constitution was first adopted in 1849 and the drafters would hardly recognize today's world with its cell phones, computers, cars, and airplanes. Afghanistan will also undergo change in future years that the founders of 2004 could not imagine. If situations arise in the future to which the Constitution provides no clear answers, should it matter what the Constitution's founders would do? Should we care about what principles they had in mind?

D. Precedent

“[T]he bare words of the Constitution's text, and the skeletal structure on which those words were hung, only *begin* to fill out the Constitution as a mature, ongoing system of law.”⁹⁴ In other words, constitutional law consists not only of the actual articles in the Constitution but also of the opinions of the Supreme Court, which interprets those articles in its decisions. As Afghanistan's system matures and Supreme Court decisions accumulate, lawyers and judges will be able to look at constitutional provisions through layers of interpretations from previous cases.⁹⁵

This creation of “precedent” is already occurring. In the *Spanta* case of 2007, for example, which you will read about in Chapter 2 on Separation of Powers, the Supreme Court made an important interpretation of Article 92. The Court held that a minister could not be subject to a vote of no confidence for failing to address issues outside of his or her authority and specific duties. Presumably, if this type of question comes to the Supreme Court again in the future it will answer it in the same way – this is what we mean by *precedent*.

Why do Supreme Court decisions have precedential value? In the Law of the Organization and Authority of the Courts of Islamic Republic of Afghanistan, Article 7 states that “courts shall resolve cases in accordance with the constitution and other laws”⁹⁶ While this means that lower courts are not bound to follow Supreme Court decisions, Article 26, Clause 1 of the law provides that the Supreme Court shall overturn a decision if it “determines that the lower court ruling was contrary to the law, fails to conform or *interpret* or contrary to the Articles 130 and 131 of the Constitution” (emphasis added). Thus when the Supreme Court interprets the Constitution in a certain way, that decision will likely have a real impact on future cases. Lower court judges may realize that if they rule in a way that goes against earlier Supreme Court decisions they will simply be overturned. The Supreme Court, for its part, should try to be as consistent as possible in its rulings and interpretations, since that enhances the consistency, stability, and predictability of the entire legal system. A particular challenge in Afghanistan is that the Supreme Court does not yet make many of its decisions public. Without an understanding of what the Court has decided, it is very difficult if not impossible to establish precedent.

⁹⁴ Tribe, *supra* note 84, at 31.

⁹⁵ See, e.g., Sotirios A. Barber & James E. Fleming, *Constitutional Interpretation: The Basic Questions* 135 (2007).

⁹⁶ Law of the Organization and Authority of the Courts of Islamic Republic of Afghanistan (2005).

The Supreme Court may, over time, change the way in which it interprets various constitutional provisions. As Professor Tribe writes:

Why change? A constitutional text that the Supreme Court read one way during an earlier period may be read by the Court to say something different in a later period. “Corrections” of this sort do not revise the underlying constitutional provision or structure itself. They aim, instead, to preserve the basic meaning of the Constitution by improving one’s reading of its terms. It is not only failures of judicial formulas, of course, that bring on such change. “The course of human events” – in any of its political, economic, or social dimensions – is capable of teaching lessons that seem to compel one to read the same text in a new way. Such lessons sometimes lead to the conclusion that the new reading – the one required in order to be faithful to the Constitution’s meaning – ought to have been the reading of the text all along At other times, one concludes that the earlier reading was entirely appropriate in its day but has been overtaken by events. And, on yet other occasions, changed readings reflect a mix of both – a confession of past error, and a recognition of changed events.⁹⁷

This reminds us that although courts may interpret the Constitution in a certain way today, it may be appropriate to reconsider that interpretation at some point in the future. This point leads directly to the last method of constitutional interpretation that we will review.

E. Pragmatism

Pragmatism is at the opposite end of the interpretive spectrum from originalism. Whereas an originalist cares deeply about what the founders meant, a pragmatist places highest priority on the consequences of an interpretative decision. In other words, a pragmatist might sometimes favor a decision that is “wrong” on originalist terms because it promotes stability or social welfare. Some critics of pragmatism argue that it is not a method of constitutional interpretation, but rather a rejection of constitutionalism and the rule of law. Such critics believe that pragmatism leads to decisions based merely on what is appropriate and popular at the moment, rather than what fits with the constitutional framework and its underlying values.⁹⁸ Yet pragmatism is not necessarily so extreme, and it would be strange for judges to place no importance on the consequences of their decisions.

A Problem of Gender?

An interesting hypothetical experiment in pragmatism can be found by examining Article 22 of the Constitution, which reads: “(1) Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. (2) The citizens of Afghanistan, man and woman, have equal rights and duties before the law.” In short, the Constitution calls for equality between men and women, with no distinction between them.

⁹⁷ Tribe, *supra* note 84, at 31.

⁹⁸ See, e.g., Barber, *supra* note 95, at 174.

What if the Legislature passed a law that required all businesses to employ women as 50% of their workforce within three years. For example, if a company employs 100 people three years from now, the law mandates that fifty of the workers must be female, even if today the company only employs 10 women. Would such a law be constitutional?

On one hand, the Legislature is trying to achieve the sort of gender equality that Article 22 of the Constitution calls for. On the other hand, does the law make a “distinction” between men and women by mandating that employers consider gender when making hiring decisions? If the Legislature’s intent is to help women get jobs, is it allowed to pass laws that mandate the hiring of women – even if some men end up getting fired or passed over as a result?

How might a pragmatic judge rule on the constitutionality of this law? Would an originalist judge rule differently? What about a textualist?

VI. AMENDING THE CONSTITUTION

Constitutions may need to be altered to reflect changing conditions or new societal consensus about the role of government. Amendments are usually more difficult to pass than regular legislation, reflecting the special status of constitutions. The particular mechanisms for passing constitutional amendments vary greatly from country to country.

The Constitutional drafters did not intend for the text to be unalterable. In fact, there are several references in the document itself to the possibility that the Constitution might need to be amended in the future. The preamble, for example, states that the people of Afghanistan “approved this constitution in accordance with the historical, cultural and social realities as well as requirements of time” And Article 149, Clause 3, provides that the Constitution can be amended “with due respect to new experiences and requirements of the time” These provisions recognize that as Afghanistan develops and circumstances change the Constitution may need to change as well; articles may need to be added, deleted, or re-written. An additional unstated reason is that faults might be discovered in the Constitution that need to be fixed. This section will cover the procedures for amending the Constitution.

Constitutions as “Precommitment”

As noted scholar Stephen Holmes observes, constitutions and popular democracy are seemingly in conflict: constitutions remove certain decisions from the democratic process by entrenching rights and governmental institutions, binding future generations without their voting consent (since constitutions are relatively difficult to amend). The natural question is why should a small group of people (a constitution’s founders) be empowered to exert such enormous influence over future generations; shouldn’t people in every generation have the right to consent to the fundamental rules that govern them?

Holmes reconciles this paradox by arguing that constitutional restraints actually serve an important democratic function: a properly functioning democracy must channel and restrict its own decision-making authority, so as to protect the deliberative process that is central to

democracy itself. “Precommitment” to a set of hard to change rules provides stability over time (no need to continually reinvent government) and serves a powerful moderating function against popular, but potentially harmful, passions.⁹⁹

Discussion Question

Should every element of a constitution be open for amendment? What about articles pertaining to the fundamental nature of the state? What about articles protecting human rights?

First, it is important to note that the Constitution may not be amended at two moments when it might be particularly vulnerable to political manipulation: during a state of emergency, and when there is an interim President.

Temporary Bans on Amendment

Article 146

The Constitution shall not be amended during the state of emergency.

Article 67, Clause 5

The First Vice-President, in acting as interim President, shall not perform the following duties:

1. Amend the Constitution;
2. Dismiss ministers;
3. Call a referendum.

At all other times the Constitution can be amended, yet the process is not supposed to be easy. It is more difficult to amend the Constitution than to pass a regular law, and this reflects the belief that the Constitution is a foundational document with core values and structures that should not be subject to popular passions of the moment. Articles 149 and 150 provide the procedures that must be followed in proposing and approving a constitutional amendment.

Articles 149 & 150

Article 149

(1) The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended.

(2) Amending fundamental rights of the people shall be permitted only to improve them.

(3) Amending other articles of this Constitution, with due respect to new experiences and requirements of the time, as well as provisions of Articles 67 and 146 of this Constitution, shall become effective with the proposal of the President [or] and approval of the majority of National Assembly members.

⁹⁹ This box only touches on Holmes’s ideas about precommitment. If you are interested in learning more, *see* Stephen Holmes, *Passions & Constraint: on the Theory of Liberal Democracy* (Univ. of Chicago Press 1995).

Article 150

- (1) To process the amendment proposals, a commission comprised of members of the Government, National Assembly as well as the Supreme Court shall be formed by presidential decree to prepare the draft proposal.
- (2) To approve the amendment, the Loya Jirga shall be convened by a Presidential decree in accordance with the provisions of the Chapter on Loya Jirga.
- (3) If the Loya Jirga approves the amendment with the majority of two-thirds of its members, the President shall enforce it after endorsement.

According to Article 149, the President proposes an amendment and the National Assembly must approve the proposal by a majority vote (51%). However, there is some uncertainty about the correct version of the text, and whether the last sentence in Article 149 uses “or” instead of “and.” If the text says “shall become effective with the proposal of the President [or] approval of the majority of National Assembly members,” it would mean that either the President or the National Assembly can propose an amendment (the National Assembly would propose an amendment by passing it with a majority vote). If the text says “and,” then it would appear that *only* the President may propose an amendment, and the proposal must then be approved by a majority of the National Assembly. Approval of a proposal by the National Assembly is just a preliminary step, though, since the Loya Jirga must also approve the amendment.

Once a proposal is passed, it must follow the procedures outlined in Article 150. Thus, “a commission comprised of members of the Government, National Assembly as well as the Supreme Court shall be formed by presidential decree to prepare the draft proposal.” It is unclear exactly what role this commission plays, and what “prepare the draft proposal” means, but there are several possibilities: 1) Does the commission turn the President’s idea, which has already been voted on by the National Assembly, into a formal proposal? 2) Does it edit the draft proposal? 3) Does it organize the convening of the Loya Jirga? Since the first two possibilities would be most in conflict with Article 149, arguably the best reading of this language in Article 150 is that the commission is responsible for organizing the Loya Jirga and nothing more. Once an amendment proposal reaches the Loya Jirga, two-thirds of the Loya Jirga’s members must approve the amendment for it to take effect.

VII. CONCLUSION

This introductory chapter provides background knowledge and theoretical frameworks that will be of use throughout the rest of this book. In the first section we discussed constitutions and constitutionalism. We explored the various purposes that constitutions serve in general, and the specific goals that the Constitution of Afghanistan addresses. We also examined why *constitutionalism* is more than simply having a constitution; it is the concept of limited government powers and defined law-making procedures.

One key concept to draw from our discussion of constitutions and constitutionalism is that the human factor cannot be ignored. The legitimacy and long-term sustainability of a constitution is

inextricably linked with the people who implement it. Constitutions are fragile; they will fail if people in government abuse their powers, ignore or circumvent the law, or engage in corruption that destroys citizens' trust in the state.

We next reviewed Afghanistan's constitutional history. Afghanistan has had a number of constitutions over the years, and there are many lessons that can be learned from how these documents were written, adopted, and carried out. These constitutions also highlight the evolution of the state, and the political and social changes that have occurred and still echo today. We then reviewed the history of the 2004 Constitution, and the major procedural, political, and social factors that influenced the final text.

Next we discussed methods of constitutional interpretation. Throughout this book you will be asked to think about whether certain actions are constitutional or not. This is valuable practice for anyone who is interested in being a lawyer, judge, legislator, or government minister, since people in these positions will regularly confront questions of what the Constitution means or allows. We discussed five different ways in which someone can interpret the Constitution, but there are other valid and reasonable ways to view the Constitution as well. The key takeaway is that it is important to be aware of *how* one can interpret the Constitution, since different methods of interpretation may lead to dramatically different outcomes.

Finally, we reviewed how to amend the Constitution. This is particularly relevant because the Constitution is a living document that can be changed and improved to meet new circumstances. Although the Constitution is fragile in one sense, as discussed above, its flexibility can also make it remarkably strong and enduring. Bear this in mind as you continue reading and think critically about what changes, if any, could improve the Constitution.

CHAPTER 2: THE SEPARATION OF POWERS

I. INTRODUCTION

In 2007, the Afghan National Assembly voted to remove Foreign Minister Spanta by a no-confidence vote pursuant to Article 92 of the Constitution.¹ President Karzai did not believe that the Wolesi Jirga had the power to do this, so he asked the Supreme Court to make a ruling under Article 121.² In a written opinion, the Supreme Court determined that the Wolesi Jirga did not have the power to remove Minister Spanta because the legislature did not follow the no-confidence vote provisions in Article 92.³ After the Supreme Court issued this decision, however, the legislature refused to recognize the Court's authority to make a judgment in the case.⁴ Even though the National Assembly refused to recognize the Court's decision, Spanta remained in the government. What does this scenario tell us about how power is allocated within the Government of Afghanistan?

The constitutional provisions relied on in this case are excerpted below:

Constitution of Afghanistan

Article 92

(1) The Wolesi Jirga, on the proposal of 20 percent of all its members, shall make inquiries from each Minister.

(2) If the explanations given are not satisfactory, the House of People shall consider the issue of a no-confidence vote.

(3) The no-confidence vote on a Minister shall be explicit, direct, as well as based on convincing reasons. The vote shall be approved by the majority of all members of the House of People.

Article 121

At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.

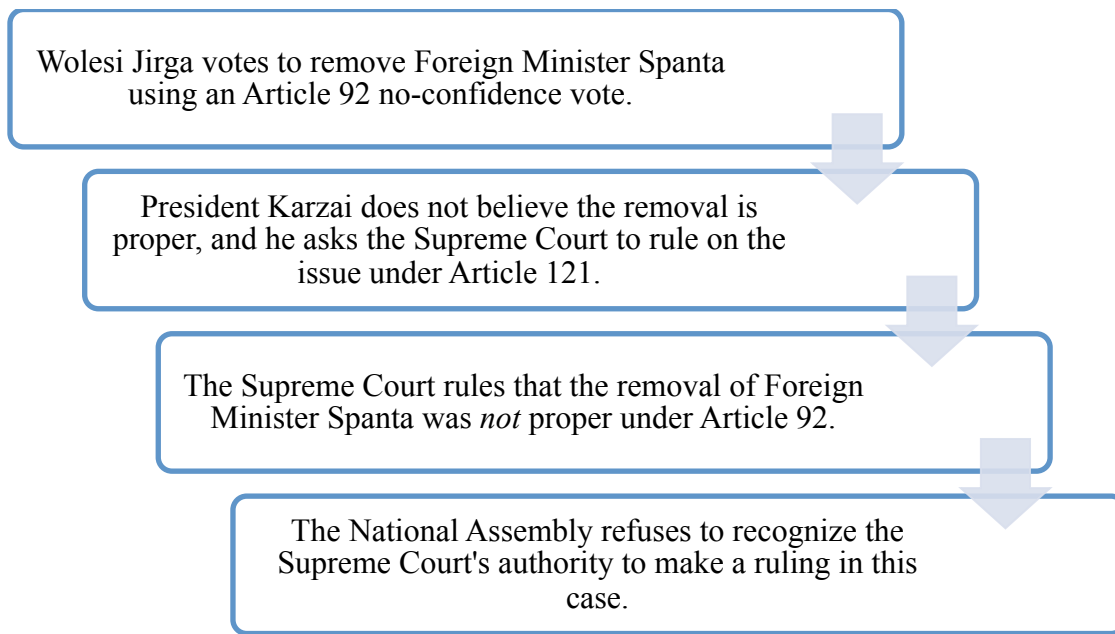
The following diagram displays the events of the Spanta case.

¹ J. Alexander Thier, U.S. Inst. of Peace, Resolving the Crisis over Constitutional Interpretation in Afghanistan 3 (2009).

² *Id.*

³ Spanta Opinion, The Supreme Court of the Islamic Republic of Afghanistan (May 13, 2007).

⁴ J. Alexander Thier, U.S. Inst. of Peace, Resolving the Crisis over Constitutional Interpretation in Afghanistan 3 (2009).



Discussion Questions

Before reading this chapter and studying the subject, how would you answer these questions based on your personal experience and knowledge of the Spanta case?

1. After all of this, was Mr. Spanta still foreign minister?
2. Does the Wolesi Jirga have the power to remove a government minister?
3. Does the president have the power to ask the Supreme Court to rule on an action by the Wolesi Jirga?
4. Does the Supreme Court have the power to decide if the Wolesi Jirga acted improperly?
5. Does the Wolesi Jirga have the power to refuse to comply with the Supreme Court's decision?
6. Who has the power to decide how the Constitution should be interpreted?
7. As a lawyer or judge in Afghanistan, where should you look to find answers to these questions?

These questions of the powers and duties granted to various governmental actors are part of an important doctrine of constitutional law called the "Separation of Powers."

II. SEPARATION OF POWERS: A THEORETICAL OVERVIEW

The most important element of a democracy is that the people vote to select their own representatives in government, who are then accountable (or responsible) to the people. To be

accountable to the people means that representatives are responsive to the needs and desires of the people. But, as in any government, there is a danger that power will be too concentrated in the hands of some people, while others are left without a voice. This risk exists in a democracy because a united majority group can elect a larger number of government officials than the minority can, and those majority officials can then control the legislative agenda and pass laws favoring the majority. Minority groups therefore might not be able to protect their interests, or even their basic rights against the will of the majority.

For example, imagine what would happen in Afghanistan if the majority of the National Assembly wanted to pass a law stating that members of the minority parties in the National Assembly were not permitted to publish their political views without first gaining permission from the majority party. This proposed law would violate Article 34 of the Constitution of Afghanistan, which provides that “Every Afghan shall have the right, according to the provisions of the law, to print and publish on subjects without prior submission to state authorities.” But, if the National Assembly held all of the power in the government, who would prevent the legislative majority from passing this unconstitutional law?

Montesquieu, a French political thinker who lived during the Enlightenment of the 17th and 18th centuries, is famous for articulating the theory of the separation of powers. Montesquieu wrote that:

When the legislative and executive power are united in the same person, or in the same body of magistrates, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the power of judging be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.⁵ All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised all these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or disputes of individuals.

The doctrine of separation of powers aims to prevent the problem of tyranny, or arbitrary rule, by distributing power throughout several branches (departments or subdivisions) of government. These separate branches then serve as “checks and balances” to the powers of the other branches. Checks and balances are mechanisms through which each branch of government can exercise some control over the other branches, so that no one group of people has absolute power. According to the theory behind the separation of powers doctrine, this system of separating power into three agencies produces four benefits:

⁵ Charles de Secondat Montesquieu, 1 *The Spirit of Laws*, bk. XI, chap. 6 (J.V. Prichard, ed., rev. ed. 1991; Thomas Nugent, trans., 1st ed., 1750).

- (1) First, it **decreases the likelihood that laws will be passed for the wrong reasons**. This is because it is much more difficult for lawmakers to act out of pure self-interest or on the basis of a passing impulse if they are restrained by the other branches. As a result, laws are more likely to be impartial and for the public good.⁶ If a King has absolute power, for example, he can pass any law he likes to benefit himself personally because there is no restraint on his power. Under a government that uses separated power, however, other parts of the government, such as the legislature and the judiciary, would prevent him from passing laws that only benefit him.
- (2) Second, the system **promotes the protection of individual rights** because, as previously mentioned, minority rights are more likely to be protected when the majority cannot do whatever it likes.⁷ For example, if the majority of the legislature was made up of businessmen and wanted to pass a law that helped businessmen but hurt farmers, farmers might be able to prevent this by using the system of separated power. Farmers might be able to persuade the president to veto the law. Or, the judicial branch might later invalidate the law if it conflicted with the Constitution.
- (3) Third, the government functions more efficiently because **each branch is able to focus on its specific work and specialize**. Much like how division of labor makes an economy more efficient, this division of labor should make the government more efficient.⁸ This functional specialization is considered particularly important to maintaining professionalism and expertise among non-elected officials such as judges and bureaucrats. Under this theory, judges can be experts in the law, and government economists can be economic experts who have spent their entire lives becoming experts in that subject matter rather than running for election. Professional specialization also allows officials in such areas of technical expertise to be insulated from direct political pressure. For example, judges can make rulings based solely on what they think is correct under the law rather than on what will help them get re-elected or will make the political leader who appointed them happy.
- (4) Fourth, the **branches of government are mutually accountable to each other**, meaning that they each work to ensure that the other branches do not exceed their proper authority.⁹ This means that each branch of government can monitor and oversee what the other branches are doing, so each branch must answer to the other branches. For example, the legislature restrains the president's power to appoint ministers through the power to bring a no-confidence vote. Likewise, the president restrains the legislature's power through his veto power.

While reading this chapter, it is important to keep in mind that there is no one "correct" way to separate power in a government, and that governmental structures vary considerably through the world.

⁶ Richard Bellamy, *The Political Form of a Constitution: The Separation of Powers, Rights and Representative Democracy*, reprinted in *The Rule of Law and the Separation of Powers* 253, 255 (Richard Bellamy, ed., 2005).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

A. Horizontal vs. Vertical Separation of Powers

This chapter will focus on the **horizontal separation of powers**, or the separation of powers between actors at the federal level of government. There is another type of the separation of powers—the **vertical separation of powers**—that refers to how power is divided between national and local governments. In Afghanistan, for example, horizontal separation of powers refers to the division of power within the central government: between the executive branch, the legislative branch, and the judicial branch. Vertical separation of powers in Afghanistan refers to the division of power between the central government, provincial governments, and local governments.

The United States is an example of a **federal** government structure (a system with a strong vertical separation of powers). All state governments in the United States make their own laws, administer their own courts, and have substantial authority over their territory. Many ethnically divided societies have also chosen to implement federal systems of government in order to create meaningful power sharing between different ethnic communities.¹⁰ Some examples of this are Bosnia-Herzegovina, Kosovo, and Cyprus.¹¹ These governments all have a robust vertical separation of powers. Afghanistan, on the other hand, chose a unitary system with power concentrated in a centralized government.

This chapter will focus solely on the horizontal separation of powers. You will learn more about the vertical separation of powers in Afghanistan in Chapter 4: Government & Administration. Even though you have not yet studied it, think about the benefits and disadvantages of a centralized versus decentralized system while reading the rest of this book.

B. How Should Power Be Separated?

Different countries choose to separate government powers in different ways. The two most common ways to separate powers are **presidential systems** and **parliamentary systems**.¹²

Presidential Systems

Presidential Systems¹³

The chief executive officer is elected by the same constituency (group of people) that chooses the legislative branch;

Different parties can control executive and legislative branches;

The president appoints the cabinet;

¹⁰ Ranier Grote, *Separation of Powers in the New Afghan Constitution*, 64 ZaöRV 897, 913 (2004).

¹¹ *Id.*

¹² Many thanks to Professor Gerhard Casper for his insights and advice on this section.

¹³ Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* 779 (2d ed. 2006).

Executive officers may only work for the executive, and members of legislature may only work for the legislative branch;

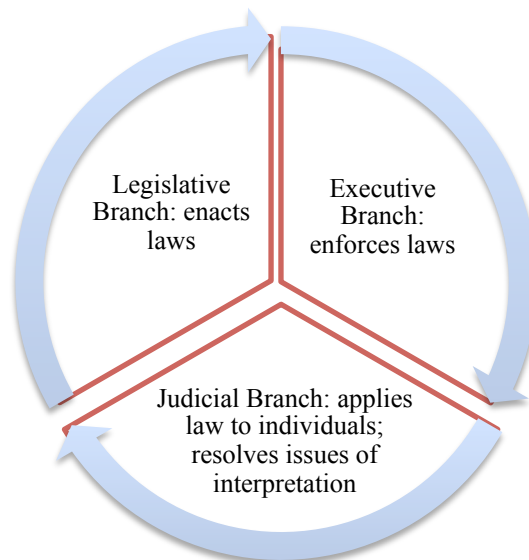
The executive and legislative powers are more strictly separated than in a parliamentary system.

Examples: Afghanistan, United States, most Latin American countries.

In presidential systems, the separation of powers has three primary components:

- (1) division between executive, legislative, and judicial acts,
- (2) government is divided into three separate branches—executive, legislative, and judicial, and
- (3) each branch employs different people. For example, no government minister may participate in the National Assembly, and no member of the legislature may act as a judge in court.¹⁴

The separation of powers in a presidential system can be visualized like this:



The reasoning behind these requirements and this structure is that if one group of people formulates laws, another group enforces them, and yet another interprets the laws, it becomes much more difficult for government agencies to act out of self-interest because the other branches are constraining their power. However, while the theory of the separation of powers includes strict separation between the functions of the three branches, in reality there is often some overlap due to practical necessities.

In presidential systems, the legislature writes and passes laws, but the president usually has the power to veto a law. The legislature can override a presidential veto by voting to pass the law by

¹⁴ Richard Bellamy, *The Political Form of a Constitution: The Separation of Powers, Rights and Representative Democracy*, reprinted in *The Rule of Law and the Separation of Powers* 253, 254 (Richard Bellamy, ed., 2005).

a supermajority (usually a two-thirds vote). You will learn more about lawmaking in a presidential system when you learn about lawmaking in Afghanistan, which uses a presidential system.

Parliamentary Systems

Parliamentary Systems¹⁵

The government, including the prime minister and cabinet, is selected by and accountable to an elected legislature;

The executive and legislative branches are controlled by the same party or coalition of parties (but different parties can control different houses of the legislature);

The highest executive officers may also be members of parliament;

If the prime minister loses the “confidence” of the legislature, a new election may occur prior to the next scheduled election time;

There is often a head of state (president), with limited substantive powers, and a head of government (prime minister), who actually runs the government;

The executive and legislative powers are less separated than in a presidential system.

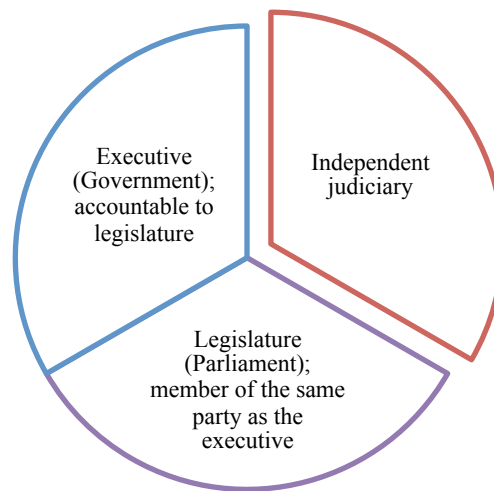
Examples: United Kingdom, Germany, South Africa, Iraq, Thailand, most Western European countries.

In parliamentary systems, both chambers of the parliament must agree on a bill before it becomes a law. But, there is no executive who has the power to veto the law because the prime minister is often a member of parliament.¹⁶ The essence of the separation of powers in parliamentary systems is traditionally considered to be the existence of an independent judiciary.¹⁷ This is because there is little to no separation between the executive and the legislature like there is in presidential systems. A parliamentary system could therefore be visualized like this:

¹⁵ Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* 779 (2d ed. 2006).

¹⁶ For more information on lawmaking under the British parliamentary system, refer to <http://www.parliament.uk/about/how/laws/passage-bill/>.

¹⁷ For a full discussion of what the term independent judiciary entails, read Chapter 6: The Judiciary.



Even though the majority party controls both the executive and the legislature, the minority party in a parliamentary system has power.¹⁸ In the United Kingdom, for example, members of the parliamentary minority have the authority to insist on a review of the actions of the majority party. This is particularly evident in the British tradition of Question Time, wherein members of the legislature ask questions of government ministers that they are required to answer. Even though the majority party controls both the executive and the legislature in a parliamentary system, the minority party has the right to question and review the actions of the executive.¹⁹

Reading Focus

As you read the rest of this chapter and the rest of this book, think about how lawmaking in Afghanistan might be different if Afghanistan had chosen to implement a parliamentary system rather than a presidential system. As you read, always keep in mind that the lawmaking system Afghanistan uses is not the only possible way to make laws, but rather one among many.

Hybrid Systems

Some countries combine presidential and parliamentary systems to form hybrid (or mixed) systems of government. The best known example of a hybrid system is the government of France. In France, the president is directly elected by the people, as in a presidential system. The president has far-reaching powers, including the power to appoint the prime minister, other ministers, and secretaries. However, the president must appoint the prime minister and the cabinet from the party that controls the parliament, even if that party is different than the president's own party. In addition, the government is accountable to parliament rather than to the president. In these ways, the French system is a parliamentary system.

Presidential vs. Parliamentary Systems in Divided Societies

¹⁸ Special thanks to Professor Gerhard Casper for making this point.

¹⁹ Special thanks to Professor Gerhard Casper for making this point.

In **presidential regimes**, the executive and the legislature are two separate entities, each separately elected by the people. Neither branch has the power to oust the other branch. As a result, the executive and the legislature must cooperate and coordinate in order to make policy.²⁰ In **parliamentary regimes**, by contrast, the executive and legislative branches are interdependent. Only the legislative branch is directly elected by the people, and the legislature produces the executive branch (led by the prime minister). This means that the executive branch needs the confidence of the legislature to stay in office. If the legislature loses confidence in the executive branch, the legislature has the power to dismiss the executive. At the same time, the prime minister usually has the power to dissolve the parliament and call for new elections. This arrangement forces the two branches to agree because each branch must accept the other.²¹

Given this, which system of government do you think is best in divided societies such as Afghanistan? Traditionally, many political theorists have believed that parliamentary systems produce a more stable situation in such cases because they force the executive and the legislature to agree in policymaking. There are very stable parliamentary regimes, such as in Scandinavian countries, where there is only moderate ideological disagreement between political parties. When extremist parties emerge in such systems, however, they have great capacity to take over the government and threaten minorities. This happened in Germany and France between World War I and World War II and in Northern Ireland more recently. On the other hand, the sharply divided presidential system in the United States often creates a situation wherein government is unable to make policy because the two branches cannot agree.²²

Currently, **advocates of parliamentary systems** argue that in divided societies, parliamentary systems “provide a consensual framework in which different economic, ethnic, and religious groups can find representation and negotiate their differences.”²³ In addition, there is an opportunity to change governments in between elections. Presidential systems, such advocates claim, are more likely to produce conflict in divided societies for two reasons.²⁴ First, a strong president can use his or her executive powers to suppress opposition.²⁵ If the president has a lot of power in the government, in some cases he can take over the legislature’s job of passing laws, thus violating constitutional design. This has happened in many Latin American countries.²⁶ Second, if the executive and the legislature are controlled by different parties and cannot agree, democratic breakdown is possible.²⁷ Professor Bruce Ackerman writes that the American presidential system is a danger to the rule of law because it encourages the president to politicize the administration of existing laws rather than to work with the legislature to create new laws, as the president should.²⁸

²⁰ Gabriel Almond et al., “Government and Policymaking,” in *Comparative Politics Today: A World View* (2009).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Bruce Ackerman, *The New Separation of Powers*, 113 Harvard Law Review 633 (2000).

²⁷ Gabriel Almond et al., “Government and Policymaking,” in *Comparative Politics Today: A World View* (2009).

²⁸ Bruce Ackerman, *The New Separation of Powers*, 113 Harvard Law Review 633 (2000).

On the other hand, **advocates of presidential systems** argue that many emerging democracies with divided societies are choosing to implement presidential systems.²⁹ Professor Steven Calabresi³⁰ argues that presidential systems are more democratic because the chief executive is directly elected by the people and because a party has to win several elections in different regions and over a longer period of time to gain control of the entire government. By contrast, one party gains control of the entire government in most parliamentary systems through winning just one election.³¹ He further believes that presidential systems are more stable since in parliamentary systems the legislature can call elections so frequently that it is possible for the government to change constantly. Calabresi thinks that the presidential veto power, which makes it more difficult to pass legislation, prevents foolish legislation and encourages long-term consistency in laws.³²

Discussion Questions

1. If you were forming a government, would you choose a parliamentary or presidential system? Why?
2. Do you think that a presidential system is the best choice for Afghanistan?
3. How would the Government of Afghanistan be different if it were a parliamentary system?

C. Criticism of the Separation of Powers Doctrine

The primary criticism of the separation of powers doctrine is that it can result in a constitutional breakdown wherein one branch violates the constitution and installs itself as the sole lawmaker.³³ This most commonly arises when different parties control the executive and the legislature, and they arrive at a deadlock wherein they cannot agree how to proceed and run the government.³⁴ Usually in such situations, it is the executive who takes control of the entire government.³⁵ This criticism therefore goes hand-in-hand with the criticism that establishing a strong executive places too much power with one individual. Some claim that the separation of powers doctrine is one of the United States' most dangerous imports to Latin America because numerous Latin American presidents have disbanded the legislatures and installed themselves as dictators.³⁶ A response to this criticism is that a strong system of checks and balances can minimize this risk.

III. THE SEPARATION OF POWERS IN THE CONSTITUTION OF AFGHANISTAN

²⁹ Gabriel Almond et al., "Government and Policymaking," in *Comparative Politics Today: A World View* (2009).

³⁰ Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 Const. Comment. 51 (2001).

³¹ *Id.*

³² *Id.*

³³ Bruce Ackerman, *The New Separation of Powers*, 113 Harvard Law Review 633 (2000).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

A. Constitutional History & Design

The doctrine of separation of powers first appeared in Afghanistan in 1964, when King Zahir adopted a constitutional monarchy with separation between the executive, legislative, and judicial branches.³⁷ The 2004 Constitution of Afghanistan is based on the 1964 Constitution, adopting a separation of powers doctrine by dividing power between three branches of government.³⁸ One difference between the 1964 and the 2004 constitution with serious implications for Afghanistan is the scope of the chief executive's power. The 2004 Constitution combines the powers of the King and the powers of the Prime Minister under the 1964 Constitution, and gives them both to the president.³⁹ This means that the 2004 Constitution gives the president the authority not only to head the executive branch, but also responsibility to maintain the function of the state of Afghanistan as a whole.⁴⁰ You will learn more about the president's dual power in Chapter 3: The Executive.

As mentioned above, the Constitution of Afghanistan adopts a presidential system rather than a parliamentary system. The National Assembly, established in Articles 81-109, has the authority of, among other things, "[r]atification, modification or abrogation of laws or legislative decrees."⁴¹ The President and the Government (the executive branch), described in Articles 60-80, have the duty, among others, to "[e]xecute the provisions of [the] Constitution, other laws, as well as the final decisions of the courts."⁴² The Judiciary, laid out in Articles 116-135, is entrusted with, among other things, "consideration of all cases filed by real or incorporeal persons,"⁴³ and "review[ing] the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law" and in accordance with specific procedures.⁴⁴ Cases can be brought before the Supreme Court at the request of either the Government or the lower courts.⁴⁵

This means that the National Assembly has the power to *enact* laws so that they become official laws of Afghanistan. The executive branch is entrusted with the sole power to *enforce* laws, or to ensure that what the legislature has passed is actually implemented in the country. And, the judiciary has the power to *apply the law to individual cases*, and to *interpret the law* if it is unclear. The 2004 Constitution includes another check on power through the Loya Jirga, established in Articles 110-115, which can convene to "decide issues related to independence, national sovereignty, territorial integrity as well as supreme national interests," "[a]mend provisions of [the] Constitution," and "[i]mpeach the President."⁴⁶ This additional body, charged with making decisions on issues of the utmost importance, provides an additional constraint on

³⁷ Ranier Grote, *Separation of Powers in the New Afghan Constitution*, 64 ZaöRV 897, 897 (2004).

³⁸ Some say that independent agencies and commissions, such as the Independent Human Rights Commission and the Independent Commission for the Supervision of the Implementation of the Constitution, form a "fourth branch" of government. You will learn more about these independent agencies in Chapter 4: Government & Administration.

³⁹ Ranier Grote, *Separation of Powers in the New Afghan Constitution*, 64 ZaöRV 897, 904 (2004).

⁴⁰ *Id.* at 905.

⁴¹ Constitution of Afghanistan, Jan. 3, 2004, art. 90(1).

⁴² *Id.* art. 75(1).

⁴³ *Id.* art. 120.

⁴⁴ *Id.* art. 121.

⁴⁵ *Id.* art. 121.

⁴⁶ *Id.* art. 111.

the power of the other three branches.⁴⁷ The Loya Jirga only convenes periodically to address certain issues and so it does not play the same consistent role the separation of powers that the other three branches do. This chapter will therefore focus only on the executive, the legislature, and the judiciary. You will learn more about the Loya Jirga in Chapter 5: The Legislature.

The Legislative Power of the Executive Branch⁴⁸

Although the Afghan National Assembly is given broad power to make the law in Afghanistan, the Constitution gives the executive substantial control over the process.

First, according to Article 97, the National Assembly must give priority to bills and treaties introduced by the Government if the Government so requests.

Second, Article 76 permits the Government to pass regulations without prior approval from the National Assembly so long as they do not conflict with any other law.

Third, under Article 79, the Government may legislate in place of the National Assembly if it decides that it is necessary to hold an “emergency session” of the legislature.

For a country to benefit from the separation of powers, the branches of government must each have *actual power* to be mutually accountable to each other. A separation of powers doctrine written on the pages of a document cannot produce benefits if each branch is not able to exercise its power in practice. One of the ways that constitutions try to ensure that the separation of powers doctrine described on paper is translated into reality is through a system of checks and balances. “Checks and balances” are mechanisms through which each branch of government acts to limit or restrain the power of the other branches.

B. Balances in the Constitution of Afghanistan

Three important constitutional balances, (ways to distribute power between the various branches) are: (1) bicameralism, (2) different constituencies and methods of election for each branch of government, and (3) different terms of office for each branch.⁴⁹ The Constitution of Afghanistan includes all three of these balances.

Bicameralism

Bicameralism is the practice of having two separate chambers in a legislature who must each pass a bill by a majority vote before it becomes a law. This means that there are two separate legislative bodies, each elected differently, that each must approve of all laws by a majority of their members. The Constitution establishes a bicameral legislature, comprised of two distinct

⁴⁷ It should be noted that the Loya Jirga’s ability to act as a check on the power of the other branches is limited by the fact that the Loya Jirga is comprised largely of members of the National Assembly pursuant to Article 110.

⁴⁸ Information in this text box taken from Ranier Grote, *Separation of Powers in the New Afghan Constitution*, 64 ZaöRV 897, 911 (2004).

⁴⁹ Donald S. Lutz, *Principles of Constitutional Design* 121 (2006).

chambers: the Wolesi Jirga (House of People), and the Meshrano Jirga (House of Elders). Article 94 requires that both chambers must pass a bill by a majority vote in order for it to become a law: “Law shall be what both houses of the National Assembly approve and the President endorses.” The basic theory behind bicameralism is that laws represent the will of a larger number of the people of a country if two separate legislative bodies must approve them, particularly if each of the legislative bodies is elected by a different constituency (group of people) and by a different mode of election.

Different Constituencies & Methods of Election

The fact that different constituencies elect each branch of government by a different electoral method means that each body that wields power within the government is chosen by a different group of people and selected in a different way. According to the Constitution, the president is elected directly by the people and must receive a simple majority of more than 50 percent of the vote in order to take office.⁵⁰ The people of Afghanistan also directly elect members of the Wolesi Jirga, with the number of representatives “proportionate to the population of each constituency,” or each province.⁵¹ By contrast, one-third of the members of the Meshrano Jirga are elected by provincial council members, one-third are elected by district councils, and one-third are appointed by the president.⁵² Unlike the executive and legislative branches, the judiciary is selected solely through appointment, with Supreme Court justices appointed by the president “with the endorsement of the Wolesi Jirga,”⁵³ and lower court judges “appointed at the proposal of the Supreme Court and approved by the president.”⁵⁴

The rationale behind ensuring that each body of government is selected by a different constituency and by a different mode of election is that each of these bodies is then directly accountable to a different group of people. The president is accountable to the entire country. Members of the Wolesi Jirga are accountable to the people of the province that elected them, who may have interests and needs specific to their region (an agricultural region, for example, may have a particular interest in farm policy). Two-thirds of the Members of the Meshrano Jirga are accountable to local governments, which gives local governments a voice in national policy-making. Currently, since district councils have not yet been established, each provincial council elects two Meshrano Jirga members, and these elected officials represent two thirds of the members of the Meshrano Jirga.⁵⁵ The one-third of the Meshrano Jirga that is appointed by the president ensures the participation of national experts, disabled persons, and nomads in the national legislature.⁵⁶ Finally, judicial appointments must be approved by two governmental bodies (the president and the Wolesi Jirga), which allows the constituencies of each body to voice their opinion on the appointment. Each of these power-balancing mechanisms reduces the likelihood that one group or special interest will dominate the national political agenda, because most decisions require the approval of multiple actors who are each accountable to different segments of society who have different needs and interests.

⁵⁰ Constitution of Afghanistan, Jan. 3, 2004, art. 61.

⁵¹ *Id.* art. 83.

⁵² *Id.* art. 84.

⁵³ *Id.* art. 117.

⁵⁴ *Id.* art. 132.

⁵⁵ Thank you to Professor Mohammad Isaqzadeh for providing this information.

⁵⁶ *Id.* art. 84.

Different Terms of Office

The third important governmental balance is different terms of office for each branch of government. In Afghanistan, the president serves five-year terms,⁵⁷ the Wolesi Jirga serves five-year terms,⁵⁸ and the Meshrano Jirga serves three-, four-, or five-year terms.⁵⁹ The first set of Supreme Court justices was appointed to four, seven, or ten-year terms, so that the conclusion of their terms would be staggered. All appointments after this initial slate will be for ten-year terms.⁶⁰ Staggered terms of office are important because they allow the people to express their preferences at different points in time, so different majorities are represented in the government as the majority's preferences are assessed at different intervals.

Suppose that in 2008, the Afghan people elected only members of the Islamic Unity Party. Then, in 2011, priorities changed and the Afghan people decided they wanted to vote for members of the National Participation Party. If they had elected all of their government representatives in 2008 and had chosen them only from the Islamic Unity Party, then the people might be left with representatives who did not represent their preferences in 2011. However, if different members of the government are selected on staggered terms at different intervals, then the Afghan people can elect officials from different parties at different times, so the government will contain representatives from both the Islamic Unity Party and the National Participation Party at the same time. Through this system, the government is, in theory, continually sampling different geographical units at different intervals to track public opinion.

Summary: Balances in the Constitution of Afghanistan

- 1. Bicameralism**—Both Wolesi Jirga and Meshrano Jirga must vote to pass law by majority
- 2. Different constituencies and methods of election for each branch of government—**
 - a. President directly elected by entire country
 - b. Wolesi Jirga directly elected by people by province
 - c. Meshrano Jirga selected through appointment system
 - d. Supreme Court appointed by President; approved by Wolesi Jirga
 - e. Lower courts appointed by Supreme Court; approved by President
- 3. Different terms of office for each branch—**
 - a. President: 5 years
 - b. Wolesi Jirga: 5 years
 - c. Meshrano Jirga: 3, 4, or 5 years
 - d. Supreme Court: 10 years

C. Checks in the Constitution of Afghanistan

⁵⁷ *Id.* art. 61.

⁵⁸ *Id.* art. 83.

⁵⁹ *Id.* art. 84.

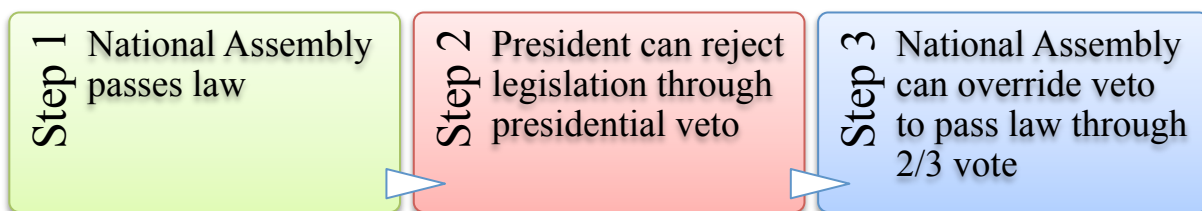
⁶⁰ *Id.* art. 117.

To complement these balances, the Constitution integrates numerous “checks” that enable the various branches of government to restrict the power of the other branches.⁶¹

The Presidential Veto

One important check is the presidential veto, articulated in Article 94, which gives the president the power to constrain the legislature’s law-making function by rejecting legislation passed by a majority of the National Assembly. The president’s authority to intervene in the legislative process, however, is limited. The National Assembly can override the president’s veto and pass a law with a two-thirds majority vote.

The Presidential Veto (Article 94)



Legislative Authority over the Executive

The legislature acts as a check on executive power by exerting a degree of control in the appointment and retention of government ministers. Although the president appoints ministers and they serve under the executive branch, the Wolesi Jirga has the power to (1) approve or reject appointments,⁶² and (2) remove a minister through a no-confidence vote.⁶³ Note that although Afghanistan uses a presidential system, it has chosen to adopt the no-confidence vote, which is typical of parliamentary systems. These provisions allow the legislature to act as a constraint on executive power, helping to ensure that ministers are appointed to represent the best interests of the people, rather than to personally serve the president. These checks also help to ensure that government ministers act to advance the interests of the people while in office. By acting as a check on the presidential appointment and removal of ministers, the National Assembly is, in theory, giving each of its diverse constituencies a voice in the selection and retention of unelected executive branch officials.

While the National Assembly has the authority to approve a no-confidence vote against government ministers, the National Assembly can vote to remove the president from office only for crimes, treason, or crimes against humanity.⁶⁴ This gives the legislature much less power over the president than over the government.

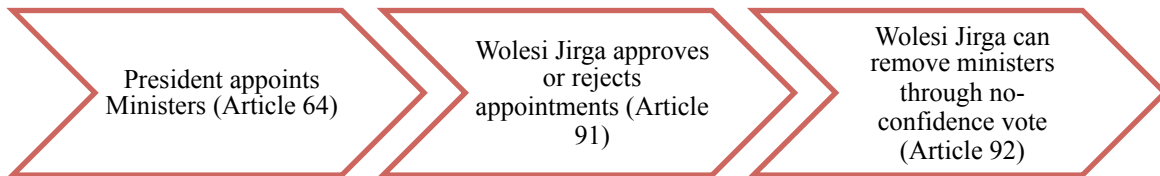
⁶¹ For further discussion of the importance of checks and balances, see Donald S. Lutz, *Principles of Constitutional Design* 127-28 (2006).

⁶² Constitution of Afghanistan, Jan. 3, 2004, art. 91.

⁶³ *Id.* art. 92.

⁶⁴ Constitution of Afghanistan, art. 69.

Appointment & Removal of Ministers



Separation of Powers in Practice: The No Confidence Vote

From reading this book and following the news in Afghanistan, you may have noticed that the National Assembly passes no-confidence votes very frequently. Why do you think that this is? One possible explanation is that in practice, the National Assembly does not have much power and so resorts to a no-confidence vote whenever it wants to try to exercise authority. However, you may have also noticed that executive branch officials frequently refuse to step down following a no-confidence vote. Is the no-confidence vote actually a check on power if the executive branch does not respect the results?

Judicial Review

A third important check grants an independent body—in Afghanistan either the Supreme Court or the Independent Commission on the Supervision of the Implementation of the Constitution—the power to interpret the Constitution and to ensure that all laws passed are consistent with the Constitution. This mechanism, known as “judicial review,” allows a third party to serve as an independent check on both the legislature and the executive, to ensure that they are upholding the values enshrined in the Constitution. The professional expertise of judges insulates legal interpretation from elected officials, who are more responsive to the whims and special interests of the majority because of a desire to be reelected. Judicial review is a controversial constitutional mechanism. Some scholars argue that it is essential for a well-functioning government, while others argue that it is undemocratic because it gives unelected judges legislative authority. Many constitutions grant the power of judicial review, while many others do not. It is not clear whether either the Supreme Court or the Independent Commission on the Supervision of the Implementation of the Constitution has the power of judicial review in Afghanistan. This will be discussed more later in this chapter and in Chapter 6: The Judiciary.

D. The Separation of Powers in Practice

This section has focused primarily on textual ways to separate power through *constitutional design*. However, it is important to keep in mind that the allocation of power through *practice* and *action* is just as essential to the doctrine of separation of powers. Words on a page do not mean anything if people do not follow them with their actions. Furthermore, how power is separated is dynamic, and can often change over time as practice changes. In order to actually understand the function of the separation of powers, one must also understand the manner in

which the branches of government interact and share power in practice. The following three anecdotes provide examples of how the separation of powers doctrine functions, or fails to function correctly, in practice. As you read through these examples, ask yourself the following questions:

- (1) Is this action consistent with Afghanistan's constitutional design?
- (2) Is this action consistent with the theory behind the separation of powers doctrine?
- (3) If your answer to either of the first two questions is no, what could be done to make this action consistent with the Afghanistan's constitutional design and the theory behind the separation of powers doctrine?

Separation of Powers in Practice: The INLTC

The Afghan Ministry of Justice established an Independent National Legal Training Center (INLTC) to train judges. The Supreme Court, however, decided that separation of powers principles precluded the Ministry of Justice (which is under the executive branch) from training judges under the judicial branch, because the Constitution establishes an independent judiciary. The Supreme Court then established its own legal training center. Nothing in the Constitution explicitly states that the Ministry of Justice cannot help to train judges. Does the doctrine of separation of powers really forbid the INLTC from training members of the judiciary?

Separation of Powers in Practice: Term Limits in the Supreme Court

Constitution of Afghanistan

Article 117

- (1) The Supreme Court shall be comprised of nine members, appointed by the President and *with the endorsement of the House of People*, and...shall be initially appointed in the following manner:
- (2) Three members for a period of 4 years, three members for 7 years, and three members for 10 years. Later appointments shall be for a period of ten years. *Appointment of members for a second term shall not be permitted.*

In 2006, President Karzai appointed three Supreme Court Justices through proper constitutional procedures for four-year terms: Chief Justice Phohand Abdul Salam Azimi, Justice Muhammad Qasim Dost, and Justice Zamen Ali Behsodi. As of 2011, however, each of these three justices was still in office, beyond their constitutionally designated term limits, because President Karzai unilaterally reappointed them as "acting justices." Viewed in the light of separation of powers doctrine, these actions are concerning because the National Assembly cannot have its voice heard in the judicial appointment process, as envisioned by the Constitution, if the president unilaterally extends the terms of Supreme Court justices. Furthermore, the Constitution limits Supreme Court justices to one term in office to insulate them from political control by either of the other branches, so they are free to make their rulings based on principles of justice rather than

political considerations. Justices cannot be free of political control if they are concerned about pleasing the president to obtain an extension of their appointment to the Court.

*Separation of Powers in Practice: The Special Election Court*⁶⁵

In 2011, President Karzai established by decree the Special Election Court (SEC). The Special Court ordered that 62 of the 249 members of the Wolesi Jirga elected in 2010 must vacate their seats. In their place, 62 parliamentary candidates who had lost their seats or were disqualified from the 2010 National Assembly elections were to be reinstated. The 62 candidates who lost their seats but were reinstated by the SEC were political supporters of President Karzai. Critics claim that Karzai created the SEC to invalidate election gains made by his opponents. Both the Independent Election Commission (IEC) and the Electoral Complaints Commission declared that the SEC had no constitutional basis. In response, Attorney General Mohammed Ishaq Aloko brought criminal charges against members of the Commissions.

The Wolesi Jirga then approved a no-confidence vote against Attorney General Mohammed Ishaq Aloko, who had convened the court on behalf of President Karzai. The Wolesi Jirga also passed a no-confidence vote against five Supreme Court justices for their support of the SEC. Mr. Aloko, however, rejected the no-confidence vote, arguing that the Wolesi Jirga did not have quorum to properly approve a vote of no-confidence since the SEC had ordered that 62 of the 132 members of parliament (MPs) who voted for the motion to vacate their seats.

MP Mr. Mohammad Sarwar Usmani Farahi threatened to apply Article 69 to President Karzai. Article 69 provides that the Wolesi Jirga can bring a charge against the president for crimes against humanity, national treason, or crime.

After several months of disputes and negotiations, President Karzai agreed to abolish the SEC. As part of the decision, Karzai reaffirmed the authority of the IEC to make final decisions in contested elections. The Independent Elections Commission agreed to reinstate nine of the 62 members that the SEC had ordered reinstated. The Wolesti Jirga, however, passed a resolution stating that the results of the parliamentary elections could not be altered by anyone, including the IEC.

Before the August 20, 2011 plenary Wolesi Jirga session, MPs accused the Minister of Parliamentary Affairs Mr. Homayon Azizi of warning members of the Wolesi Jirga not to attend the plenary session. MPs claimed that he did this so that the Wolesi Jirga would not be able to show its opposition to the reinstatement of the nine MPs. MPs jokingly referred to Mr. Azizi as “The Minister of the Executive Branch for Parliamentary Affairs,” because they felt his allegiance to the executive branch was so strong.

⁶⁵ Information in this text box taken from: Ray Nordland, *Afghan Court Invalidates a Quarter of Parliament*, New York Times (June 23, 2011); Ray Rivera & Abdul Waheed Wafa, *Under Guard in Kabul, Officers are Sworn In*, New York Times (Sept. 3, 2011); Alissa Rubin & Abdul Waheed Wafa, *Afghan Court on 2010 Vote Is Shut Down*, New York Times (Aug. 11, 2011); APAP Legislative Newsletter (Aug. 11, 2011, Vol. 6, No. 5), available at www.sunyaf.org; APAP Legislative Newsletter (July 1, 2011, Vol. 5, No. 22), available at www.sunyaf.org.

In September 2011, the speaker of the National Assembly swore in eight of the nine reinstated members. Hundreds of police officers blocked the doors to parliament to prevent the replaced MPs from entering. Many members of the National Assembly stood outside during the swearing in ceremony to show their support for the ousted members.

What does this occurrence tell us about the separation of powers in Afghanistan? Was the president constitutionally permitted to establish the SEC? Was the Wolesi Jirga constitutionally permitted to approve the votes of no confidence? Does the Constitution permit the IEC to alter or clarify election results? Could the Wolesi Jirga apply Article 69 against the president in this case? Is the Minister for Parliamentary Affairs allowed to tell MPs not to attend a plenary session?

Discussion Questions

1. One of the primary objectives of separation of powers is the protection of minority rights. In your opinion, are minority rights being protected in Afghanistan?
2. Are laws being passed and implemented out of concern for the public good rather than self-interest in Afghanistan?
3. Do you think that the different branches of the Afghan government serve as checks and balances for one another?
4. If the Afghan Constitution establishes a system of governance that relies on the doctrine of separation of powers, why might it be that Afghanistan is not experiencing all of these benefits?

Reading Focus

Keep in mind that there is no ideal system of the separation of powers. The ideals behind the separation of powers—expressing the people’s will through representative government and preventing all power from being concentrated in the hands of one person or group—are what are truly important. There are many different ways to achieve these ideals. As you read this chapter, always ask yourself what other means or government structures could be used to achieve the same goal of democratic government and the protection of rights.

IV. SEPARATION OF THE JUDICIAL BRANCH: JUDICIAL REVIEW

The judiciary plays an important role in any separation of powers scheme. Many nations give their high court the power to “review” legislation, or to determine whether a law is consistent with the constitution (which, as you learned in Chapter 1, is the supreme law of the land). If the court determines that a law is *not* consistent with the constitution, it can invalidate that law. This

is called the power of “judicial review.” Inherent in the power of judicial review is the power to interpret the constitution. There are different types of judicial review under the broad concept.⁶⁶

- (1) **Abstract Review:** The right to bring the case before the constitutional court is reserved for the highest state bodies and officials (the president or the cabinet), groups of members of parliament (i.e. parliamentary opposition), and similar bodies. The constitutionality of a statute is examined abstractly, not in the context of any particular case.
- (2) **Concrete or Incidental Review:** The constitutional or supreme court reviews cases based on referrals of constitutional questions by lower courts.
- (3) **Constitutional Complaint:** This procedure gives individuals access to a constitutional court. A person who already has lost his or her case before the ordinary courts can complain before the constitutional court that his or her constitutional rights have been violated.

Different types of governments structure judicial review in different ways. The United States design features one court system, with a high court that reviews all types of cases. Other countries employ a system in which a specialized constitutional court reviews all constitutional issues. While many legal systems today support the notion of judicial review, it is important to note that the topic can be controversial and that not everyone believes that it is a good idea. Some argue, for example, that the judiciary should not be permitted to issue interpretations of laws because in doing so it is essentially creating new laws, which only the legislature has the power to do.

Reading Focus

As you read the rest of this chapter and Chapter 6: The Judiciary, think of *who* is asking a supreme or constitutional court to decide a particular question. Is it an ordinary citizen? A lower court? The president? The legislature? Think of how the origin of the case might influence how power is allocated between the judiciary and the other branches.

According to Article 121 of the Constitution of Afghanistan, the Supreme Court of Afghanistan only hears cases referred to it by the government or the courts. As you are reading, think about how that affects how the Supreme Court operates and interacts with the executive and the legislature.

A. Constitutional Courts: Parallel Supreme Jurisdictions

A constitutional court is an independent, specialist court that decides only matters of constitutional interpretation.⁶⁷ The constitutional court model gives the power of judicial review

⁶⁶ Definitions quoted from Lech Garlicki, *Constitutional Courts versus Supreme Courts*, 5 International Journal of Constitutional Law 44, 46 FN 6, 7, 8 (2007).

⁶⁷ *Id.*

to a single court and that court is outside of the regular court system.⁶⁸ Because of this, such systems are sometimes referred to as **centralized judicial systems**.⁶⁹ In systems that use constitutional courts, there are usually two judicial systems, each with its own high court.⁷⁰ The first system, dealing with matters of constitutional interpretation, is under the authority of the constitutional court.⁷¹ The second system, sometimes referred to as the ordinary court system, adjudicates all matters not under the jurisdiction of the constitutional court, and is under the authority of its own high court.⁷² Constitutional courts can perform a wide variety of roles, including: (1) adjudicating issues relating to constitution drafting or constitutional amendments, (2) judicial review of legislative acts, (3) review of the constitutionality of executive action, and (4) examine the legality of actions of political parties and elections.⁷³

Constitutional Courts⁷⁴

Specialist Court having ONLY constitutional jurisdiction;

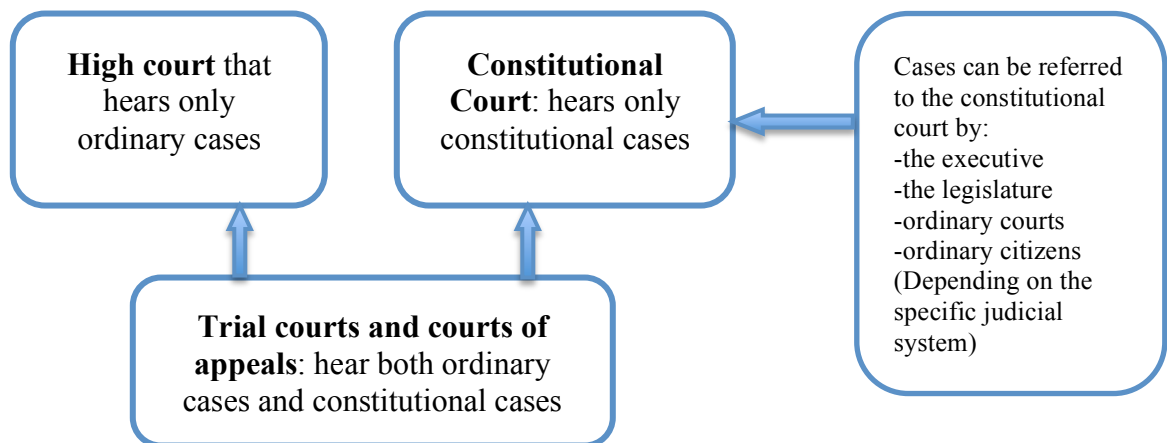
ONLY **one court has power of judicial review** and the power to interpret the constitution;

Constitutional court systems are sometimes referred to as *centralized* systems;

Often involves two judicial systems: 1) constitutional system, and 2) civil or ordinary system.

Countries with Constitutional Courts (a few of many examples): Austria, France, Germany, Italy, Spain, Russia, Turkey, Egypt, South Africa, Thailand, and Indonesia.

Diagram of a Judicial System with Parallel Supreme Jurisdiction & a Constitutional Court



⁶⁸ Lech Garlicki, *Constitutional Court Versus Supreme Courts*, 5 International Journal of Constitutional Law 44, 44 (2007).

⁶⁹ Andrew Harding, Peter Leyland & Tania Groppi, *Constitutional Courts: Forms, Functions and Practice in Comparative Perspective*, in *Constitutional Courts: A Comparative Study* 1, 3 (2009).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 6-7.

⁷⁴ *Id.* at 3.

A Constitutional Court of Afghanistan?

Early drafts of the 2004 Constitution of Afghanistan included a constitutional court. The Government's final draft, which was finally backed by the Loya Jirga, however, opted for a Supreme Court instead.⁷⁵

The Constitutional Court of the Federal Republic of Germany

Like most European countries and many other countries around the world, Germany has a specialized constitutional court. The German Constitutional Court serves as the model for many other such courts around the world. As with other constitutional courts, the German constitutional court has one job: to review public acts to determine whether or not they are constitutional. The constitutional court does not hear appeals on other types of cases or consider other issues; it focuses all its attention on determining whether executive and legislative acts are constitutional.

Germany chose to have a specialized constitutional court due to a belief that judicial review is a political act because it involves judgments on legislation or executive action.⁷⁶ Germany wanted constitutional review done by a special court with judges elected by parliament and therefore representative of the political community, rather than a court of legal technocrats.⁷⁷

The German Basic Law specifically lists the Constitutional Court's entire jurisdiction.⁷⁸ This means that the law makes clear which types of cases the court can review and which types it cannot. The Constitutional Court of Germany has expansive authority. For example, the Constitutional Court can rule on the following types of issues:

- (1) The Constitutional Court has the authority to **declare political parties unconstitutional**.⁷⁹ One example of this type of case is when after World War II, the court banned a neo-Nazi party.⁸⁰
- (2) The Constitutional Court has the authority to rule on **disputes between branches of the federal government** of Germany in order to maintain the proper balance of power between them.⁸¹ For example, if a political party does not get a place on the ballot, that party can ask the court to rule on whether or not it should have a place on the ballot.⁸²

⁷⁵ Ranier Grote, *Separation of Powers in the New Afghan Constitution*, 64 ZaöRV 897, 911 (2004).

⁷⁶ Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 3 (2d ed. 1997).

⁷⁷ *Id.*

⁷⁸ *Id.* at 10.

⁷⁹ *Id.* at 11.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

- (3) The Constitutional Court has the authority to engage in **concrete judicial review**, or judicial review arising from an ordinary lawsuit.⁸³ This means that a lower court, when ruling on a particular issue, thinks that it involves a constitutional issue and so refers the case to the Constitutional Court.⁸⁴ A requirement of concrete judicial review is that a party has actually brought a claim involving the particular issue in question.
- (4) The Constitutional Court has the authority to engage in **abstract judicial review**, which means that the court can rule on whether a particular public act is constitutional even if a party has not brought a claim involving the issue in question.⁸⁵ In the case of abstract review, the government requests that the court rule on a particular issue.⁸⁶ Usually, minority members of parliament who disagree with a particular law bring abstract review cases. Unlike with concrete review, in the case of abstract review, no individual has brought a claim on the issue before a lower court.
- (5) Individuals in Germany also have the right to bring **constitutional complaints** before the Constitutional Court.⁸⁷ This means that any individual may submit a complaint of unconstitutionality if one of his or her constitutional rights has been violated by a “public authority,” or the actions of a governmental body.⁸⁸

Justices on the German Constitutional Court are elected for twelve-year terms with no possibility of reelection.⁸⁹ All justices must retire at age 68 even if they have not served twelve years.⁹⁰ Half of the justices on the Constitutional Court are elected by one of the chambers of parliament, while the other half of the justices are elected by the other chamber of parliament.⁹¹ The Minister of Justice compiles a list of federal judges who meet the qualifications for appointment, and the parliament votes for a candidate from this list.⁹² The elections process is high politicized, in part because the two-thirds majority requirement in one of the chambers gives the parliamentary majority substantial control over the election process.⁹³

The Constitutional Court has the power to prepare its own budget in consultation with parliament and the Ministry of Finance.⁹⁴ The court’s deliberations are secret.⁹⁵ When issuing opinions, one justice drafts an opinion that reflects the opinion of the majority of the court. The official opinion is unsigned, and at least six justices must agree to it.⁹⁶ If a justice disagrees with an opinion, he or she can write and sign a dissenting opinion explaining why he or she does not agree with the

⁸³ *Id.* at 13.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 14.

⁸⁸ *Id.*

⁸⁹ *Id.* at 21.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 21.

⁹³ *Id.* at 22.

⁹⁴ *Id.* at 23.

⁹⁵ *Id.* at 24.

⁹⁶ *Id.* at 24-26.

majority.⁹⁷ The Constitutional Court, however, decides more than 90 percent of its reported cases unanimously.⁹⁸

Discussion Questions

1. What do you think of the notion of abstract review? What benefits or disadvantages might it have?
2. What do you think of the fact that ordinary citizens can bring constitutional complaints before the Constitutional Court? Would a system like that work in Afghanistan? Why or why not?
3. Do you think it is a good idea that the Constitutional Court of Germany can declare political parties unconstitutional? Why might this be a good or bad idea in Afghanistan?
4. According to Article 121 of the Constitution of Afghanistan, the Supreme Court can review public acts only at the request of the Government or the courts. How could this fact make the Supreme Court of Afghanistan operate differently from the Constitutional Court of Germany?
5. What do you think about the fact that justices on the Constitutional Court of Germany are elected by the Parliament? How would such a system work in Afghanistan? How would it change the Supreme Court of Afghanistan?

The Constitutional Court of Egypt

Prior to the 2011 revolution, Egypt also had a constitutional court known as the Supreme Constitutional Court (SCC).⁹⁹ Even though Egypt's system of government has changed substantially since 2011, the former SCC was successfully used for decades and served as a model for constitutional courts. The SCC's level of judicial independence varied over the years. Ironically, President Jamal Abd al-Nasir established the Supreme Court in order to limit judicial independence by bringing the court under the executive.¹⁰⁰ Subsequently, in 1979, President Anwar al-Sadat established the new Supreme Constitutional Court, designed to have substantial independence.¹⁰¹

The executive, however, maintained tight control over court appointments.¹⁰² The president appointed the chief justice by presidential decree. The president also appointed associate justices, was required to choose between two nominees: one selected by the chief justice and one selected by the general assembly of the Court.¹⁰³ There was also no limit to the number of justices on the

⁹⁷ *Id.*

⁹⁸ *Id.* at 26.

⁹⁹ Clark B. Lombardi, *Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally 'Islamic' State*, in *Constitutional Courts: A Comparative Study* 217 (Andrew Harding & Peter Leyland, eds. 2009).

¹⁰⁰ *Id.* at 219.

¹⁰¹ *Id.* at 220.

¹⁰² *Id.* at 224.

¹⁰³ *Id.* at 227.

SCC, which the president has previously used to add additional justices sympathetic to his views.¹⁰⁴

Law of Egypt No. 48 (1979)

Article 25 grants the Supreme Constitutional Court three main powers:¹⁰⁵

- (1) To serve as the final authority in case of a jurisdictional dispute between two Egyptian courts.
- (2) To issue authoritative interpretations of legislative texts if different judicial institutions (for example, the national courts and the administrative courts) have disagreed about the proper interpretation and uniform interpretation is important.
- (3) To perform constitutional review in certain cases, including ones where lower courts determine that a legitimate constitutional question needs to be resolved.

In the Egyptian system, lower courts could refer cases with constitutional issues to the SCC, and once a case was referred to the SCC, the court was obligated to hear it.¹⁰⁶ As a general matter, lower courts were willing to refer cases to the SCC, and citizens were allowed access to have their constitutional claims adjudicated.¹⁰⁷

The SCC made a series of landmark decisions limiting the executive's control over the political system throughout the 1990s, including striking down numerous election laws and incorporating international human rights norms into Egyptian constitutional law.¹⁰⁸ While the Constitution of Egypt did not explicitly guarantee individual human rights, Articles 64 and 65 guaranteed "the rule of law."¹⁰⁹ The SCC ruled that the Constitution compelled adherence to standards of individual human rights because this notion of "the rule of law," along with Islamic Law, encompassed international human rights standards.¹¹⁰ The government of Egypt was therefore constitutionally bound to adhere to international human rights standards, even if these were not specifically written in the Constitution of Egypt.¹¹¹ The SCC frequently heard cases on issues of Islamic law and issued opinions backed by Islamic Law reasoning.¹¹²

Prior to the 2011 revolution, Egypt had been under a state of emergency suspension powers for years (discussed later in this chapter). In 1979, President Sadat enacted controversial reforms to the family law, granting women additional rights by emergency decree.¹¹³ He chose to enact them by emergency decree because there was too much resistance from the religious

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 224.

¹⁰⁶ *Id.* at 225.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 230.

¹⁰⁹ *Id.* at 230.

¹¹⁰ *Id.* at 231.

¹¹¹ *Id.* at 231.

¹¹² *Id.* at 232-37.

¹¹³ *Id.* at 229.

establishment to pass them through the regular legislative process.¹¹⁴ In 1985, the SCC held that the family law reforms had been unconstitutionally enacted and voided the law.¹¹⁵ The SCC reasoned that when passing legislation under his emergency powers, the president must show a connection between the emergency decree and state security, which did not exist in this case.¹¹⁶ This ruling made a bold statement of judicial independence with the message that the Constitution limited what the executive could enact through emergency decree. After all of these bold rulings on subjects such as human rights and emergency powers, President Mubarak neutralized the SCC by appointing his political allies to the Court.¹¹⁷

The Supreme Court of Afghanistan

Article 121 of the Constitution of Afghanistan provides that the Supreme Court may only review legislation “upon request of the Government or the Courts.” The president of Afghanistan can appoint and remove judges on lower courts without the approval of the National Assembly.¹¹⁸ This gives the president substantial authority over which cases are referred to the Supreme Court.

B. Decentralized Judicial Review: The Supreme Court Model

Supreme courts are characterized by the notion that “jurisdiction to engage in constitutional interpretation [thus judicial review] is not limited to a single court.”¹¹⁹ All courts are under a single general judicial system. And, all courts are generalized, deciding issues of common law, statutory interpretation, and constitutional interpretation.¹²⁰ This means that courts in the ordinary judicial system review legislation and determine issues of constitutionality. Because many courts have the power of judicial review, supreme court systems are sometimes referred to as **decentralized judicial systems**. Since the ordinary court system decides issues of constitutionality in addition to ordinary cases, there is only one high court with jurisdiction over the entire legal system.

Supreme Courts¹²¹

Generalized courts hear **all types of cases**;

The jurisdiction to engage in constitutional interpretation is **not limited to a single court**;

The system is *decentralized*;

Only one highest court exists;

¹¹⁴ *Id.* at 229.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 229-30.

¹¹⁷ *Id.* at 239.

¹¹⁸ Ranier Grote, *Separation of Powers in the New Afghan Constitution*, 64 ZaöRV 897, 906-07 (2004).

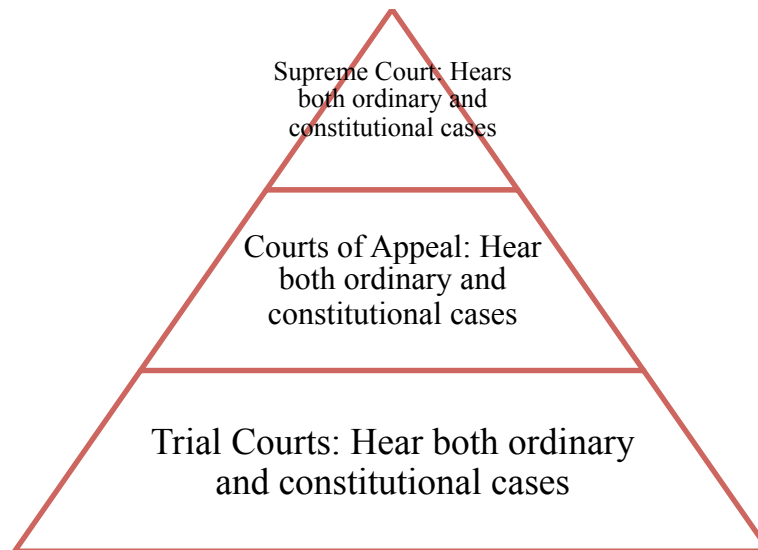
¹¹⁹ Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* 465 (2d ed. 2006).

¹²⁰ *Id.*

¹²¹ *Id.*

Countries with Supreme Courts (a few examples): The United States, Argentina, Australia, Canada, India, Japan.

Diagram of a Judicial System Featuring a Supreme Court and Judicial Review



Discussion Questions

1. Is there a benefit to having one court specialize solely in constitutional interpretation?
2. Is there a benefit to having constitutional interpretation more widely dispersed among courts?
3. What do you see as the benefits and disadvantages of having two judicial systems as opposed to a single judicial system?

The Theory Behind Decentralized Judicial Review

The Federalist Papers are classic commentaries on the formation of the United States' system of government written by Alexander Hamilton, John Jay, and James Madison at the time that the United States constitution was written (the late eighteenth century). The Federalist No. 78 lays out the theory behind the United States judicial review system:¹²²

[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution. . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment

¹²² The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by judges as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. . . .

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter, rather than the former.

This excerpt from the Federalist Papers can be summarized as follows:

The legislature should not decide on the validity of its own laws or its own powers because this is an invitation for it to act in a self-serving manner.

Courts should to serve as an “intermediate body” between the people and the legislature to ensure that the legislature does not exceed its authority.

As the “least dangerous branch,” the judiciary is best situated to be in this position because it is the least likely to make politically motivated decisions or act tyrannically. This is because it has no control over the military (“the sword”) or the budget (“the purse”).

Therefore, the judiciary has the sole power to interpret the laws to ensure that they are consistent with the Constitution (the supreme law of the land), and to ensure that the legislature has not exceeded its authority by passing an unconstitutional law.

The Federalist papers make clear that the power of judicial review does not indicate that the judicial branch has more power than the legislative branch. The two branches have co-equal power, but the *people* have power superior to both branches. In reviewing legislation for its constitutionality, judges must not substitute their will for that of the legislature, or do what the judges want to do personally with regard to the legislation. Rather, judges must make impartial decisions based on constitutional and legal principles that represent the *will of the people*.

One question that arises when reading this passage is: how does the judiciary know what the will of the people is any more than the legislature does? After all, the people elected the legislature,

not the judiciary. This is one of the primary criticisms of the power of judicial review. Some say that judicial review is undemocratic because judges are not elected, and that it would be better for the elected legislature to make these decisions.

To respond to this criticism, it is important to look back at the theory behind constitutionalism and popular sovereignty. According to this theory, as you learned in Chapter 1 on constitutionalism, the people are their own sovereigns, and the will of the people is represented in the constitution. Therefore, by ensuring that all laws are consistent with the constitution, the judiciary is ensuring that all laws are consistent with the will of the people.

There are other practical justifications for judicial review as well. First, some argue that because constitutional interpretation and legal analysis are technically complex topics, a society benefits from having one group of people (usually judges) specialize in the subject. This creates professionalism within the field of constitutional and legal analysis. Second, some claim that it is good to have those who are interpreting the constitution and laws insulated from direct political pressure. If elected officials were charged with evaluating the constitutionality of the laws, they might constantly base their decisions on what they think would be most likely to get them elected in the next election, rather than constitutional and legal principles. Third, some say that while judicial review is not perfect, it is the best available option. While judges are not perfect, it is better to have neutral professionals who are trained in the subject matter deciding issues of constitutional interpretation than to have officials seeking reelection doing so.

Despite these theoretical arguments, the United States Supreme Court is frequently criticized for making decisions based on politics rather than legal principles. There is no easy answer to the question of how to best uphold a constitution. And, there is not a correct government or judicial structure for doing so. Rather, it is important that you know how different systems work and what arguments people make in support of those systems. Then you can come to your own conclusions.

Discussion Questions

1. Who better represents the will of the people—the judiciary or the legislature?
2. Who has the power to interpret the Constitution in Afghanistan?

The Supreme Court of the United States

More countries in the world follow the constitutional court model. For countries that follow the supreme court model, however, the United States Supreme Court is the leading example. The United States Supreme Court differs from the German constitutional court model in several key ways.

The United States Supreme Court consists of nine justices. The president appoints these nine justices, and the Senate (the upper chamber of the Congress) must approve the president's nominees by a simple majority. Supreme Court appointments are very politicized in practice, often turning into ideological battles between the United States' two political parties. Once

appointed, Supreme Court justices have lifetime tenure, meaning that they can remain justices for the rest of their lives. The rationale behind lifetime tenure is that it will allow the court to make decisions without regard to political pressure from the executive or the legislature.

In order for the United States Supreme Court to hear a case, it must arise from an actual case that the lower courts have ruled on. The United States does not conduct abstract judicial review like the Constitutional Court of Germany. Also, unlike many constitutional court systems, in the United States the lower courts themselves cannot refer cases to the Supreme Court. Rather, the parties to a case file an application to have a lower court's decision reviewed based on constitutional reasons.

In addition, while the German Basic Law specifically states what types of cases Constitutional Court of Germany has the authority to review, the United States Constitution does not explicitly mention that the Supreme Court has the power to review legislation for constitutionality. Rather, the Supreme Court itself ruled that it possesses the power to conduct judicial review.

At the beginning of the nineteenth century, the United States was a young country, having only gained independence in 1783. Although the United States adopted its constitution in 1787, in the early nineteenth century the country was still trying to figure out exactly how power should be divided between the different branches of government, much as Afghanistan is doing today.

In 1801, President John Adams made several last-minute judicial appointments right before he left office and his political rival Thomas Jefferson replaced him as president.¹²³ These judicial appointees are often referred to as the “midnight justices” because Adams appointed them so late on his last night in office. The Congress, which supported Adams, passed a law creating new positions for judges to help Adams make the midnight appointments.¹²⁴ Adams made these appointments so late that while he followed all constitutional and legal procedures to make the appointments, he did not have time to deliver the actual pieces of paper, or commissions, to some of the appointees to make their appointment official. Because John Adams was his political rival, President Jefferson did not deliver the judicial commissions to the appointees.¹²⁵ The new Congress, which supported Jefferson, repealed the law that had created the new judicial positions.¹²⁶

One of the men who had been appointed but did not receive his commission, William Marbury, went to the Supreme Court of the United States, requesting that the Court force President Jefferson's Secretary of State (Foreign Minister) James Madison to deliver the commission. This case raised new and important legal issues in the United States, and became the famous case of *Marbury v. Madison*.¹²⁷

Article II, Section 2 of the United States Constitution gives the president the authority to appoint judges with the “Advice and Consent of the Senate.” In this case, President Adams gained the

¹²³ Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 1-2 (16th ed. 2007).

¹²⁴ *Id.* at 9.

¹²⁵ *Id.* at 1-2.

¹²⁶ *Id.* at 9.

¹²⁷ 5 U.S. (1 Cranch) 137 (1803).

advice and consent of the Senate for his midnight appointments, he was president at the time he made the appointments, and he was acting pursuant to a law passed by Congress that was valid at the time. The issue before the Supreme Court was whether President Jefferson could disregard those judicial appointments by refusing to deliver the commissions. The Court held that because the appointments were constitutionally valid, Jefferson could not choose to ignore the appointments, and Marbury must receive his commission. While the Court was deciding the case, several people questioned the Supreme Court's authority to decide the constitutionality of legislative acts.¹²⁸

Marbury stands for two important propositions. First, the case stands for the notion that if the Constitution and another law conflict, courts should always give priority to the Constitution because it is the supreme law of the land. Second, *Marbury* became famous for the larger proposition that the United States Supreme Court has “the power to police the other branches, acting as the central guardian of constitutional principles and the special enforcer of constitutional norms.”¹²⁹ This means that the Supreme Court has the power to decide if the president and the congress are acting contrary to the Constitution. And, if the Court decides that the either of the other branches is violating the Constitution, the other branch must stop what it was doing immediately.

The following is an excerpt from the original text of *Marbury v. Madison*:¹³⁰

Marbury v. Madison, the Supreme Court of the United States
(February 1, 1803)

Certainly all those who have framed written constitutions contemplate them as forming the *fundamental and paramount law of the nation*, and consequently, the theory of every such government must be, that an act of the legislature, repugnant¹³¹ to the constitution, is void.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

¹²⁸ Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 9 (16th ed. 2007).

¹²⁹ *Id.* at 1.

¹³⁰ Edited text excerpted from Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 6-9 (16th ed. 2007) (emphasis added).

¹³¹ Repugnant means “opposed or contrary.” An “act repugnant to the constitution” is an act that violates the constitution or is against the constitution.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

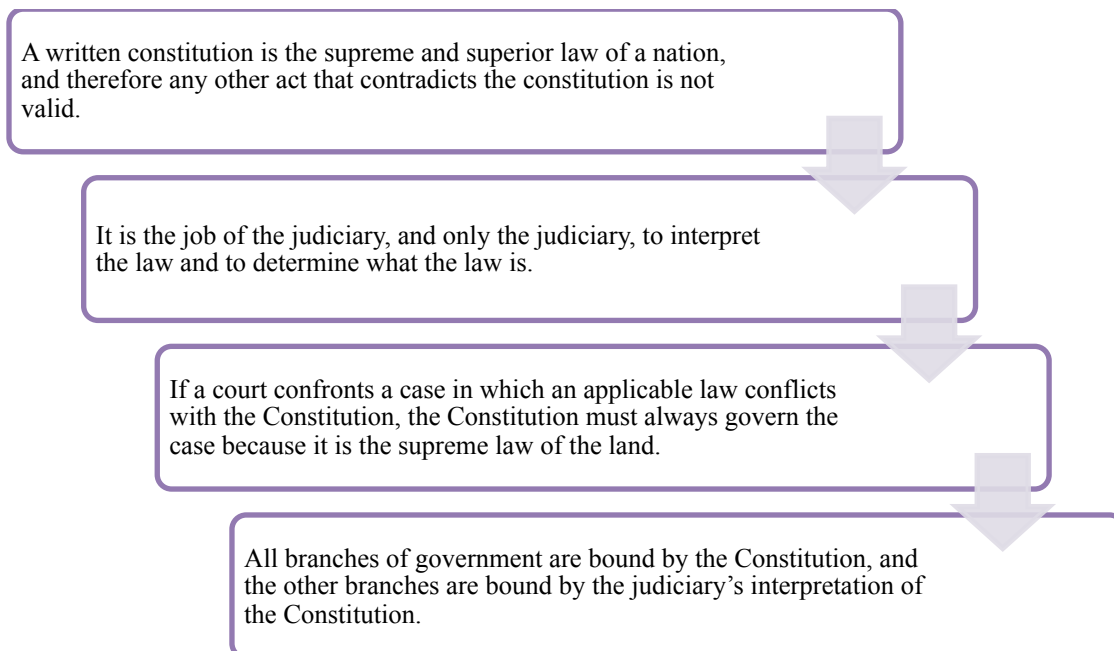
Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes to the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature practical and real omnipotence,¹³² with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

[A] law repugnant to the constitution is void; and that the *court*, as well as other departments, are bound by that instrument.

The Supreme Court's reasoning can be broken down into the following step-by-step analysis:

***Marbury v. Madison* Step-by-Step Analysis**



Marbury is often criticized as politically motivated. John Marshall, the Chief Justice of the Supreme Court who wrote the opinion, was a strong Adams supporter, and even served as his

¹³² Omnipotence means “the quality of state of having very great or unlimited authority or power.”

Secretary of State (Foreign Minister). Marshall had therefore been involved in Adam's appointment of the midnight justices, and so had an interest in whether the commissions were delivered or not. Marshall states in the opinion that it "is emphatically the province and duty of the judicial department to say what the law is" as if this is a commonly known fact. The notions that the judiciary has the sole power to interpret the laws and that the courts have the power to invalidate legislative acts, however, were new concepts at the time. Some accuse Marshall of inventing the concept just to give the Court more power.¹³³ Regardless of why Marshall wrote what he did, the ideas that the judiciary has the sole power to interpret the law and the Constitution and that the other branches must defer to the Court's judgment are widely accepted in the United States today.

Marbury v. Madison was an important moment in the development of the United States. Today, it is undisputed that the Supreme Court has the power to decide whether or not a law is constitutional, and the Supreme Court has invalidated many laws as unconstitutional. Even more importantly, the other branches respect the Supreme Court's authority in practice. When the Supreme Court makes a ruling, the other branches respect that ruling and act accordingly. The Congress, for example, will allocate budget money according to Supreme Court decisions, and the Executive will use its power to enforce those decisions.

Discussion Questions

1. Do you think that the Supreme Court's holding in *Marbury v. Madison* was correct?
2. On what legal authority did the Supreme Court base its decision in *Marbury*?
3. What do you think about the accusations of political motivation in *Marbury*?
4. Do you see any similarities or differences between the situation in the United States at the time of *Marbury v. Madison* and the situation in Afghanistan today?

The Supreme Court of Pakistan

Pakistan adopted a supreme court system in its 1973 constitution. The Supreme Court of Pakistan is composed of a Chief Justice and no more than 16 additional justices.¹³⁴ According to the Supreme Court's website: "The President of Pakistan appoints Judges to the Supreme Court from amongst the persons recommended by the Chief Justice of Pakistan on the basis of their knowledge and expertise in the different fields of law."¹³⁵ As you can see below in the excerpts from the Constitution of Pakistan, the Supreme Court has expansive authority. It has original jurisdiction over certain types of intergovernmental disputes, appellate jurisdiction over most cases arising in lower courts, including Pakistan's Federal Shariat Court, and jurisdiction to

¹³³ Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 11 (16th ed. 2007).

¹³⁴ The Supreme Court of Pakistan, *Composition of the Court & Appointment of Judges* (last visited April 7, 2013), available at <http://www.supremecourt.gov.pk/web/page.asp?id=115>.

¹³⁵ *Id.*

render advisory decisions at the request of the president. The Court has the power of both constitutional and statutory review.¹³⁶

**Selected Excerpts from the 1973 Constitution of Pakistan:
Jurisdiction of the Supreme Court**

184. Original Jurisdiction of Supreme Court.

(1) The Supreme Court shall, to the exclusion of every other court, have original jurisdiction in any dispute between any two or more Governments. [Explanation: In this clause, “Governments” means the Federal Government and the Provincial Governments.]

185. Appellate Jurisdiction of Supreme Court.

(1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences.

(2) An appeal shall lie to the Supreme Court from any judgment, decree, final order or sentence.

186. Advisory Jurisdiction.

(1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.

(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.

The Supreme Court of Pakistan is generally regarded as an activist court, and it has frequently clashed with Pakistan’s executive and legislative branches. In 2007-2008, the Court was engaged in a protracted power battle with Pakistan’s executive branch that resulted in constitutional crisis. The conflict began in 2007 when then-president Pervez Musharraf suspended Chief Justice Iftikhar Chaudhry alleging corruption.¹³⁷ This action was particularly interesting given that Musharraf handpicked Chaudhry after he came to power in a 1999 coup. Shortly thereafter, Chaudhry sat on a 12-judge panel that legitimized the coup based on grounds of necessity.¹³⁸

After Chaudhry became Chief Justice in 2005, however, he engaged in an ambitious public interest litigation campaign that brought him into conflict with the Musharraf regime.¹³⁹ In this litigation, the Court halted government-sanctioned construction projects on safety grounds,¹⁴⁰ freed oil and sugar prices from executive-branch control,¹⁴¹ and invalidated the privatization of several state-owned enterprises on corruption grounds.¹⁴² Chaudhry also established a Human Rights Cell within the Supreme Court¹⁴³ and took an activist stance towards illegal detentions

¹³⁶ Shoaib A. Ghias, Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf 344, in *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* 340-377 (Terence C. Halliday et al., eds., 2012).

¹³⁷ *Id.* at 340.

¹³⁸ *Id.* at 345-46.

¹³⁹ *Id.* at 346.

¹⁴⁰ *Id.* at 346-47.

¹⁴¹ *Id.* at 347-48.

¹⁴² *Id.* at 348-49.

¹⁴³ *Id.* at 346.

associated with the U.S. “war on terror” by demanding that the Ministry of the Interior produce lists of missing persons.¹⁴⁴

At the same time, because the Constitution of Pakistan states that the president may not concurrently hold any other government position, members of the legal community were challenging Musharraf’s eligibility to run in the upcoming 2007 presidential election because he remained head of the military.¹⁴⁵ After Chaudhry showed his willingness to rule against regime interests, Musharraf realized that he could not rely on the Supreme Court to uphold his eligibility for reelection. A day after the Court requested that the government report the whereabouts of a list of 148 missing persons in March 2007, President Musharraf suspended Chaudhry.¹⁴⁶

Musharraf suspended Chaudhry by presidential decree, despite the fact that the Constitution of Pakistan does not grant the president the power to unilaterally remove a supreme court justice.¹⁴⁷ Rather, the Constitution gives this power of removal to the Supreme Judicial Council, which is comprised of the three senior-most judges on the Supreme Court and the two senior-most judges on the provincial high courts.¹⁴⁸ Musharraf purposely suspended Chaudhry when the second-most senior judge, Rana Bhagwandas, whose independence the regime feared, was out of the country for personal reasons.¹⁴⁹

Following the ouster of Chaudhry, Pakistan’s bar associations boycotted appearing in court and ignited mass street protests against his dismissal.¹⁵⁰ Syed Fakhar Imam, the former Speaker of Pakistan’s National Assembly, is quoted as saying: “For the first time in Pakistan’s history a chief justice stared a general in the eye and did not blink. This gave the people the strength to protest in defense of the law and the most basic tenets of democracy.”¹⁵¹ On July 20, 2007, the Supreme Court of Pakistan issued a decision reinstating Chaudhry as Chief Justice, but his reinstatement was short-lived.¹⁵²

On November 3, 2007, following the presidential election, Musharraf suspended the Constitution and declared martial law, issuing an order asserting that, “the Supreme Court or a high court and any other court shall not have the power to make any order against the President or the Prime Minister.”¹⁵³ When 64 judges refused to take an oath under this order, Musharraf replaced them.¹⁵⁴ The constitutional and political crisis Musharraf had created by trying to rein in the judiciary, however, had damaged his political viability beyond repair. Facing impeachment, Musharraf resigned in 2008, and his successor, Asif Ali Zardari, used the reinstatement of the

¹⁴⁴ *Id.* at 349.

¹⁴⁵ *Id.* at 350.

¹⁴⁶ *Id.* at 349.

¹⁴⁷ *Id.* at 357.

¹⁴⁸ *Id.* at 361.

¹⁴⁹ *Id.* at 361.

¹⁵⁰ *Id.* at 362-63.

¹⁵¹ *Id.* at 356.

¹⁵² *Id.* at 365.

¹⁵³ *Id.* at 369.

¹⁵⁴ *Id.* at 369.

dismissed judges as a political tool to consolidate his power.¹⁵⁵ Zardari finally bowed to pressure to reinstate Chaudhry, along with other ousted judges, in March 2009.¹⁵⁶

As of 2013, Chaudhry remained Chief Justice of the Supreme Court of Pakistan.¹⁵⁷ In 2012, the Court dismissed Prime Minister Yousuf Raza Gillani on the basis of contempt of court charges.¹⁵⁸ Shortly thereafter in early 2013, the Court ordered the arrest of his successor, Prime Minister Raja Pervez Ashraf, on corruption charges.¹⁵⁹ Supporters of the Court argue that it serves as a critical check on Pakistan's strong executive and is thus a cornerstone of the country's democratic structure. Critics of the Court have called its maneuvers "judicial coups" and have accused the Court of putting Pakistan's democracy at risk by continually fomenting domestic political unrest and intruding in the daily affairs of the government.¹⁶⁰ What do you think?

Judicial Power & Economic Liberalization

Shoaib A. Ghias¹⁶¹ makes the following argument on the relationship between the executive and the Supreme Court in Pakistan. What do you think?

"Public law scholars suggest that economic liberalization expands judicial power since independent courts are useful for targeting low-level corruption, enforcing contracts, attracting investors, and accepting blame for unpopular economic measures. The regime tolerates independent courts because of the judiciary's economic function of fostering growth. In Pakistan, while courts targeted low-level corruption, they also canceled contracts, scrutinized investors, and exposed the regime for unpopular economic outcomes. The regime tolerated the Chaudhry Court because of the judiciary's political function of regime legitimization. But once empowered, the Court began to dismantle the regime's social control and became unreliable for regime legitimization."

V. EMERGENCY POWERS

Thus far we have focused on constitutional functions under normal conditions. But what happens when a nation experiences unexpected events? There are three primary constitutional approaches to dealing with emergency situations:¹⁶²

¹⁵⁵ *Id.* at 372.

¹⁵⁶ *Id.* at 372.

¹⁵⁷ The Supreme Court of Pakistan, Hon'ble Chief Justice of Pakistan (last visited April 8, 2013), *available at* <http://www.supremecourt.gov.pk/web/page.asp?id=204>.

¹⁵⁸ Nasir Habib & Jethro Mullen, Pakistani Supreme Court Orders Arrest of Prime Minister in Corruption Case, *CNN Online*, Jan. 16, 2013, *available at* <http://edition.cnn.com/2013/01/15/world/asia/pakistan-politics>.

¹⁵⁹ *Id.*

¹⁶⁰ Paula Newberg, The Court Rules in Pakistan, *Yale Global Online*, June 21, 2012, *available at* <http://yaleglobal.yale.edu/print/7918>.

¹⁶¹ *Id.* at 351.

¹⁶² Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* 840 (2d ed. 2006).

- (1) **Some constitutions provide special constitutional provisions that identify under what conditions a government may depart from the constitution's normal balance of power and specific procedures to follow in the event of such a departure.**

Nations that use this approach often specify what could qualify as an “emergency” that warrants special powers. Constitutions often define “emergencies” broadly to refer to, for example: invasion, wars outside a nation’s territory, rebellion and civil disorder (including short-term riots), natural disasters, and economic crises.¹⁶³ These constitutions then proceed to describe the types of special powers a government may assume during such times of emergency.

- (2) **Other constitutions are written according to a belief that a constitution does not need to specify what to do in the event of emergency. Instead, the balance of power should be interpreted to take into account the fact that the allocation of power may need to shift during an emergency.**

Professor Gross describes this model as: “While the law on the books does not change in times of crisis, the law in action reveals substantial changes that are introduced into the legal system by way of revised interpretations of existing legal rules.”¹⁶⁴ This model is sometimes criticized for being unprincipled, and allowing those in power to change the legal system under the guise of protecting the country from an emergency.¹⁶⁵ Supporters of this model respond that it is impossible to draw a bright line distinction between “normal” times from times of emergency, so the legal system should reflect reality.¹⁶⁶

- (3) **Finally, some models assert that governments should not depart from the normal balance of powers during emergencies because this would make it too easy for political leaders to use emergencies to give themselves more power.**

Under this option, an emergency cannot authorize a departure from the normal legal system. The ordinary legal system provides the necessary solution to any emergency, and the constitution applies equally in war and in peace. Critics of this model maintain that it is naïve, because a government will necessarily take whatever measures are necessary when faced with serious threats, so law and actual government practice may sharply diverge, revealing an unrealistic legal system.¹⁶⁷ Moreover, critics assert that if the conditions and procedures are not carefully delineated in the constitution, it is actually easier for the government to invoke special emergency powers in normal times and for such powers to become the norm.¹⁶⁸

Discussion Questions

¹⁶³ *Id.* at 841.

¹⁶⁴ Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 Yale Law Journal 1011 (2003).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

1. Which one of these options do you think is the best and why?
2. Does having special emergency powers make it difficult for a government to return to normal powers after an emergency has passed? Is there an incentive to extend the emergency powers indefinitely?
3. Can a line be drawn between normal times and times of emergency? How would you draw that line?
4. Is it naïve to think that some governments can respond to emergencies without special emergency powers?
5. Should the government be held to different standards in times of emergency?

Emergency Powers in Emerging Democracies

Professor Victor Ramraj argues that emergency powers should be viewed fundamentally differently in nations that are trying to establish legality as opposed to nations with established rule-of-law.¹⁶⁹ He believes that states seeking to establish the rule of law face a paradox wherein the government may need to assert extra powers to stabilize the country so that a legal system can develop. But at the same time, invoking emergency powers can give the impression that the government is disregarding constitutional constraints and the rule of law itself.¹⁷⁰ Do you agree with this assertion? Should emerging democracies be given more latitude in invoking emergency powers and suspending the constitution while they are trying to establish the rule of law? Or should emerging democracies be held to the same standard as everyone else in order to avoid setting a bad precedent during development?

The Constitution of Afghanistan follows the first option outlined above and contains special provisions for the separation of powers in times of emergency. Usually, constitutions give more power to the executive and less power to the legislature during times of emergency. The Constitution provides the following:

Constitution of Afghanistan Chapter 9: The State of Emergency

Article 143

(1) If because of war, threat of war, serious rebellion, natural disasters or similar conditions, protection of independence and national life become impossible through the channels specified in this Constitution, the state of emergency shall be proclaimed by the President, throughout the country or part thereof, with endorsement of the National Assembly.

¹⁶⁹ Victor V. Ramraj, *The Emergency Powers Paradox*, in *Emergency Powers in Asia: Exploring the Limits of Legality* 21, 22 (2010).

¹⁷⁰ *Id.*

(2) If the state of emergency continues for more than two months, the consent of the National Assembly shall be required for its extension.

Article 144

During the state of emergency, the President can, in consultation with the presidents of the National Assembly as well as the Chief Justice of the Supreme Court, transfer some powers of the National Assembly to the government.

Article 145

During the state of emergency, the President can, after approval by the presidents of the National Assembly as well as the Chief Justice of the Supreme Court, suspend the enforcement of the following provisions or place restrictions on them:

1. Clause 2 of Article 27;
2. Article 36;
3. Clause 2 of Article 37;
4. Clause 2 of Article 38.

Article 146

The Constitution shall not be amended during the state of emergency.

Article 147

(1) If the presidential term or the legislative term of the National Assembly expires during the state of emergency, the new general elections shall be postponed, and the presidential as well as parliamentary terms shall extend up to 4 months.

(2) If the state of emergency continues for more than four months, the President shall call the Loya Jirga.

(3) Within 2 months after the termination of the state of emergency, elections shall be held.

Article 148

At the termination of the state of emergency, measures adopted under Article 144 and 145 of this Constitution shall be void immediately.

A. Article 143

The first clause of Article 143 addresses the question “what is an emergency”? The clause provides a list of four objective conditions constituting an emergency: (1) war, (2) threat of war, (3) serious rebellion, and (4) natural disasters. The clause further provides that if “similar conditions” arise, the government may also invoke a state of emergency. Does this fact—that the president can invoke emergency powers under “similar conditions”—give the president permission to invoke emergency powers whenever he wants to?

Importantly, the circumstances under which the president may invoke emergency powers are constrained by the requirement that “protection of independence and national life become

impossible through the channels specified in this Constitution.” This means that the president may only invoke the state of emergency if the nation cannot function under the normal system. At the same time, it might be possible for the president to argue that a wide array of conditions could render “national life...impossible” under normal constitutional conditions, thus allowing him to easily invoke emergency powers. Constitutional text is often very vague and open-ended, leaving open a wide variety of possible interpretations. Those entrusted with constitutional interpretation must later fill in those gaps.

While the president’s power to declare the state of emergency may seem vast, the National Assembly must endorse a declaration of emergency powers. Additionally, the National Assembly must consent to extend emergency powers for more than two months. These are important ways in which the legislature can constrain the president’s power to declare and extend a state of emergency.

B. Article 144

This article allows the president to assume increased power by transferring “some powers” of the legislature to the executive. In many countries, the executive assumes more power in times of emergency. This is because of a belief that in times of emergency, the government needs to be able to react quickly, and the normal legislative process may be too time-consuming. Proponents of this theory claim that the country needs decisive leadership, and the executive is best situated to provide this. Additionally, the president has the best access to information and intelligence and is Commander-in-Chief of the military. While it is true that the normal legislative process can be slow and can result in deadlock, the justifications for increased executive power during emergencies also make executive control during such times dangerous.

The fact that the president controls the military and intelligence apparatus, combined with the fact that the president can act quickly on his own initiative, creates a danger that the president can use the state of emergency to take actions otherwise not authorized under the Constitution. As mentioned previously in this Chapter, the president of Egypt frequently used emergency powers to pass legislation by presidential decree that would have been impossible to pass through the normal legislative process. For this reason, Article 144 requires the participation of other government actors before transferring legislative power to the executive. According to Article 144, both presidents of the National Assembly and the Chief Justice of the Supreme Court (the heads of the other branches of government) must consent before legislative powers are transferred to the executive, and the National Assembly has to consent to extend the state of emergency for more than two months.

It is noteworthy that Article 144 does not enumerate which powers of the legislature may be transferred to the executive in times of emergency. The phrase “some powers” seemingly prevents the executive from assuming *all* of the legislature’s power in times of emergency. This lack of specificity, however, could potentially lead the president to assume large portions of the legislature’s power during an emergency.

C. Article 145

Article 145 gives the president, with the approval of the heads of the other two branches, the authority to suspend or restrict a number of constitutional provisions. Importantly, the Constitution limits the provisions that the executive may suspend during times of emergency to the following four provisions, meaning that all other provisions must remain in place during times of emergency.

Constitution of Afghanistan

Article 27, Clause 2

No one shall be pursued, arrested, or detained without due process of law.

Article 36

The people of Afghanistan shall have the right to gather and hold unarmed demonstrations, in accordance with the law, for attaining legitimate and peaceful purposes.

Article 37, Clause 2

The state shall not have the right to inspect personal correspondence and communications, unless authorized by provisions of the law.

Article 38, Clause 2

No one, including the state, shall have the right to enter a personal residence or search it without the owner's permission or by order of an authoritative court, except in situations and methods delineated by law.

Discussion Questions

1. Why do you think that the drafters of the Constitution selected these particular provisions to be suspended in times of emergency?
2. The definition of "emergency" comprises war and natural disaster. But, the suspension of these specific provisions seems focused on the threat of internal rebellion. Why do you think this is?
3. Do you think that suspending these provisions would be necessary in times of emergency? Do you think that any danger might result from suspending these provisions?
4. Why does the president gain more power in times of emergency?
5. How do you define an emergency? How do you tell when a state of emergency ends?

Each of these provisions includes internal constraints, even without special emergency suspension powers:

- (1) Article 27, Clause 2 allows the government to arrest and detain people, but detention must be with *due process of law*.

- (2) Article 36 grants the Afghan people the right to hold demonstrations only under certain conditions:
 - (a) Such demonstrations must be *unarmed*.
 - (b) Demonstrations must be *in accordance with the law*. This means that the government can limit demonstrations simply by passing laws against them through the normal legislative process, so long as those limitations do not conflict with any other part of the Constitution.
 - (c) Demonstrations may only be for *legitimate and peaceful purposes*. Violent demonstrations, or demonstrations for purposes deemed illegitimate, therefore, would not be permitted.
- (3) Article 37, Clause 2 prohibits the government only from searching correspondence *illegally*. If laws permitting the search of correspondence are passed under the normal legislative process, then it is permissible under Article 37.
- (4) Article 38, Clause 2 only forbids the government from entering an individual's home *absent authorization* from either the legislature (via a law) or from the judiciary (via a judicial order). The government therefore has legal channels to conduct searches, even under ordinary conditions.

The common element that each of these provisions is that under ordinary times, the Constitution allows the government to act only under the authority of a legislative or judicial act. The emergency suspension provisions allow the executive to act under its own authority, bypassing the need for legislative or judicial authorization. Given this, are these emergency suspension provisions justified and necessary?

D. Article 146

Article 146 states that the Constitution may not be amended during the state of emergency. This is important because the Constitution is the supreme law in the country, and during states of emergency the normal consultative process that ensures participation from a wide range of actors is suspended. If the president could unilaterally amend the Constitution during a state of emergency, his powers would be virtually unrestrained.

E. Article 147

Article 147 states that if elections are scheduled to occur during a state of emergency, those elections shall be suspended. On the one hand, this is logical. It would be very difficult to conduct elections during an emergency, and the country would need consistent leadership during such a time. On the other hand, this provision could potentially allow the president to declare and extend a state of emergency in order to avoid elections and stay in power.

To address this concern, Article 147 requires that the Loya Jirga is convened if a state of emergency continues for more than four months. Additionally, Article 147 requires elections within two months after the state of emergency ends. The Constitution assigns the duty to

convene the Loya Jirga, however, to the president. If the president declared and extended the state of emergency to avoid elections, and he declined to call the Loya Jirga after four months, what type of recourse would other government actors have?

F. Article 148

Article 148 attempts to avoid the problem of continuously extended emergency powers by explicitly stating that (1) transfer of legislative power to the executive, and (2) suspension of selected provisions of the Constitution, shall be void immediately when the state of emergency ends.

G. Criticisms of Emergency Powers

A primary criticism of special emergency powers is that it is impossible to accurately draw a line between times of “normalcy” and times of “emergency.” Nations often experience long periods of conflict or civil unrest. If a country has a civil war lasting 30 years, is there a 30-year-long emergency, or at some point does the country revert to “normal” times? If the nation reverts to the law of normal times, what determines at what point the emergency ends? This has presented a serious problem for countries that face threats of terrorism. Such countries must constantly balance the importance of counterterrorism with democratic checks and balances on the different branches.

Some countries have responded to threats by extending the state of emergency indefinitely. For example, when enacted in 1928, the Special Powers Act in Northern Ireland (a country that experienced prolonged conflict as a result of its constitutional status and tension between Protestant and Catholic religious groups), was supposed to last for five years. However, the Act subsequently became permanent.¹⁷¹ Similarly, Israel has been under emergency powers since its establishment in 1948, even though the state of emergency was initially supposed to be a temporary provision to last only through the War of Independence.¹⁷² Since 1974, the government has routinely used emergency powers to deal with ordinary situations such as monetary issues and labor disputes.¹⁷³

Under the former government of Egypt, the country was under emergency powers that authorized prolonged detention without filing charges and warrantless searches from 1981 until the regime was overthrown in 2011.¹⁷⁴ The emergency powers authorized the conviction of members of the Muslim Brotherhood, Egypt’s largest opposition group, in military courts on undisclosed charges, and human rights groups strongly opposed the measures.¹⁷⁵ As mentioned previously in this Chapter, the Egyptian Supreme Constitutional Court made a strong showing of judicial independence when it voided numerous laws that Egyptian presidents had passed

¹⁷¹ Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 Yale Law Journal 1011 (2003), reprinted in Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* 877 (2d ed. 2006).

¹⁷² *Id.*

¹⁷³ *Id.* at 879.

¹⁷⁴ *Egypt Renews Emergency Law Powers*, BBC Online, May 26, 2008, available at <http://news.bbc.co.uk/2/hi/7420133.stm>.

¹⁷⁵ *Id.*

pursuant to emergency decree power. Protestors cited the continuous state of emergency powers as a primary reason motivating the mass protests and revolution in Egypt in January 2011.

Emergency Powers in Practice¹⁷⁶

During the August 6, 2011 Wolesi Jirga plenary session, Mr. Siavash Baktash (Kabul) claimed that President Karzai was considering declaring a state of emergency in Afghanistan. “In recent days there are talks about the declaration of a state of emergency by the president. I would like to make it clear to Mr. Karzai that there is no excuse for him to do that and that he will not be able to do so without the confirmation of the National Assembly.” Mr. Siavash went further to warn the president against such a declaration and said that it would turn Afghanistan into a “Middle East”—referring to the recent uprising of the Middle East and North Africa. Mr. Siavash warned: “If the President does go ahead with the state of emergency, no better fate will await him than that of Mr. Mubarak.”

Mr. Abdul Zahir Qadeer also touched on the issue, saying, “There are certainly rumors about the state of emergency, but the President has no authority to declare that without the confirmation of the National Assembly.” Mr. Qadeer went on to say that if the president took such action, it would be very “reckless” of him.

Mr. Nader Khan Katawazai, an MP from the eastern province of Paktika, however, called the debate about the state of emergency “premature.” Mr. Katawazai argued: “No emergency state has been proposed or considered by the President and no official has mentioned it, so it’s premature to discuss it.” He did agree with his colleagues though that in order for the president to declare a state of emergency, confirmation by the National Assembly was necessary: “We all know that the President can’t declare a state of emergency without the approval of the National Assembly.”

VI. EXECUTIVE & LEGISLATIVE POWER IN FOREIGN & MILITARY AFFAIRS

In many countries the chief executive has more power relative to the legislature in foreign and military affairs than in domestic affairs. Many constitutions, such as the constitutions of the United States, France, and Afghanistan, provide that the president is the commander-in-chief of the armed forces. Different constitutions divide the power to declare war and make treaties between the executive and the legislature in different ways. The Constitution of Afghanistan allocates power in foreign and military affairs as follows:

Constitution of Afghanistan

Article 64

The President shall have the following authorities and duties:

(3) Being the Commander in Chief of the armed forces of Afghanistan;

¹⁷⁶ Text of this example quoted from APAP Legislative Newsletter (11 August 2011, Vol. 6, No. 3). See www.sunyaf.org.

- (4) Declare war and peace with the endorsement of the National Assembly;
- (5) Take necessary decisions to defend territorial integrity and preserve independence;
- (6) Dispatch armed forces units outside of Afghanistan with the endorsement of the National Assembly;
- (14) Appoint heads of political representatives of Afghanistan to foreign states as well as internal organizations;
- (15) Accept credentials of foreign political representatives in Afghanistan;
- (17) Issue credential letter for conclusion of international treaties in accordance with the provisions of the law;

Article 75

The Government shall have the following duties:

- (4) Prepare the budget, regulate financial conditions of the state as well as protect public wealth;

Article 90

The National Assembly shall have the following duties:

- (3) Approval of the state budget as well as permission to obtain or grant loans;
- (5) Ratification of international treaties and agreements, or abrogation of membership of Afghanistan in them;

Article 91

The House of People shall have the following special authorities:

- (2) Decide on the development programs as well as the state budget;
- (3) Approve or reject appointments according to provisions of this Constitution.

Article 95

Proposals for drafting the budget and financial affairs shall be made only by the Government.

Article 99

If, during the sessions of the National Assembly, the annual budget, or development program, or issues related to national security, territorial integrity and independence of the country is under discussion, the sessions of the Assembly shall not end pending decision of the matter.

The Constitution of Afghanistan gives almost full authority over war and foreign affairs powers to the executive branch, but the legislative branch does maintain important checks on the executive's powers. One of the most important checks that the legislature maintains over the executive is approval of the budget. A country cannot fight a war without funding it, so the Government of Afghanistan cannot commit troops or engage in hostilities without the National Assembly approving a budget that funds those military actions. While the National Assembly must approve the state budget, it is the executive branch that prepares the budget, so the executive has considerable control over the budget even though the legislature must approve it.

Additionally, while the Constitution gives the president the power to negotiate and sign international treaties, the legislature has the power to ratify international treaties. When the executive signs an international treaty, it is like promising that the country will commit to being a party to the treaty. But a nation does not officially become bound by a treaty until it is ratified.

The Afghan National Assembly therefore has the power to determine what international treaties actually become legally binding on Afghanistan. The Wolesi Jirga furthermore has the power to approve or reject the president's appointments. Thus, while the president has the primary responsibility to select Afghanistan's foreign representatives, the Wolesi Jirga must approve of foreign representatives before they take office.

The United States is also known for concentrating war powers in the executive branch, although Senate approval is required before the president can take many foreign affairs actions. The United States' treaty making process is similar to that of Afghanistan. In U.S. constitutional law, the president is understood to have expansive power in issues of foreign relations or military action because (1) quick action is required when military action is involved, (2) the president has constitutional authority to speak for the nation, (3) the president has better access to relevant information and intelligence,¹⁷⁷ and (4) the military is under the president's control so there is a direct and unified chain of command. One important difference between the two countries is that the U.S. Constitution gives Congress the power to declare war,¹⁷⁸ whereas the Constitution of Afghanistan gives the president the power to declare war, although only with the "endorsement of the National Assembly." Do the justifications that U.S. constitutional law gives for granting the president increased power in foreign and military affairs apply equally to the case of Afghanistan?

You will learn more about the executive power in foreign and military affairs under the Constitution of Afghanistan in Chapter 3: The Executive.

VII. THE SEPARATION OF POWERS IN AFGHANISTAN: A CASE STUDY

The following is an English translation of the Supreme Court of Afghanistan's decision in the 2007 Spanta case¹⁷⁹ referred to in the introduction to this Chapter. The opinion grapples with the status of the separation of powers in Afghanistan and the question of who interprets the Constitution of Afghanistan.

Spanta Opinion, The Supreme Court of the Islamic Republic of Afghanistan (May 13, 2007)

Letter No. (944) 626 dated May 13, 2007 of the Ministry of Parliamentary Affairs sent to the Supreme Court of the Islamic Republic of Afghanistan at the request and directive of President of the Islamic Republic of Afghanistan, was set forth for discussion in the High Council of the Supreme Court. The Supreme Court reviewed, assessed, and considered the contents of the letter from a legal point of view. The letter contained three questions about the interpellation¹⁸⁰ of the two Government Ministers—Ustad Akbar, the Minister for Refugees and Repatriation,

¹⁷⁷ Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* 826 (2d ed. 2006).

¹⁷⁸ U.S. Const. art. I, § 8, cl. 11.

¹⁷⁹ Spanta Opinion, The Supreme Court of the Islamic Republic of Afghanistan (May 13, 2007).

¹⁸⁰ Interpellation means "a procedure in some legislative bodies of asking a government official to explain an act or policy, sometimes leading, in parliamentary government, to a vote of confidence or a change of government."

and Dr. Spanta the Minister of Foreign Affairs—by the Wolesi Jirga, which led to a no-confidence vote for both of the ministers on May 10 and 12, 2007.

Having assessed its content, the letter does not specifically consider the no-confidence vote declaration against the Minister for Refugees and Repatriations on May 10. However, the Wolesi Jirga did not attain a majority vote of no-confidence against the Minister of Foreign Affairs because the first vote was confusing and considered null according to Article 92, Clause 3 of the Constitution. The Wolesi Jirga's second vote on May 12 was questionable to the President for the following reasons:

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

The Office of the President has asked the Supreme Court for clarification on these three questions.

The Supreme Court of Afghanistan, as the independent pillar of the judiciary of the country, believes that the National Assembly of Afghanistan is a platform for fulfilling the sacred wishes of the people of Afghanistan to achieve the rule of law, stability, and democracy. The National Assembly has taken firm steps within its authority and is cooperating through legal procedures with the other two branches of the Government (the Executive and the Judiciary), just as these other

two branches have played a similar role in strengthening the National Assembly (Legislature). In this spirit, the Supreme Court addresses this issue according to legal analysis and law enforcement. After assessing the issue, the Supreme Court deemed it necessary to obtain additional information from the Ministry of Parliamentary Affairs and the Wolesi Jirga. The Court also asked the Ministry of Foreign Affairs to provide lawful documents that show diplomatic communications [between Afghanistan and Iran] on the subject of the protection of dignity and on efforts to avoid the forceful expulsion of Afghan refugees from the Islamic Republic of Iran.

Although we could not obtain the requested documents from the Wolesi Jirga, the Ministry of Parliamentary Affairs provided to the Supreme Court the procedure prepared by Wolesi Jirga and the list of Wolesi Jirga members who took part in the May 10 and 12 sessions. These documents explain the procedure of the Wolesi Jirga in the process of interpellation of the two ministers, Ustad Akabar and Dr. Spanta. Additionally, the Ministry of Foreign Affairs, at the request of the Supreme Court, sent documents that explain actions and continued contacts of the Ministry of Foreign Affairs with the Islamic Republic of Iran on the issue of Afghan refugees. These documents include 49 letters that indicate that the Iranian authorities put direct and indirect pressure on Afghan refugees, ignoring multilateral agreements signed to avoid forceful expatriation of the refugees and to extend their voluntary repatriation period. The letters demonstrate the diplomatic efforts of the Ministry of Foreign Affairs in cases of crime, assault, and battery of the refugees. [According to these letters, the Ministry of Foreign Affairs] requested that the Islamic Republic of Iran consider the brotherly and Islamic relations between the two neighbors, to adhere to the agreements that the two countries had signed and to allow the refugees to stay in Iran and to live in peace and dignity until the situation was conducive for their return. These letters are attached to this opinion.

In this decision, the Supreme Court considers the action of the Wolesi Jirga, utilizing its authority under Article 92 of the Constitution in the process of interpellation. The Supreme Court also seeks to reply to the three questions posed by Office of the President regarding the authority granted by Article 92 as applied to a no-confidence vote. On this issue, the Office of the President has asked for Supreme Court's judgment, interpretation, and assessment. In response, the Supreme Court of Afghanistan reasons and holds that:

Article 92 of the Constitution provides:

The Wolesi Jirga, on the proposal of 20 percent of all its members, shall make inquiries from each Minister.

If the explanations given are not satisfactory, the Wolesi Jirga shall consider the issue of a no-confidence vote.

The no-confidence vote on a Minister shall be explicit, direct, as well as based on convincing reasons. The vote shall be approved by the majority of all members of the Wolesi Jirga.

This Article should be interpreted as follows:

- (1) As indicated in the text of Article 92, the justifications for interpellation shall be thoroughly analyzed. In a no-confidence vote, the Wolesi Jirga plays the role of a national court delivering a vote of no confidence in a Minister for failure to perform specific duties. According to Article 77 of the Constitution, Ministers of the Government are responsible to Wolesi Jirga. If a Minister fails to provide a satisfactory explanation of his performance of duties specified under Article 77, the Minister shall be considered responsible for this nonperformance of duties specified to him. In such a case, the Wolesi Jirga may either decide to allow the Minister to remain in his post, or it may consider a vote of no confidence against him pursuant to Article 92. If the Wolesi Jirga decides that the explanations are not satisfactory and refers the issue for a no-confidence vote, the no-confidence vote is the final decision issued by the national court, provided that the reasons are clear and convincing and directly related to nonperformance of specific duties of a Minister, and not based on actions of another person or authority that the Minister has no control over. Under Article 92, a majority of members of the Wolesi Jirga must vote for no confidence in order to unseat a Minister.

As provided in the questions of Office of the President, if the interpellation of the Minister of Foreign Affairs is due to the poor conditions of Afghan refugees in Iran and the expulsion of those refugees from Iran, which because of actions by the Iranian Government, it should be admitted that preventing such an action is beyond the authority and specific [Article 77] duties of the Minister. He therefore should not have been considered guilty, and this is not a proper justification for a no-confidence vote of the Minister. The expulsion of Afghan refugees directly by Iran does not relate to the duties of the Minister, and because preventing Iran from such a decision is not within the specified responsibility of the Minister. As previously mentioned, the Minister of Foreign Affairs, as part of his duty under Article 77 of the Constitution, has continuously maintained diplomatic contacts with Iran on the issue of refugee expulsion. To consider him guilty of this is beyond the meaning of the law.

- (2) The no-confidence vote took place on May 10, 2007, during which 124 members of the Wolesi Jirga voted for no confidence [50 percent of the 248 members at that time]. One contested vote does not represent the majority of the members of the Wolesi Jirga, and this in itself nullifies the case because out of 248 votes, 124 for no confidence was against 124 remaining votes, and because this does not constitute a majority, the vote is nullified according to law. However, according to legal principles, both Islamic and international, votes that end in ties are counted as invalid. National Assembly procedures for

the past two years had practiced holding a second vote if the first one was a tie, and therefore not valid. The second vote held by the National Assembly on May 12, 2007 indicates that the National Assembly considered the first vote void, otherwise the second vote wouldn't have occurred.

- (3) The second vote, at which more members of the Wolesi Jirga were present, has no legal base and is unlawful, as the first vote on May 10 ended with the interpellation session and a ruling that there would not be a second vote on the same already decided subject. In the second voting session, there were new members who were not present at the first voting session and therefore were not informed of whether the reasoning and opinions on the issue were convincing and justified. How would the decision be legal if some members do not know what happened in the last session?

Furthermore, the last paragraph of Article 65 of the National Assembly Code of Conduct clearly states: "After the declaration of the results of an approved issue, a second discussion shall not take place." Thus, the May 10, 2007 vote, which resulted in 124 no-confidence votes and 124 remaining votes, nullifies the issue pursuant to Article 92 of the Constitution [which requires a majority for a no-confidence vote]. The second vote on May 12, 2007 was therefore invalid.

- (4) Another legal reason for this decision is that the second vote session took place on the same issue, which renders it a revision of the first interpellation decision. Pursuant to legal principles and established law, revision of penal judgments may only occur in favor of the offender, not against him. Therefore, the May 12 vote of no confidence is not consistent with legal principles. Thus, the Supreme Court of Afghanistan, while paying tremendous respect to the legal jurisdiction of the National Assembly, has an obligation to express its impartial judicial opinion on the referred issue under Article 121 of the Constitution of Afghanistan, at the request of Government. Based on this principle, the High Council of the Supreme Court puts forth this explanatory opinion relating to Article 92 of the Constitution of Afghanistan and the no-confidence vote sessions of the Wolesi Jirga held on May 10 and 12.¹⁸¹

After the Supreme Court issued this ruling, the National Assembly refused to recognize the power of the Supreme Court to decide this case.¹⁸²

Discussion Questions

¹⁸¹ At the time of this opinion, the members of the Supreme Court of Afghanistan were: Chief Justice Abdul Salam Azimi, Justice Ghulam Nabi Nawayee, Justice Zamen Ali Behsudi, Justice M. Omar Babrakzai, Justice Mawlawi Mohammed Qasem, Justice Abdul Rashid Raashed, Justice Abdul Halim Nasimi, and Justice Bahudin Baha.

¹⁸² J. Alexander Thier, U.S. Inst. of Peace, *The Status of Constitutional Interpretation in Afghanistan* 1.

1. Are you persuaded by the legal reasoning that the Supreme Court uses in the *Spanta* case? Why or why not?
2. Was the *Spanta* case properly before the Supreme Court?
3. Do you think that the *Spanta* decision was decided based on legal or political grounds?
4. On what legal authority did the Supreme Court base this decision?
5. What similarities and differences do you see between the *Spanta* case and the U.S. case *Marbury v. Madison*, excerpted above?

This decision touches on a wide variety of separation of powers issues and issues of constitutional interpretation. Several of the issues covered will be analyzed in turn.

A. Article 121: Who Has the Power to Interpret the Constitution?

One important fact of the *Spanta* case is that the reason the Supreme Court was deciding the case was because the Government had requested that they do so. The Constitution of Afghanistan provides the following:

Constitution of Afghanistan

Article 121

At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation.

According to this article, the Supreme Court can only interpret the Constitution if the Government or courts ask it to. The legislative branch, however, does not have the authority to request that the Supreme Court review the consistency of laws with the Constitution. Does this structure render it difficult for the Supreme Court to function as an independent body in politically sensitive cases such as the *Spanta* decision? Does it create a situation where the Supreme Court will only hear cases when the government actor referring the case is sure it can win?

In the *Spanta* case, for example, one could argue that the Government would not have requested that the Supreme Court decide the case if it was not reasonably certain that the Court would rule in its favor. One could also argue that once the Government has referred a case to the Supreme Court, the Court is then expected to rule in the Government's favor. Do you think that the decision in *Spanta* was based on legal principles or on the delicate political interplay between the branches of the government?

On the other hand, some might argue that it is important for the functioning of the government for the executive and the judiciary to have the option of referring potentially problematic

legislation to an independent judiciary to review its validity. One could further argue that it would make no sense to give the legislature the authority to request that the Supreme Court review laws since the legislature makes the laws.¹⁸³ In addition, one could argue that once lower Afghan courts become more established and developed, they will be able to request Supreme Court review of their decisions and that this will be an important way to achieve consistency in judicial rulings throughout the country.¹⁸⁴

At the same time, others might argue that minority members of the legislature who opposed a particular law should be able to refer that law to the Supreme Court to rule on its legality. This would help allow minority representation in the legislature.

Some might argue that this issue is irrelevant because after the Supreme Court issued the *Spanta* opinion, the legislature refused to recognize the decision. If a court's rulings are not recognized and enforced, what effect do they have? Some might also argue that the Supreme Court is not the proper body to conduct constitutional review of legislation because in 2008 the government of Afghanistan passed a law establishing an Independent Commission for Supervision of the Implementation of the Constitution, as provided for in Article 157 of the Constitution. This Commission, many argue, has a clearer mandate to interpret the Constitution than the Supreme Court does. You will learn more about this Commission in Chapter 6: The Judiciary.

B. What Constitutes a “Convincing Reason?”

The first issue the Supreme Court addresses is what constitutes a “convincing reason” pursuant to Article 92. Determining what a particular word means in the context of the constitution and how it applies to a particular case is a common type of constitutional interpretation. The Court states that in order for a no-confidence vote to be valid, it must be based on reasons that are “clear and convincing and directly related to the nonperformance of specific duties of a Minister, and not based on actions of another person or authority that the Minister has no control over.” In the opinion, it is unclear what legal authority the Supreme Court relies on to read the fact that a “convincing reason” necessarily includes that it be directly related to the duties of a Minister. What legal authority do you think the Supreme Court is relying on in making this conclusion? Do you think it was justified in using this reasoning?

One way to assess constitutional interpretation is to examine how a particular interpretation will apply to future cases. Will the standard “clear and convincing and directly related to the nonperformance of specific duties of a Minister, and not based on actions of another person or authority that the Minister has no control over” be a good standard with which to assess future no-confidence votes? When asking whether the Wolesi Jirga has acted properly in delivering a vote of no confidence against a minister, is it proper to ask whether the reasons related to the minister's duties?

¹⁸³ There is, however, inconsistency in this argument, because Article 121 also grants the Executive the authority to request that the Supreme Court review international treaties and covenants. The Executive is generally responsible for writing treaties and covenants. In addition, a sizeable minority of the legislature might want to challenge a law that it opposed on constitutional grounds.

¹⁸⁴ A counterpoint to this argument is that lower courts will not refer their cases to the Supreme Court unless they think that the Supreme Court will affirm their decision because courts do not want to be overturned.

Another argument that one could make on this issue is that what constitutes a convincing reason should be the internal business of the legislature and that a court should not be permitted to second guess the legislature's determination in this regard. Many countries have legal doctrines protecting certain political decisions made by the government from judicial scrutiny. Do you think there is support for prohibiting the judiciary from evaluating the legislature's decision in this case?

C. What Constitutes a Majority?

The Supreme Court continues to conclude that because a valid majority was never attained in the no-confidence vote, the vote was valid. This raises the issue of what exactly constitutes a majority in a complicated case like such as *Spanta*. Article 92 provides that: "The vote shall be approved by the majority of all members of the Wolesi Jirga." First, it is important to note that Article 92 requires a majority of *all* members of the Wolesi Jirga, as opposed to a majority of members present at that particular session. This means that if less than 50 percent of the members are present in a given session, no legislation can be passed.

The formula for determining a majority is indeed 50 percent plus 1. But here the Court faces a tie, followed by a second vote that did achieve a majority. The Constitution does not provide any guidance regarding what to do in the case of a tie. When a constitution doesn't provide any guidance on a specific situation like this, the court interpreting it must turn to other legal authorities to fill these gaps. In this case, the Court concluded that, "according to legal principles, both Islamic and international, votes that end in ties are counted as invalid." The Court continued to explain that the National Assembly had a history of holding a second vote after a tie, but that the National Assembly Code of Conduct prohibited a second vote. Turning to international legal norms, procedural rules, and local practice are common ways of fillings gaps in a constitution.

The Court then continues by declaring that because the first vote was a tie, a majority did not cast a vote of no confidence for the Foreign Minister. According to the text of the Constitution—"The vote shall be approved by the majority of all members of the Wolesi Jirga"—this appears to be a reasonable interpretation. Do you agree with this conclusion? If the Wolesi Jirga no-confidence vote ends in a tie rather than a majority, are future votes foreclosed? Or are future votes necessary to break the tie?

D. Was the Second Vote Valid?

The Supreme Court then concludes that the second vote was independently invalid because some of the Wolesi Jirga members who voted in the second vote were not present for the debate that occurred before the first vote. The Court argues that this makes the second illegal because some voting members were not well informed of the situation on which they were voting. On what authority does the Court base this assertion? Article 92 requires only that "[t]he vote...be approved by the majority of all members of the Wolesi Jirga." It contains no requirement that the voting members be well informed before casting a vote of no confidence. Is the Supreme Court's conclusion that the second vote was invalid because some members of the majority weren't present at the first vote reasonable? Is it the right decision?

E. A Political Decision?

What does this case tell us about the separation of powers in Afghanistan? What does the case tell us about the nature of relationship between the three branches of the government of Afghanistan? The *Spanta* case has been criticized for being a tool that President Karzai used to settle a score with the National Assembly to achieve his goals. Do you agree or disagree with this criticism? Why?

Discussion Questions

1. After reading this chapter and the *Spanta* case, do you think that all of the branches of the Government of Afghanistan have equal power?
2. Based on what happened in the *Spanta* case, do you think that each of the branches of the Government of Afghanistan are able to exercise the power granted to them in the Constitution? Can you think of examples to support your answer?
3. Can you think of other instances in Afghanistan in which the president has asked the Supreme Court to make a ruling? What was the result?

VIII. CONCLUSION: THE FUTURE OF THE SEPARATION OF POWERS IN AFGHANISTAN

One of the biggest separation of powers challenges that Afghanistan will face on the coming years is the difference between **de jure separation of powers** (how it is written in the constitution) and **de facto separation of powers** (how it is actually practiced).¹⁸⁵ The Constitution grants many formal powers to the legislature and the judiciary to act as checks on the power of the executive. In reality, however, the legislature and the judiciary may not be able to exercise these powers.

First, the judiciary may not be able to act independently to check the power of the executive because the appointment and dismissal of all lower court judges requires unilateral presidential approval, with no parliamentary approval requirement.¹⁸⁶ Furthermore, the judiciary depends on the executive for devising and implementing its budget. The executive has frequently used this to pressure the judiciary.¹⁸⁷

Second, the institutional weakness of the National Assembly has undermined its capacity to check the power of the executive. This institutional weakness stems from the National Assembly's fragmentation and absence of political parties, which has made the body's decision-making process cumbersome and inefficient. One example of this weakness is in the Wolesi

¹⁸⁵ Special thanks to Professor Mohammad Isaqzadeh for providing the idea and information for this section.

¹⁸⁶ See Ranier Grote, *Separation of Powers in the New Afghan Constitution*, 64 ZaöRV 897 (2004).

¹⁸⁷ See Lorenzo Delesgues & Yama Torabi, Integrity Watch Afghanistan, *Reconstructing National Integrity System Survey* (2007).

Jirga's failure to establish a special commission to "inquire about and study government actions" as provided for in Article 89 of the Constitution. In this instance, even though the Wolesi Jirga has de jure power to monitor government actions, its institutional weakness prevents it from exercising that power and therefore prevents it from acting as a check on executive power.

Third, Afghanistan has a highly centralized system of government, with immense power concentrated in the presidency. In particular, the president has extensive unilateral powers over appointments to sub-national administrations such as provincial and district officials and the police. This power gives the president substantial leverage in bargaining with members of the National Assembly, thus making it more difficult for the legislature to act as a check on the executive.¹⁸⁸

How Afghanistan will be able to reconcile these gaps between de jure and de facto separation of powers remains to be seen in the coming years.

¹⁸⁸ See Anne Evans, Nick Manning, Yasin Osmani, Anne Tully & Andrew Wilder, Afghanistan Research and Evaluation Unit & The World Bank, *A Guide to Government in Afghanistan* (2004).

CHAPTER 3: THE EXECUTIVE

I. INTRODUCTION

During the deliberations leading up to the Constitutional Loya Jirga of 2003, President Karzai made the following statement: “In countries where there are no strong institutions, where the remnants of conflict are still there, we need a system with one centrality, not many centres of power.” While the Constitution provides for other branches of government and articulates a substantial set of individual rights, it clearly endorses this vision of a powerful central authority as a stabilizing force and therefore imbues the president with broad authority to govern the state.

In this chapter, we will examine the breadth of presidential power under the Constitution and analyze the costs and benefits of centralizing power in the executive. We begin with the formal structure established by the Constitution, including presidential elections, benefits, term limits, qualifications, accession, and hierarchy. We then examine the president’s powers and responsibilities through his dual roles as head of state and the head of the Government and its various Ministries. Throughout our analysis of the current Constitution, we will refer to elements from the 1964 Afghan constitution to compare them with Afghanistan’s current system. In Chapter 4: Government and Administration, we will look beneath the executive to see what the Constitution has to say about the president’s administrative agencies and government ministries.

Discussion Questions

1. Do you agree with President Karzai’s statement above?
2. If such a system is enshrined in a country’s constitution, how difficult is it to change?
3. Does President Karzai’s approach focus too much on short term stability, while limiting the long term potential for representative government? Or is this a necessary sacrifice in a country still struggling to establish stable government?

II. FORMAL STRUCTURE

A. Overview of the Executive

Of the 162 Articles in the 2004 Constitution, only eleven fall under Chapter 3: The President. In order to understand the duties and powers of the president, as well as the president’s relationship with the other branches of government and government officials in the ministries, we must look first to the text of the Constitution.

What is the position of president?

Constitution of Afghanistan

Article 60

The president is the head of state of the Islamic Republic of Afghanistan, executing his authorities in the executive, legislative and judiciary fields in accordance with the provisions of this Constitution.

There is a great deal of substance in this short statement. Very generally, it means that the Constitution grants the president certain powers in each of the three branches of government. In the executive field, the president commands the armed forces (Art. 64(3-6)), proclaims states of emergency (Art. 64(8)), appoints and oversees ministers and other government officials (Art. 64(11)), establishes commissions (Art. 64(20)), and represents the country to foreign nations (Art. 64(14, 15, 17)). In the legislative field, the president determines national policy with the National Assembly (Art. 64(2)), endorses and vetoes legislation (Art. 64(16), Art. 79), convenes extraordinary sessions of the Assembly during recess (Art. 107), and appoints one-third of the Meshrano Jirga (Art. 84). In the judicial field, the president appoints the justices of the Supreme Court and lower judges (Art. 132), and approves sentences of capital punishment (Art. 129).

Another important point to note about Article 60 is that it provides for an explicit limitation on the president's power. It grants the president the power to execute these authorities only "in accordance with the provisions of this Constitution." Even if the president acts in furtherance of an explicit constitutional duty, the action must not contradict or violate any other constitutional provision. For example, under Article 64(10) the president has the power and duty to appoint the ministers of the government. However, Article 72 lists the qualifications of a minister, which the president must respect. He may not appoint a minister younger than 35 years of age or a minister who has been convicted of crimes against humanity, a criminal act, or deprivation of civil rights. In this way, even the president must obey the Constitution. We will analyze these issues further as we proceed, but for now take a moment to consider what it means to be the head of state of an Islamic Republic.

Discussion Questions

1. What "authorities" should the head of state possess in the executive, legislative, and judiciary fields?
2. What are the dangers of giving the head of state expansive powers in all three branches?
3. If the drafters of the Constitution were worried about concentrating power in the executive, what protections could they build into the Constitution?

B. President and Vice Presidents

The very first Article in Chapter 3 of the Constitution, Article 60, sets the basic structure of the executive branch: one president and two vice presidents (one "first vice president" and one "second vice president"). You might ask why two vice presidents are required instead of just one. Some commentators suggest that this feature was intended to encourage ethnic diversity at the highest level of state authority, and thus far the positions have in fact been filled by ethnic

minorities.¹ In addition, when violence and threats of violence against political leaders are commonplace, it makes sense to take extra precautions to preserve the continuity of government. Article 60 establishes that the first vice president is next in line in case of the absence, resignation, or death of the president, followed by the second vice president.² It also requires a candidate running for the office of president to name his two vice presidential running mates so the public is aware of the entire ticket (list of candidates running as a group) before voting.

The Afghan vice presidents' constitutional roles appear to be exclusively limited to the executive branch. Indeed, apart from providing a clear successor to the president in the stated circumstances, the Constitution does not elaborate on the role of the vice presidents. Although most nations limit the vice president's role to the executive branch, not all do. For example, Article I Section 3 of the United States Constitution states that: "The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided. The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States." Under the United States Constitution, the vice president is a member of both the executive and the legislative branches. As you learned in Chapter 2 on Separation of Powers, some may argue that this violates the doctrine of separation of powers. Likewise, it has been and remains controversial in the United States, although the modern vice president's legislative role is generally minimal and almost always ceremonial rather substantive.³

C. Accession

The Constitution provides for explicit mechanisms for transferring executive authority in situations where the sitting president is incapacitated. These mechanisms are first addressed in Article 60.

Constitution of Afghanistan

Article 60

In case of absence, resignation or death of the President, the first Vice President shall act in accordance with the provisions of this Constitution. In the absence of the first Vice President, the second Vice President shall act in accordance with the provisions of this Constitution.

Taken alone, this provision is incomplete. While it indicates the conditions that could necessitate the transfer of executive authority (absence, resignation or death of the president), and it gives the constitutional order of the transfer (first vice president, then second vice president), it concludes with a general statement instead of explicit instructions. This provision simply lays the

¹ Rainer Grote, *Separation of Powers in the New Afghan Constitution*, 64 Heidelberg Journal of International Law 897, 915 (2004).

² It has been argued that the creation of the second vice president post was an expedient political decision made by President Karzai to obtain support for the presidential system by critical powerbrokers before the Constitutional Loya Jirga. International Crisis Group, *Afghanistan: The Constitutional Loya Jirga*, 3 (12 December 2003), <http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/B029%20Afghanistan%20The%20Constitutional%20Loya%20Jirga.pdf>.

³ United States Senate, Vice President of the United States (President of the Senate), *available at* http://www.senate.gov/artandhistory/history/common/briefing/Vice_President.htm.

foundation, and we must look to other Articles for the complete structure of this conditional transfer of authority.

Articles 67 and 68 build on Article 60's foundation. Under Article 60, the imperative is simply that the first vice president "shall act in accordance with the provisions of this Constitution." These provisions are given in Articles 67 and 68. Article 67 states unequivocally that in certain circumstances, "the First Vice President shall assume authorities and duties of the President." These circumstances are: "resignation, impeachment, or death of the President, as well as an incurable illness impeding performance of duty." In order to qualify as a "resignation" under Article 67, "[t]he President shall personally tender resignation to the National Assembly." Also clearly defined in Article 67, an incurable illness must be "verified by an authoritative medical team assigned by the Supreme Court." If one of these situations occurs, it is clear from Article 67 that the vice president's constitutional obligations are to assume the authorities and duties of the president.

But what about presidential absence? You may have noticed that while Article 60 lists "absence" as a condition triggering its imperative, the first clause of Article 67 does not. Is there another provision governing the First Vice President's actions in case of presidential absence? Indeed, the final clause of Article 67 states: "In the absence of the President, the duties of the First Vice President shall be determined by the President." In other words, the president can decide which duties to delegate to his first vice president in his absence. This makes sense because of all of these potential scenarios, only presidential absence allows the president to specifically select the duties that he wants to delegate to the vice president, and there may be valid reasons why the president may not want to delegate all of them. However, in case of resignation, impeachment, death, or incurable illness impeding performance, an automatic transfer of presidential authority is required.

In cases where a vice president must assume the authorities and duties of the president, "elections for the new President shall be held within 3 months in accordance with Article 61 of the Constitution." The vice presidents can nominate themselves as presidential candidates. During the time when a vice president is acting as interim president, Article 67 does not allow him to "1. Amend the Constitution; 2. Dismiss ministers; 3. Call a referendum." These are two very interesting provisions. Why might the Constitution's drafters have included such powerful limitations on vice presidential power? One possible motivation might have been to promote socially constructive incentives. This way, the vice president knows that if the president dies, is impaired or forced to resign, and he rises to the position, his powers as interim president are substantially limited and he must face an election in only three months. Another explanation is that if a president is impeached, the legitimacy of his administration may be substantially damaged. It may make sense to give the voters the opportunity to replace the administration with new elected officials rather than simply elevate another politician aligned with the disgraced former president.

Discussion Question

In the American presidential system, if the vice president is elevated to the presidency, he completes the time remaining in the presidential term before another election is held. Clearly

there is an element of stability in this continuity, and such a system is not facially unfair since the vice president was elected on the same ticket as the president. Can you think of arguments for the Afghan system? Can you think of arguments for the American system?

Article 68 adds more to this system of accession. If a vice president dies or resigns, the president may appoint a replacement with the endorsement of the Wolesi Jirga. As you can see, the same limitations on the power of an interim president apply in this case as were discussed above.

Constitution of Afghanistan

Article 68

In case of simultaneous death of the president and the First Vice President, the Second Vice President, the president of the Meshrano Jirga, the president of the Wolesi Jirga, and the Foreign Minister shall succeed respectively and, in that order, and, according to Article 67 of this Constitution, shall assume the duties of the President.

D. Benefits

Pay and benefits for public officials is always a controversial issue. One reason to include constitutional provisions on this issue is to make it more difficult for public officials to use their authority to enrich themselves at the public's expense. After all, it would be much more difficult for public officials to amend the Constitution than it would be to simply write a new law or repeal an old one to allow this type of self-enrichment.

Article 70 requires the president's salary and expenses to be regulated by law and provides that upon completing his term, the president "shall be entitled to financial benefits of the presidency for the rest of his life in accordance with the law." These benefits are denied to a president who is "dismissed" from the position. Why do you think the drafters included these elements of this provision? By requiring presidential salary and benefits to be regulated by law passed by the legislature, the Constitution provides a check on a possible source of corruption.

What about lifetime financial benefits? After all, a presidential term is only five years, but this provision of Article 70 means each president will continue to receive presidential salary for the rest of his or her life. One reason may be that providing lifetime pay reduces incentives to abuse the position and steal public funds for private gain. Additionally, this provision may reflect the uniqueness of the presidential position and the practical realities of life after the presidency. Once you have served as the head of state you are likely overqualified for any other job, and there are likely substantial security reasons for keeping former presidents out of the job market.

E. Presidential Fiduciary Duties

Fiduciary Duties & The Law of Agency

The preceding discussion about benefits ties neatly into our next subject: presidential fiduciary duties. It is important to note that the Constitution does not use the terms "fiduciary duty" or

“agency,” and we use these terms to describe, by analogy, this particular set of constitutional limitations on presidential power. What are fiduciary duties? The concept of a fiduciary duty typically arises in agency law, where an agent is a fiduciary of the principal. In other words, when you, as the principal, designate someone as your agent for a particular purpose, they owe you certain duties in the performance of that purpose. Those are called fiduciary duties. Very generally speaking, these duties require the agent to use the legal powers granted by the principal for the sole purpose of advancing the aim the relationship was formed to pursue.⁴

In a democratic republic, the people elect representatives to act as their agents, granting them authority to make decisions (laws) that bind the people as principals. In the legislature, the elected officials represent particular segments of the national population. In theory, each representative pursues the interests of his or her constituents, bargaining and compromising to obtain their desired legislative results. Legislators who don’t achieve the results desired by their constituents are held accountable in the next election.

In a similar sense, the president is an agent of the people as well, bestowed with authority to take actions on their behalf. But the president is different from a legislator. The authority of the executive is vested in an individual, in contrast to the plurality of legislators. The president may be considered the agent of the nation, not just a segment of the population. His job is so critical to the functioning of the government and the nation that it is understood that he must do more than simply obtain what the majority of people desire. For example, in ensuring the laws are properly executed, or providing for the national defense, he may find that he must act against the immediate desires of a majority of voters in the interest of the nation.⁵

According to Article 4(2), “the nation is composed of all individuals who possess the citizenship of Afghanistan.” Article 4(1) in turn provides: “National sovereignty in Afghanistan shall belong to the nation, manifested directly and through its elected representatives.”⁶ To capture the concepts of agency and fiduciary duties in the language of Article 4, we can say that the president is an agent of the sovereign nation of Afghanistan, bestowed with authority to act on behalf of the citizens of Afghanistan. Keep the agent-principal relationship and the concept of fiduciary duties in mind while examining Article 66 next.

The Constitution of Afghanistan

Article 66

⁴ See generally, Frank Easterbrook & Daniel Fischel, *Contract and Fiduciary Duty*, 36 Journal of Law & Economics 425 (1993).

⁵ “When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection.” The Federalist No. 71, at 412 (Alexander Hamilton) (Kathleen Sullivan ed., 2009).

⁶ Some scholars argue that the true source of sovereignty depends on who possesses the ability to elect and remove those in power. “According to [Jean] Bodin’s method, if the people have the ability to elect and remove those who are at the top of the chain of power, they are in fact sovereign regardless of the legal or constitutional doctrine used to explain and justify the operation of the political system. . . . The fact remains that constitutional republics worthy of the name, regardless of who or what is called sovereign, markedly tend toward de facto popular sovereignty.” Donald S. Lutz, *Principles of Constitutional Design* 140–41 (2006).

(2) The President shall not sell or bestow state properties without the provision of the law.

(3) The President cannot act based on linguistic, sectarian, tribal, and religious as well as party considerations during his time in office.

The purpose of these clauses seems clear. The first clause seeks to prevent abuses by the president through his authority over state properties and constrains that authority by limiting it to that which is authorized by law.⁷ This limits presidential discretion on the administration of state properties and enables the legislature to pass laws governing such presidential actions. This is a classic example of constitutional separation of powers, designed to protect the people against tyranny and corruption.

The second clause is a bit subtler. It too seeks to prevent presidential abuses, but it does so by enumerating particular prohibited purposes that may not serve as a justification or motivation for the use of presidential authority. As the senior elected official of the executive branch, the president represents all the people of Afghanistan, not just his family, tribe, or province. Under Article 66, the president must “take into consideration the supreme interests of the people of Afghanistan,” not just those of a particular favored group.

Articles 151, 152, 154, and 155 all appear to serve the same general interests in limiting corruption and self-dealing that we have described in this section.

Constitution of Afghanistan

Article 151

The President, Vice Presidents, Ministers, Chief Justice and members of the Supreme Court, the Attorney General, Heads of the Central Bank and National Directorate of Security, Governors and Mayors, during their term of offices cannot engage in any profitable business with the state.

Article 151 addresses concerns about self-dealing and self-enrichment by public officials in positions of authority with the opportunity to direct government resources to their own benefit. Note that this provision does not prohibit all profitable business activities, only profitable business with the state. Is this provision currently enforced? If you were in one of these positions, would you find this provision to be an unfair and overly broad restriction on your economic activities? Note that commercial law generally permits directors and other corporate officers to engage in self-dealing transactions as long as they satisfy certain standards protecting the other shareholders. Should this provision be amended to allow self-dealing transactions that meet standards of fairness designed to ensure the transaction benefits the nation, or is the blanket prohibition warranted?

Constitution of Afghanistan

⁷ Art. 9 states: “Mines and other subterranean resources as well as historical relics shall be the property of the state. Protection, management and proper utilization of public properties as well as natural resources shall be regulated by law.” Considering Afghanistan’s rich mineral resources, can you see why Art. 66’s constraint on presidential power is an important tool to prevent corruption and abuse?

Article 152

The President, Vice Presidents, Ministers, Chief Justice and members of the Supreme Court, Presidents and members of the National Assembly, the Attorney General and judges shall not engage in other jobs during their term of office.

Again, this provision supports the strong public interest in minimizing conflicts of interest between official duties and private enterprise. Nevertheless, a key observation is that the salaries for these officials must be sufficient in order for these provisions to succeed.

Constitution of Afghanistan**Article 154**

The wealth of the President, Vice Presidents, Ministers, members of the Supreme Court as well as the Attorney General, shall be registered, reviewed and published prior to and after their term of office by an organ established by law.

Can you articulate the motivation for this provision? If you opposed it, how would you argue that this is overly intrusive and insufficiently useful in preventing corruption? What must happen before this provision can be enforced? What if the president refuses to sign the law establishing the “organ” (government entity) responsible for reviewing the officials’ finances?

Finally, Article 155 pertains to the salaries of certain elected officials:

Constitution of Afghanistan**Article 155**

Suitable salaries shall be fixed for Vice Presidents, Ministers, Presidents, as well as members of the National Assembly and Supreme Court, judges, and Attorney General in accordance with the provisions of the law.

Compare this language with Section 1 of Article II of the United States Constitution, “The president shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument⁸ from the United States, or any of them.” The purpose of this particular provision is to prevent the legislature from using their control over the president’s salary to coerce his cooperation. By prohibiting the legislature from changing the president’s salary during his term of office, “They can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice.”⁹ The Afghan Constitution leaves such details to legislation. This may present the very problem that concerned Alexander Hamilton and the other Framers of the United States Constitution enough to include this provision.

⁸ “The returns arising from office or employment usually in the form of compensation or perquisites.” Merriam-Webster Online Dictionary.

⁹ The Federalist No. 73, *supra* note 5, at 421 (Alexander Hamilton).

F. Elections

Article 61 provides the constitutional requirements for presidential elections, and the language is relatively straightforward.

Constitution of Afghanistan

Article 61

(1) The president shall be elected by receiving more than 50 percent of votes cast by voters through free, general, secret and direct voting.

The provision requires a candidate to win a *majority* (more than 50 percent of all votes cast) to become president. This requirement, as opposed to a simple *plurality* (more votes than the other candidates but less than 50 percent of all votes cast), increases the possibility of a run-off election between popular candidates who received less than 50 percent of the vote. This is especially true given that there is no limit on the number of candidates who can run for president, so it is likely that many candidates will each receive a small percentage of the votes.¹⁰ So what happens if there isn't a winner in the initial election?

Constitution of Afghanistan

Article 61

(4) If in the first round none of the candidates gets more than 50 percent of the votes, elections for the second round shall be held within 2 weeks from the date election results are proclaimed, and, in this round, only two candidates who have received the highest number of votes in the first round shall participate.

See the box below for a discussion on how this process worked (or did not work) during the 2009 presidential election.

According to Article 61, Afghans elect the president through a direct popular election. However, direct popular election is not the only method of electing the president of a democratic republic. In fact, the United States uses a different system called the “electoral college,” whereby “electors” from each state pledge their votes for the candidate selected by that state’s voters. The Presidential election is determined by the outcome of these state elections, not by the nationwide popular vote.¹¹ Of course, the federal system of the United States, which facilitates the electoral college system, is structurally quite different from the unitary system of government in Afghanistan.

¹⁰ For example, in the 2009 presidential election, approximately 40 challengers officially ran against Hamid Karzai, 29 of whom remained in the race through election day. International Crisis Group, *Afghanistan: Elections and the Crisis of Governance*, 6 (25 November 2009), http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/b96_afghanistan__elections_and_the_crisis_of_governance.ashx.

¹¹ For more information on the electoral college in the United States, see the website of the United States National Archives at <http://www.archives.gov/federal-register/electoral-college/about.html>

In addition to “direct,” Article 61 uses the terms “free, general, and secret” to describe these elections. Anonymity or “secrecy” in voting, safeguarded by the provision, protects voters from backlash and coercion. “Free” is generally understood to mean that voters shall be free from coercion, and free to vote however they choose. General is understood to mean available to all who are constitutionally entitled to vote.

Constitution of Afghanistan

Article 61

(7) In case one of the presidential candidates dies during the first or second round of voting or after elections, but prior to the declaration of results, re-election shall be held according to provisions of the law.

This provision is quite vague and appears to simply allow for more detailed legislation governing these circumstances to be written later. In a system with no limit on the number of potential presidential candidates, is it necessary to hold a re-election because one candidate dies during the first round of voting, without any regard to whether the death has any effect on the election’s outcome? What if the re-election is extremely expensive?

According to Article 61, the presidential term is five years, expiring “on the 1st of Jawza of the 5th year after elections.” It should be obvious why expressly stating the length of a term of office in a constitution is helpful in constraining the power of the executive and preventing tyranny. However, it is certainly fair to ask, “why five years?”

The president of the United States serves a term of four years instead of five. According to the drafters of that Constitution, there is a need for a balance between the desire for an effective executive and the need to constrain his ability to abuse and enlarge his power. “As on the one hand, a duration of four years will contribute to the firmness of the executive in a sufficient degree to render it a very valuable ingredient in the composition, so, on the other, it is not long enough to justify any alarm for the public liberty.”¹² While not an exact science, the term’s duration must be long enough to encourage the president to perform his duties energetically and take risks on behalf of the nation, but not so long that it facilitates tyranny. It must also be long enough to allow the public to observe his performance and judge his merits.

These same principles apply to the Afghan president, but perhaps with different weights attached to the two sides of the scale. In a developing country in need of infrastructure development and widespread institutional reforms, consistency in the executive branch of government may be important for long-term development and direction. However, there is also a greater risk of the executive expanding his power and taking advantage of the circumstances. How do you weigh the two sides?

Article 61 also expressly describes when presidential elections must take place.

Constitution of Afghanistan

¹² The Federalist No. 71, *supra* note 5, at 414 (Alexander Hamilton).

Article 61

(3) Elections for the new President shall be held within 30 to 60 days prior to the end of the presidential term.

Since the president's term ends on the first of the Afghan month of Jawza, and the election must be held between thirty and sixty days before the end of the president's term in office, the Constitution clearly delineates the period during which elections must be held. In addition, Article 156 authorizes an Independent Elections Commission (IEC) to "administer and supervise every kind of elections." However, in Afghanistan's second presidential election, elections were delayed several months, creating a constitutional crisis.

2009 Presidential Election

Hamid Karzai was elected in October 2004 to his first term as president. According to Article 61 of the Constitution, this term would end on the first of the Afghan month of Jawza 1388 (corresponding to May 22, 2009), which meant that the next presidential election would have to be held between the sixteenth of Hamal and the fifteenth of Sawr 1388 (March 23 and April 22, 2009). However, the IEC, charged with administering elections by Article 156 of the Constitution, announced that the elections must be delayed three months. The justification for the delay was that cold weather, security, and lack of preparation time would prevent many people from voting, which would render the results illegitimate.¹³

Two constitutional questions arose from the necessity of delaying the presidential elections. The first was whether the IEC could delay the elections beyond the time allowed by Article 61 of the Constitution, and the second was whether these circumstances permitted the sitting president, Hamid Karzai, to continue to serve beyond the first of Jawza despite the clear language of Article 61 to the contrary. The answer to the first question was apparently yes, and the election was held three months later. The second question was vigorously debated, with some arguing that Karzai should hand over power to the Meshrano Jirga, and others arguing that the first vice president should assume the office of the president.¹⁴ The question went to the Supreme Court, which held that President Karzai could remain in office until the newly scheduled elections to ensure national consensus and stability in the country.¹⁵

The election was finally held, and contested preliminary results gave Karzai 54.6% of votes and leading challenger Abdullah Abdullah 27.7%. However, a fraud investigation by the Electoral Complaints Commission disqualified nearly 25% of total votes, resulting in an amended figure of 48.3% for Karzai and 31.5% for Abdullah. Since no candidate received at least 50% of votes cast, the Constitution required a run-off. However, after complaining of the "inappropriate actions of the government and the election commission," Abdullah announced that he would not participate in the second round run-off. This decision forced yet another constitutional dilemma,

¹³ Ahmad Majidyar, *Afghanistan's Presidential Election*, American Enterprise Institute Middle Eastern Outlook Series, 1, 5 (January 2009), <http://www.aei.org/docLib/20090129-No1MEO23850g.pdf>.

¹⁴ *Id.* at 5–6.

¹⁵ Alex Thier, *Afghanistan's Constitutional Opera Continues . . .*, Comparative Constitutions (26 May 2009), <http://www.comparativeconstitutions.org/2009/05/afghanistans-constitutional-opera.html>

as no candidate had won a clear 50% majority as required by Article 61. This constitutional requirement notwithstanding, the IEC declared Karzai the winner of the presidential elections the day after Abdullah's withdrawal, citing the absence of another candidate, security, and financial concerns. Given the costs and risks of holding another election, was the IEC justified in canceling the run-off? Does this mean that Article 61 can be violated by the IEC when it determines it is necessary for the stability of the country? What government body (if any) has the authority to challenge or adjudicate a challenge to the IEC's decision in such a situation? This is fundamentally a question of separation of powers, and one you should be able to analyze by the time you finish this book.

International observers have expressed concerns about the IEC's independence, since President Karzai appointed all seven members of the Commission. The International Crisis Group wrote: "In February 2009, the National Assembly passed a law that would have authorized the legislature to review and approve presidential appointees to the IEC and thus lessen perceptions of bias. Karzai vetoed it, citing an absence in the constitution of a specific reference to legislative oversight of presidential appointments."¹⁶ Is the IEC truly independent if its Commissioners are appointed by the sitting president without any oversight or approval from another branch? Is there a conflict of interest for the Commissioners? Is this important enough to warrant a constitutional amendment?

Discussion Question

Consider the following quotation in light of our discussion of Article 61 of the Constitution. "You cannot have a democracy unless there are reasonably free and fair elections in which the people can choose and replace their leaders in a reasonably well and neutrally administered environment, and in which there is relative freedom from intimidation and relative freedom for people to speak their minds. You cannot lower the bar and say this is just a 'different form of democracy' where candidates are being murdered and opposition is being silenced or bought off."¹⁷

G. Term Limits

Article 62 limits an individual to two terms as president and places the same restriction on vice presidents. Such a limitation furthers the concern of protecting against tyranny, while allowing an effective and popular executive to retain office for a full ten years. This is of course, a matter of balancing these concerns. Every country that imposes term limits on elected officials has to face the reality that in some cases these restrictions will force a good president out earlier than the majority of the population would prefer, in order to protect against the possibility of such a leader destroying the very system that put him in power. Although each term is four years instead of five in the United States, the U.S. Constitution also allows for two terms as president.

¹⁶ International Crisis Group, *Afghanistan: Elections and the Crisis of Governance*, 6 (25 November 2009), http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/b96_afghanistan_elections_and_the_crisis_of_governance.ashx.

¹⁷ Larry Diamond, Ashraf Ghani & Rend al Rahim, *Democracy's Development: Second Elections in Iraq and Afghanistan*, 33 *Fletcher Foreign World Affairs* 47, 60–61 (2009).

The drafters of that Constitution argued that presidential reeligibility is necessary “to enable the people, when they see reason to approve of his conduct, to continue him in the station in order to prolong the utility of his talents and virtues, and to secure to the government the advantage of permanency in a wise system of administration.”¹⁸ It was thought that the possibility of reelection would motivate the first-term president to perform his duties energetically and fairly, and that in addition, limiting the president to one term would deny the people the opportunity to keep an effective executive in office without too great a risk.

H. Eligibility Requirements and Qualifications

Article 62 states the required qualifications for any presidential candidate. The first provision of this Article states that to be eligible, a candidate “1. Shall be a citizen of Afghanistan, Muslim, born of Afghan parents, and shall not be a citizen of another country.” As you should see, this provision goes to substantial lengths to restrict candidacy to those with “pure” Afghan credentials. Not only must the candidate be an Afghan citizen without dual citizenship, but the candidate must be “born of Afghan parents” as well. Some have noted that during the constitutional debates prior to adoption, “a powerful nativism surfaced, with people from all over the country calling for a ban on ministers holding dual citizenship.”¹⁹ While a moderating compromise was reached regarding ministers with dual citizenship, it appears the “purists” won out for the presidency. During the initial transition period, this restriction may disqualify some otherwise promising candidates who lived outside of Afghanistan for many years as a result of the unrest.

Under Article 62 a candidate, “2. Shall not be less than 40 years old the day of candidacy; and 3. Shall not have been convicted of crimes against humanity, a criminal act, or deprivation of civil rights by court.” What reasons support these eligibility requirements?

I. Oath

Constitution of Afghanistan

Article 63

....

In the name of God, Most Gracious, Most Merciful: I swear by the name of God Almighty that I shall obey and protect the Holy religion of Islam, respect and supervise the implementation of the Constitution as well as other laws, safeguard the independence, national sovereignty and territorial integrity of Afghanistan, and, in seeking God Almighty's help and support of the nation, shall exert my efforts towards the prosperity and progress of the people of Afghanistan.

This is the oath that Article 63 requires the president to take before assuming office.

¹⁸ The Federalist No. 72, *supra* note 5, at 416 (Alexander Hamilton).

¹⁹ Barnett Rubin, *Crafting a Constitution for Afghanistan*, in *Constitutional Politics in the Middle East* 147, 156 (Said Amir Arjomand ed., 2008).

Clearly, Islam figures prominently in the oath, as it does in the rest of the Constitution.²⁰ The president swears to “obey and protect the Holy religion of Islam,” but the Constitution goes no further in explaining what this means. This is consistent with Article 62’s requirement that a candidate must be Muslim to be eligible for the presidency. Clearly a non-Muslim would not be able to take this oath in good faith. The Constitution does not require ministers, members of the Supreme Court, or members of the National Assembly to be Muslim.²¹ However, ministers swear to “protect the Holy religion of Islam,” not to obey it, and members of the Supreme Court swear “to attain justice and righteousness in accordance with tenets of the Holy religion of Islam,” and therefore there is no inconsistency with this difference in eligibility requirements.²²

In reference to his powers as the commander in chief of Afghanistan’s military, the president also swears to “safeguard the independence, national sovereignty and territorial integrity of Afghanistan.” This oath demonstrates that the president understands that he has both the authority and the duty to provide for the national security of Afghanistan, as provided for in Article 64 and which will be discussed further below.

Finally, the oath affirms the president’s role as the chief executive, responsible for executing the laws of Afghanistan and responsible to the people. As discussed above, the president has a responsibility to act on behalf of the people of Afghanistan and a duty to not use his position to benefit himself at their expense. The oath requires the president to publicly acknowledge and accept these terms of office and gives the public a concise description of the president’s responsibilities.

III. THE DUAL ROLES OF THE EXECUTIVE

A. Introduction

Does Afghanistan have a presidential or parliamentary system? This question is addressed more fully in the Chapter 2 on the Separation of Powers, but it is a helpful place to start in our discussion of the roles of the Afghan president. “[I]n most parliamentary systems, those who will administer government are chosen from among incumbent legislators, and the office of national chief executive is a formal one that does not normally involve actual administrative decision making. There is said to be a separation of ‘head of state’ from ‘head of government.’”²³ It should be clear that this is not the system created by the 2004 Afghan Constitution, which

²⁰ “[M]aking the safe-keeping of Islam the President’s utmost obligation before anything else, even before compliance with the Constitution, shows the place of religion in the country and in the Constitution. It also indicates that the president will have a decisive role in implementing these words according to his/her understanding of the primacy of Islamic principles. Article 64, however, which contains a detailed list of the powers and duties of the President, is silent on Islam and its safekeeping.” Said Mahmoudi, *The Sharia in the New Afghan Constitution: Contradiction or Compliment?*, 64 Heidelberg Journal of International Law, 867, 872 (2004).

²¹ See Arts. 72, 85, and 118.

²² See Arts. 74 and 119.

²³ Laurence P. Claus, *Separation of Powers and Parliamentary Government*, in Global Perspectives on Constitutional Law, 48, 48 (Vikram Amar & Mark Tushnet, eds., 2009). Generally speaking, the role of the ‘head of state’ is to represent the sovereignty of the nation, particularly with respect to other countries and international bodies, and often to appoint government officials. The general role of the ‘head of government’ is to manage the government and to be responsible for its effectiveness. You should gain a greater understanding of these concepts as you read this chapter, and pay attention as the different responsibilities are outlined under the two roles.

combines these functions into one strong executive. However, it is useful to use the dual roles of ‘head of state’ and ‘head of government’ to study the president’s constitutionally described powers and responsibilities. For clarity, the ‘state’ refers to the sovereign nation, and the ‘government’ is the executive authority of the state.

The Constitution gives the president expansive powers to direct and oversee the functioning of the state. In one role, the president is the head of state described in Article 60, with authority in all branches of government and responsibility for national security.²⁴ In his second role, the president is the senior official of the government, with powers of appointment over ministers, control over government policy and regulations, and responsibility for the effectiveness of the government.²⁵

This way of understanding the president’s roles has a foundation in the history of the creation of the 2004 Constitution. Following the conclusion of public consultations on provisions of the proposed constitution, the Constitutional Review Commission submitted its draft constitution to President Karzai in September 2003.²⁶ Under this draft constitution, executive power would be divided between a directly elected president and a prime minister.²⁷ The president would hold authority to appoint Supreme Court Justices and one-third of the Meshrano Jirga, while the prime minister would be responsible for enforcing laws, protecting Afghanistan’s sovereignty, pursuing national interests, managing financial issues, and reporting to the National Assembly.²⁸

Initially, the draft called for the Wolesi Jirga to select the prime minister, but that was changed to provide for presidential selection of the prime minister with confirmation by the Wolesi Jirga. The argument that “this would breed instability in a highly factionalised and armed society by creating two executives with competing bases of power—the popular vote versus the support of parliament—led in September 2003 to the adoption of a more workable system in which the president’s appointed prime minister would not need a vote of confidence to serve, but could be removed by a no-confidence vote.”²⁹ The National Security Council and the drafting commission changed this provision during their review, which eliminated the office of prime minister altogether, “and the president received full power to appoint a cabinet (whose members could not be serving legislators) subject to parliamentary approval.”³⁰

B. President’s Role as Chairman of Government

While the majority of the presidential authorities and duties listed in Article 64 relate to the president’s role as head of state and derive from the king’s authorities and duties under the 1964

²⁴ Grote, *supra* note 1, at 904-05 (“According to the new Constitution, the president of the Islamic State of Afghanistan combines the powers which had been exercised by the King and by the Prime Minister under the Constitution of 1964.”).

²⁵ *Id.*

²⁶ International Crisis Group, *Afghanistan: The Constitutional Loya Jirga*, 3 (December 12, 2003), <http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/B029%20Afghanistan%20The%20Constitutional%20Loya%20Jirga.pdf>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Rubin, *supra* note 19, at 154.

³⁰ *Id.*

Constitution, the power to “determine the fundamental lines of the policy of the country with the approval of the National Assembly” epitomizes the role of a prime minister or chairman of government.³¹ Under the 1964 Constitution, the prime minister was responsible for presenting the government’s policy to the Wolesi Jirga for approval.³² Under the 2004 Constitution, the president sets the government’s policy, and the exercise of his policy does not depend on the approval of Cabinet officials.³³ The government’s “main task is to assist the president in the implementation of his policies. Unlike the Constitution of 1964, the Constitution of 2004 leaves no room for a politically autonomous role of the Government . . . The Ministers are not only appointed by the President, they are also responsible to him (Article 77), which practically means that they can be [removed] by unilateral Presidential decision.”³⁴ To further reinforce this principle, Article 71 also states that, “The Government shall be comprised of Ministers who work under the chairmanship of the President.”

The president holds appointment power for Government ministers and ambassadors subject to the endorsement of the Wolesi Jirga.³⁵ Under the 1964 Constitution, the king and the prime minister each had a role to play in this process.

1964 Constitution of Afghanistan

Article 89

The government shall be formed by the person designated as Prime Minister by the King. The members and policy of the government are presented by the Prime Minister to the Wolesi Jirga, which, after debate, resolves on a vote of confidence in the government. When the vote of confidence is given, the King issues a royal decree appointing the head and members of the government. Afterwards the Prime Minister acquaints the Meshrano Jirga with the policy of the government.

Article 76, while not in Chapter 3 of the Constitution, relates directly to the creation and implementation of government policy in a way that further expands the president’s power in an area traditionally reserved for the prime minister. “To implement the fundamental lines of the policy of the country and regulate its duties, the government shall devise as well as approve regulations, which shall not be contrary to the body or spirit of any law.” Without this power to issue regulations necessary for implementing policies and executing laws, the government would likely have to rely on the National Assembly in order to implement its policies. Note that this Article places an important constraint on the president’s regulatory authority by subordinating it to both the body and the spirit of existing law. This gives the legislature an important check on the president’s regulatory authority. This will be discussed further in Chapter 4 on Administration.

C. President’s Role as Head of State

³¹ Article 64, No. 2.

³² Article 89 of the 1964 Constitution of Afghanistan.

³³ Grote, *supra* note 1, at 907.

³⁴ *Id.*

³⁵ Article 64, Nos. 11, 14.

“The monarchical origin of the functions of the president are still visible in the constitutional definition of his role in Article 60, which states that the president is the head of state of the Islamic Republic of Afghanistan and conducts his authorities in the executive, legislative and judiciary branches in accordance with the provisions of the Constitution. Unlike the U.S. Constitution which unequivocally ties the powers of the president to his position as head of the executive branch of government, the new Afghan Constitution deliberately transcends the classical division of powers in order to assign to the president a comprehensive responsibility for the smooth functioning of the state as a whole.”³⁶

Supporting this assertion is the fact that many of the presidential “authorities and duties” listed in Article 64 originate from Article 9 of the 1964 Constitution, which deals with the “rights and duties” of the king. These include the duty or authority to: be the commander in chief of the armed forces, declare war and peace, convene the Loya Jirga, declare and terminate the state of emergency, inaugurate sessions of the National Assembly, appoint Supreme Court Justices, appoint the unelected members of the Meshrano Jirga, appoint judges and senior civil and military officials, endorse laws, reduce and pardon penalties, and bestow medals. We will touch on a few of these authorities and duties below.

Military Affairs

There are several sections of Article 64 touching on the president’s dominant role in military affairs.

2004 Constitution of Afghanistan

Article 64

The president shall have the following authorities and duties:

....

- (3) Being the Commander in Chief of the armed forces of Afghanistan;
- (4) Declare war and peace with the endorsement of the National Assembly;
- (5) Take necessary decisions to defend territorial integrity and preserve independence;
- (6) Dispatch armed forces units outside of Afghanistan with the endorsement of the National Assembly.

The president’s authority to unilaterally act is not unlimited across types of military action. While the president is always the commander in chief, he may only act without the endorsement of the National Assembly when acting to “defend territorial integrity and preserve independence.” This provision may envision situations such as invasion, revolution, or terrorist attacks, where the country cannot afford to wait for the National Assembly to deliberate.

Contrast this with the acts of declaring war and peace or dispatching military units outside of Afghanistan. In these circumstances, Article 64 displays a bias toward deliberation and public

³⁶ Grote, *supra* note 1, at 904-05.

debate. Requiring the endorsement of the National Assembly is a way to ensure public support for these actions. One argument in support of such a distinction is that war (or the end of a war through a peace treaty) or the dispatch of troops outside the country's borders may require long-term sacrifice and commitment by a large portion of the country's population, for which popular support is essential. The members of the National Assembly may be better equipped to listen to the people in their districts and provinces and therefore better positioned to measure public support for the proposed actions.

Authority in the Executive

2004 Constitution of Afghanistan

Article 64

The *president* shall have the following authorities and duties:

....

(13) Appoint, retire, and accept the resignation and dismissal of judges, officers of the armed forces, police, national security as well as high-ranking officials according to the provisions of law.

1964 Constitution of Afghanistan

Article 9

The *king* has the following rights and duties:

....

(14) Appoints judges and high-ranking civil and military officials and grants them retirement in accordance with the provisions of the law.

As the chief executive and commander in chief entrusted with the nation's security, it may seem logical that the president should be granted this type of control over the executive officers he commands in the nation's interest. However, the Constitution limits the president's authority to manage executive officials such as government ministers, who are in part constitutionally responsible to the Wolesi Jirga and whose appointments must be approved by the Wolesi Jirga. Chapter 4 will delve deeper into presidential authority with respect to government officials. It will also explore the structure of the administrative state, including provincial and district administrations and presidential control over such institutions, such as the appointment of municipal officials, provincial governors, and other officials. Presidential authority cannot be properly understood without a thorough understanding of the administrative state and its complex network of relationships.

Authority in the Judiciary

As an interesting separation of powers issue, note that Article 64 grants the president the authority to appoint judges without the consent or endorsement of any other branch. "Whereas the members of the Supreme Court are appointed by the president with the approval of the Wolesi Jirga and can only be dismissed on a motion of more than a third of its members which is

adopted by a two-thirds majority (Article 127), the appointment and dismissal of the judges on the lower courts do not require the approval of Parliament.”³⁷ While this system of presidential control without parliamentary endorsement may be faster and more efficient, it may also pose a greater risk of executive corruption and create the perception of a biased justice system.

As noted above, the president also has the authority under Article 64 to “[a]ppoint the Chief Justice of the Supreme Court as well as justices of the Supreme Court with the endorsement of the Wolesi Jirga.”³⁸ This corresponds to Article 13 of the 1964 Constitution, except that the 2004 Article requires the endorsement of the Wolesi Jirga. As you will see in the box below, this parliamentary check on presidential power has already proven significant.

Nominating the Chief Justice

In 1385 (2006) President Karzai nominated Fazel Hadi Shinwari to the position of Chief Justice of the Supreme Court of Afghanistan, a position he had held for the previous five years. The Wolesi Jirga rejected Shinwari in a vote of 117 to 77, amid concerns about his educational background and the influence of his conservative religious views on his legal decisions.³⁹ In addition, Parliament rejected three more of President Karzai’s Supreme Court nominations, sending a strong message of dissatisfaction with the state of the Afghan judiciary. They finally approved Abdul Salam Azimi as the new chief justice.

Authority in the Legislature

One of the president’s most important functions is to endorse legislation passed by Parliament.⁴⁰ The king played this role under Article 9 of the 1964 Constitution, which authorized him to “sign laws and proclaim their enforcement.” This role is further articulated in the 2004 Constitution’s Article 94: “[l]aw shall be what both houses of the National Assembly approve and the president endorses, unless this Constitution states otherwise.” What happens if the president refuses to endorse legislation passed by both houses of the National Assembly? Under Article 94, the president can veto the legislation and send it back to the National Assembly, initially preventing it from becoming law.⁴¹ However, the presidential veto can be overruled by a two-thirds majority vote in the Wolesi Jirga.

An additional power the president has in the legislature is the duty to appoint one-third of the members of the Meshrano Jirga.⁴² These members serve for a period of five years and must include “two members from amongst the impaired and handicapped, as well as two from

³⁷ Grote, *supra* note 1, at 906.

³⁸ Article 64, No. 12.

³⁹ Carlotta Gall, *Afghan Parliament Rejects Chief Justice Nominee*, N.Y. Times, May 28, 2006, <http://www.nytimes.com/2006/05/28/world/asia/28kabul.html?ref=carlottagall>.

⁴⁰ Article 64, No. 16 (“Endorse laws as well as judicial decrees”).

⁴¹ “In the case the president rejects what the National Assembly has approved, the president shall send it back, within 15 days from the date it was presented, to the Wolesi Jirga mentioning the reasons for rejection, and, with expiration of the period or if the Wolesi Jirga re-approves it with two-thirds of all the votes, the draft shall be considered endorsed and enforceable.” Article 94.

⁴² Article 84, No. 3.

nomads.”⁴³ Furthermore, “[t]he President shall appoint 50 percent of these individuals from amongst women.”⁴⁴ Presidential appointees to the Meshrano Jirga serve longer than the rest of the body, which is elected by the district and provincial councils. Presidential appointees thus have a form of seniority. This appointment power of the president partially corresponds to Article 9 of the 1964 Constitution, which grants the king the authority to appoint “the nonelected members of the Meshrano Jirga and appoint its president from amongst its members.”⁴⁵ The provisions requiring the president to include representatives of the handicapped and women do not stem from the 1964 Constitution but are new innovations, as is the current form of selecting the Meshrano Jirga’s president.

IV. CONCLUSION

*“Afghanistan’s origin as an empire can be seen in its de jure unitary state: the administration was meant to enable the centre to control the periphery, not to help local communities exercise self-government.”*⁴⁶

Regardless of Afghanistan’s imperial origins, however, any current democratic system of government requires justification in terms of how it functions to serve the Afghan people.

After reading this chapter, it should be clear to you that the Constitution envisions a strong presidential system with a chief executive possessing broad powers and extensive responsibility for the functioning of government. There are valid reasons for supporting such a centralized system. Given the current unrest in much of the country and the continuing struggle between the central government and local power-holders, devolution of power to local levels could serve to strengthen the same criminal warlords against whom the government is fighting. In such a situation, centralization may be necessary to help overcome the obstacle of extra-legal local power holders. As one former member of the Election Complaints Commission stated, “[u]ntil there is a complete disarmament by all protagonists, the likelihood of a successful democratic transition will be greatly diminished, because armed militias will continue to rely on force rather than on the political and legal systems to resolve problems, exercise influence, and maintain control over their resource and revenue bases.”⁴⁷

Discussion Question:

One interesting concept to consider is whether the current system should be changed once the country is stabilized and international entities play a smaller role in Afghanistan’s governance and development. “The type of institutional or political structure needed for state-building may not be the same political structure that will later provide the best governance.”⁴⁸

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Article 9, No. 12 of the 1964 Constitution of Afghanistan.

⁴⁶ Rubin, *supra* note 19, at 158.

⁴⁷ Grant Kippen, *The Long Democratic Transition, in* Future of Afghanistan, 35, 37 (J Alexander Thier ed., 2009).

⁴⁸ Rubin, *supra* note 19, at 161.

“One powerful minister, considered a stalwart supporter of presidentialism and centralization, confided in private that he thought a more decentralized parliamentary system would ultimately be better for a stable and inclusive Afghanistan, but that adopting such options in the short term would delay or even prevent the building of urgently needed institutions.” Do you agree?

Discussion Question:

Hopefully you have seen that much of this analysis is a matter of weighing and balancing various priorities and concerns. On the one hand there is the concern of abuse of executive power and tyranny, and on the other is the concern of effective government. There are many ways to organize government to attempt to balance these concerns, depending on a wide variety of factors, including the preferences of those to be governed. In the United States, as in Afghanistan, the drafters of the Constitution decided that an effective chief executive was critical to the well-being of the country. Read the following argument, used in the debates surrounding the creation of the United States Constitution, and consider its application to your study of the role of the executive in the Afghan Constitution.

“Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. . . . A feeble executive implies a feeble execution of government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.”⁴⁹

⁴⁹ The Federalist No. 70, *supra* note 5 at 403 (Alexander Hamilton).

Chapter 4: Government & Administration

I. INTRODUCTION

As you read in Chapter 1, constitutions are critically important as aspirational documents that capture the core animating ideals of a state. They play a unifying and inspirational role domestically, while also functioning internationally to represent the collective vision of the nation's citizens. Fundamentally, constitutions also have an important function in setting out the structure of the state. But this role is generally limited to governmental super-structures and the basic blueprints of complex mechanisms such as elections, legislative actions, and the separation of powers.

“In general, written constitutions tend to say relatively little about the administrative state, though the establishment of a government structure is a core function of constitutions. While the rules governing selection and activities of executives and parliaments are described in great detail, the sub-political institutions of government are not consistently or thoroughly regulated. Written constitutions tend to focus on providing chains of accountability and democratic legitimacy for the decisions of administrators, rather than detailed rules regulating the administration.”¹

The thorough study of the dozens of Afghan government institutions and the rules governing their operations is beyond the scope of this chapter and indeed this book. The subject of administrative law is critically important and often very complex, and it truly requires its own book and its own course even to adequately survey. The purpose of this chapter is to provide a basic understanding of the administrative institutions established by the 2004 Afghan Constitution, including their roles, responsibilities, and authority, as well as some of the issues that can arise in the administrative context.

This chapter first explores the constitutional provisions regarding local and provincial administration, including their basic structure and principles, provincial councils, district councils, and municipalities. The chapter then focuses on the Government as established by the Constitution and related statutes. The topics covered include the Government's basic structure and underlying principles, the qualifications of ministers and their required oath of office, Governmental duties, regulatory and legislative power, and finally the Wolesi Jirga's role in providing oversight.

II. LOCAL AND PROVINCIAL ADMINISTRATION

A. Basic Structure

¹ Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*, in *COMPARATIVE ADMINISTRATIVE LAW*, 117, 123 (Susan Rose-Ackerman & Peter Lindseth eds., 2010).

Chapter 8 of the Afghan Constitution, entitled “Administration,” illustrates the tendency of written constitutions to say very little about the administrative state. Consisting of only seven articles, Chapter 8 sets out a framework of institutions with vague responsibilities and limited authority. As discussed throughout this book, the Afghan Constitution embraces a strong central government that delegates power sparingly. It is therefore unsurprising that the Constitution does not create robust provincial and local institutions to aid in the administration of the state. Instead, it defines weak institutions that possess little independent authority and retains for the national government expansive power to regulate and control these entities. In a sense, the provincial and district administrations of Afghanistan are simply the extension of ministries in Kabul.

Constitutional Translations

You may notice that the language used in Article 136 in the box is slightly different than the language used in the text. That is because they are from two different English translations of the Constitution. Throughout this chapter and this book, pay close attention to small linguistic differences that are the result of translation. Think about whether those linguistic differences could affect the meaning of the text. Legal translation can have a significant effect on how a text is interpreted.

Constitution of Afghanistan

Article 136

- (1) The Administration of Islamic Republic of Afghanistan shall be based on central and local administrative units in accordance with the law.
- (2) The central administration is divided into a number of administrative units, each of which shall be headed by a minister.
- (3) The local administrative unit is a province.
- (4) The number, area, parts, and structures of the provinces and the related administrations are regulated by law on the basis of population, social and economic conditions, and geographic location.

Structurally, Chapter 8 of the Afghan Constitution provides for the establishment of administrative units at the national level headed by ministers, as well as provincial, district, and village councils and municipal institutions at the subnational level. Article 136 provides for a “central administration” that “shall be divided into several administrative units, each headed by a Minister.” The Article also establishes that “[t]he local administrative unit shall be a province.” Not all provinces are equal in all ways, however, and “the number, area, divisions and related provincial organizations as well as number of offices shall be regulated on the basis of population, social and economic conditions, as well as geographical location.” This means that the provincial institutions will vary in these ways (number, area, divisions, number of offices, and related provincial organizations) depending on these factors (population, social and economic conditions, and geographical location), but there is no constitutional guidance as to

how these factors should be weighed. As discussed below, it is left for the legislature to adjust this general structure through statutes.

Constitution of Afghanistan

Article 137

The government, in preserving the principles of centralism, shall transfer necessary powers, in accordance with the law, to local administrations in order to accelerate and improve economic, social as well as cultural matters, and foster peoples' participation in developing national life.

Article 137 establishes the guiding principles and permissible goals of the central government's delegation of authority to local administrations. This Article makes very clear that the establishment of local administrations is not meant to foster independence from the central government. Instead, "the principles of centralism" provide the foundation for the administrative system. Note that only "necessary powers" shall be transferred from the central government to local administrations, and only for certain purposes, including encouraging participation in "national life," as opposed to provincial or local life.

In addition, the central government makes most of the appointments at the provincial and even district level. The president or relevant minister appoints all civil servants in provincial and district administration. And, the central government makes almost all administrative and fiscal decisions at the provincial and district levels. One excellent guide to Afghanistan's government describes it this way: "The powers and responsibilities of the provincial and district administrations are determined (and therefore may be withdrawn) by central government. Though provinces and districts are legally recognized units of subnational administration, they are not intended to be autonomous in their policy decisions other than through some flexibility in implementing centrally determined programs."² Article 137's emphasis on specific criteria for the delegation of power demonstrates the Afghan Constitution's commitment to a strong central government and its reluctance to allow that central power to be distributed to local institutions.

This commitment to preserving power within the national government is also evident in the way the Constitution explicitly provides for a central legislative role in regulating the system of administration it establishes in Chapter 8. Article 136 states that "[t]he administration of the Islamic Republic of Afghanistan . . . shall be regulated according to the law." Chapters 2 and 3 of this book, on the separation of powers and the executive, describe the president as "the executive" and the "head of government," and they examine the president's responsibility for managing the state. However, as these chapters also discuss, the president does not have complete freedom to manage in whatever fashion he chooses. Instead, Article 136 states, the legislature may regulate the administration of the state through its lawmaking power as permitted by the Constitution, thereby limiting the executive branch's authority. This creates overlapping responsibilities shared by the executive and legislative branches, requiring inter-branch cooperation and creating inevitable friction in the management of these elements of the bureaucracy.

² Afghanistan Research and Evaluation Unit & The World Bank, *A Guide to Government in Afghanistan*, 7-8, 2004, available at <http://www.areu.org.af/Uploads/EditionPdfs/407E-A%20Guide%20to%20Government%20in%20Afghanistan-Book-web.pdf>.

Structure of Local & Provincial Administration in Afghanistan³

Table 1: Formal Central-Local Relationships in Afghanistan				
	Administrative arrangements		Fiscal arrangements	
	Structure	Personnel	Revenue	Expenditure
Province	The departmental structure mirrors the ministry structure in Kabul – although not all ministries have corresponding departments.	The governor approves junior staff appointments and transfers (<i>karmand</i> grade 6 and below and <i>agir</i> staff at grade 3 and below), the relevant minister approves <i>karmand</i> staff from grades 3-5, and senior staff (grade 2 and above) are appointed by the president.	All tax and customs levels are set by central government statute. All revenues are collected on behalf of Kabul. Subsequent fiscal transfers to the province are made as per-line department budget allocations. Actual cash transfers reflect the difference.	The “ordinary” and development budgetary allocations for the provinces are the sum total of the administrative decisions made by the various Kabul ministries concerning the allocations to their provincial departments.
District	The structure mirrors the departmental structure in the province – although not all departments have corresponding units in the district.	The governor approves junior staff appointments and transfers (<i>karmand</i> grade 6 and below and all <i>agir</i> staff), the relevant minister approves <i>karmand</i> staff from grades 3-6, and the senior staff (<i>ulhwal</i> and judge) are appointed by the president.	Districts collect minor business taxes; rates are reviewed by a review committee of district and provincial representatives every three years. Revenues are remitted to the province.	The “ordinary” and development budgetary allocations for the districts are the sum total of the administrative decisions that have been made by the various provincial departments concerning the allocations to their district subdepartments.
Provincial municipality	The municipality structure (departments and numbers of staff) is set by the Ministry of Interior, with the agreement of the governor.	The governor approves the appointment and promotion for <i>agir</i> grade 3 and below. The governor approves other junior staff appointments and transfers (<i>karmand</i> grade 6 and below and <i>agir</i> grade 2 and above), the relevant minister approves <i>karmand</i> staff from grades 3-5, and the senior staff (grade 2 and above) are appointed by the president.	All tax and fee rates are set in Kabul. Revenues remain in the municipality and fund all municipal expenditures.	The “ordinary” and development budgetary allocations for the municipality are processed by the municipality and approved by the Ministry of Interior (municipalities general presidency), with the agreement of the governor.
Rural municipality	The structure is set by the Ministry of Interior, with the agreement of the provincial municipality and governor.	These are district staff, therefore the governor approves junior staff appointments and transfers (<i>karmand</i> grade 6 and below and all <i>agir</i> staff), the relevant minister approves <i>karmand</i> staff from grades 3-5, and any senior staff are appointed by the president.	All tax and fee rates are set in Kabul. Revenues remain in the rural municipality and fund all expenditures.	No formal budgetary allocations are made other than salary payments. Development budget expenditures are agreed ad hoc and administered by the municipality.

Source: AREU/WB staff assessment.

³ AREU & The World Bank, A Guide to Government in Afghanistan, 10, 2004, available at <http://www.areu.org.af/Uploads/EditionPdfs/407E-A%20Guide%20to%20Government%20in%20Afghanistan->

Discussion Questions

Every article of Chapter 8 contains a clause explicitly authorizing the legislature to regulate the article's subject matter through its lawmaking power, just like Article 136. Throughout this chapter, we encourage you to consider just how you might expect the legislature to regulate each administrative institution described. Consider the following questions in each circumstance:

1. Where might there be conflict between the legislative and executive branches, and how might each conflict be resolved?
2. How does the situation reveal some benefits and disadvantages of the centralized system of administration?
3. How do the different institutions share power and where are the friction points?

B. Provincial Councils

As you might expect, the Constitution provides that “[t]here shall be a provincial council in every province.” Provinces are the largest subnational governance unit in the country. Afghanistan is divided into 34 administrative provinces. While omitting reference to any set number of council members, Article 138 does require “free, general, secret, as well as direct elections” “by the residents of the province, proportionate to the population.” Each member of a provincial council “shall be elected for four years,” but unlike the presidential elections discussed in Chapter 3 of this book, there are no specific electoral procedures or dates required by the Constitution. Instead, the details are once again left to the legislative and executive branches to determine through legislation and implementation. Each council “shall elect one of its members as President,” but the Constitution says nothing more about the role of the council president, the term of office, or procedures for selection and removal.

Constitution of Afghanistan

Article 138

- (1) In every province a provincial council is to be formed.
- (2) Members of the provincial council are elected in proportion to the population by free, direct, secret ballot, and general elections by the residents of the province for a period of four years in accordance with the law.
- (3) The provincial council elects one of its members as Chairman.

Article 139

- (1) The provincial council takes part in securing the developmental targets of the state and improving its affairs in a way stated in the law, and gives advice on important issues falling within the domain of the province.

(2) Provincial councils perform their duties in cooperation with the provincial administration.

Article 139 describes the general role of provincial councils, namely to “participate in the attainment of the development objectives of the state and improvement of the affairs of the province in the manner prescribe[d] by laws, and shall advise the provincial administrations on related issues.” Furthermore, the council “shall perform its duties with the cooperation of the provincial administration.” In other words, provincial councils are meant to advise and work with provincial administrations on provincial development as prescribed by law. As we discussed in Chapter 3, the president appoints Afghanistan’s provincial governors, who are primarily responsible for law enforcement, dispute resolution, and revenue collection. Thus, in keeping with the commitment to a strong central government, the president appoints the provincial governors who wield the actual executive authority, while the people elect the councils who act only in an advisory capacity. See the box below for a short critique of this method of organization.

The National Assembly has in fact passed legislation addressing the provincial councils, including the 2005 Law on Provincial Councils. According to this legislation, the authority of provincial councils falls into three broad categories: (1) participation in provincial development planning, (2) monitoring and appraisal of provincial institutions, and (3) participation in conflict resolution.⁴ Even with this legislation, the major problems which still persist are ambiguity of the roles of provincial councils, overlapping between their functions and the functions of other provincial institutions, and the inability to pass binding decisions.⁵

Provincial Councils and Democratic Representation

“Provincial councils—ostensibly elected to ensure their constituencies’ representation—serve the governor in an advisory capacity alone. They have no veto authority otherwise over the governor’s administration, as he reports directly to the president. Given Afghanistan’s geography, localized society, and democratic constitution, its citizens’ incapacity to influence local government more directly feels to them like an injustice. The policy and conduct of a governor arguably has greater impact than the national government on their daily lives. The two greatest hindrances to gubernatorial elections are security and the absence of significant electoral reform. Afghans’ sense of citizenship and appreciation for democratic political processes would be greatly enhanced were these to be overcome. Their ability to vote for their governor or, at least, for provincial councils empowered to wield real oversight authority would be effective steps towards this end.”⁶

⁴ Afghanistan Research and Evaluation Unit, *Provincial Governance Structures in Afghanistan: From Confusion to Vision?*, 6, 2006, available at <http://areu.org.af/Uploads/EditionPdfs/611E-From%20Confusion%20to%20Vision-BP-print.pdf>.

⁵ Afghanistan Research and Evaluation Unit, *Provincial Governance Structures in Afghanistan: From Confusion to Vision?*, 6-9, 2006, available at <http://areu.org.af/Uploads/EditionPdfs/611E-From%20Confusion%20to%20Vision-BP-print.pdf>.

⁶ Richard Kraemer, *Towards State Legitimacy in Afghanistan*, 65 International Journal 638, 644 (2010).

C. Local Councils

Constitution of Afghanistan

Article 140

(1) In order to organize activities involving people and provide them with the opportunity to actively participate in the local administration, councils are set up in districts and villages in accordance with the provisions of the law.

(2) Members of these councils are elected by the local people through, free, general, secret and direct elections for a period of three years.

(3) The participation of nomads in these councils is regulated by law.

Article 140 specifies two purposes for local (i.e. district and village) councils: organizing activities, and attaining “the active participation of the people in provincial administrations.” Districts are smaller administrative units than provinces. Each province in Afghanistan is divided into multiple districts. Article 140 also provides electoral procedures, but they are even less fully described than those for provincial councils: “Local residents shall elect members of these councils for 3 years through free, general, secret, as well as direct elections.” While the three-year terms and polling style may be relatively clear, the clause does not define “local residents,” which is left to the legislature and the executive branch to clarify through legislation and implementation. Indicative of the Afghan Constitution’s concern with ethnic inclusion and national unification, Article 140 also requires that the “[p]articipation of nomads in these local councils shall be regulated in accordance with the provisions of the law.” Ostensibly the drafters felt that this was a significant issue that would be more appropriately addressed by the national legislature rather than local councils. It is important to note that at the time this chapter is being written, the reality on the ground falls far short of even the basic structure outlined in these constitutional articles. As is true of municipal institutions, few district councils exist in a recognizable form, few elections are held to fill them, and this absence of representative bodies further undermines the ideals of the Afghan democracy and the Constitution created to protect them.⁷

D. Municipalities

As limited as the constitutional text may be for provincial and local councils, its guidance on municipalities is even more meager. Municipalities are administrative units smaller than both provinces and districts, and they usually center around an urban area. According to Article 141, the purpose of establishing municipalities is “to administer city affairs.” Unlike the councils discussed above, municipalities do have some inherent administrative authority. “Municipalities are, in principle, a separate level of government in that they have some limited autonomy in

⁷ Afghanistan Research and Evaluation Unit, *District Councils: The Missing Middle of Local Governance*, 1, (27 June 2011), available at <http://www.areu.org.af/Uploads/EditionPdfs/1118E-District%20Councils%20Roundtable.pdf>.

budget execution and in budget preparation. However, the Ministry of Interior (MoI) controls their staffing establishment and approves their budgets.”⁸

Constitution of Afghanistan

Article 141

- (1) Municipalities shall be set up in order to administer city affairs.
- (2) The mayor and members of the municipal councils are elected by free, general, secret, and direct elections.
- (3) The affairs related to municipalities are regulated by law.

The electoral procedures for mayors and municipal councils are simply “free, general, secret and direct elections.” The third and final clause states only that, “[m]atters related to municipalities shall be regulated by law.” As you should now clearly see, the more vague and limited the constitutional text, the more substantial the government’s role should be in providing enforceable rules and procedures to implement the constitutional guidance. Article 142 captures this point nicely: “[t]o implement the provisions as well as attain values enshrined in this Constitution, the state shall establish necessary offices.” This broad grant of discretionary authority is an acknowledgement that in the realm of administration, it is nearly impossible for a constitution to prescribe a detailed blueprint that works well in every situation. A case-by-case determination is often required, and constitutions are inherently ill suited to distinguish among slightly different cases. The alternative is to grant authority to government institutions and provide guidance as to how that authority should be exercised. In the case of municipalities, it is clear that the bulk of the law governing municipal institutions will come from legislative and executive determinations rather than constitutional requirements.

Reading Excerpt

Between Discipline and Discretion: Policies Surrounding Senior Subnational Appointments
By Martine van Bijlert⁹

Read the following excerpt from Martine van Bijlert’s study on presidential appointment of subnational governance positions. What do you think of the excerpt? Do you agree or disagree? How could the subnational appointments system be improved?

“The President remains a central figure in the appointments process. Presiding over a wide patronage network, he is constantly advised and petitioned by delegations and influential personalities seeking the appointment or removal of certain officials. It is a staggered system, in which the President’s entourage and advisers are equally approached and petitioned, resulting in

⁸ Afghanistan Research and Evaluation Unit & The World Bank, *A Guide to Government in Afghanistan*, 8, 2004, available at <http://www.areu.org.af/Uploads/EditionPdfs/407E-A%20Guide%20to%20Government%20in%20Afghanistan-Book-web.pdf>.

⁹ Afghanistan Research and Evaluation Unit Briefing Paper Series (May 2009).

a complex web of multi-layered negotiations, promises and pay-offs. Provincial governor posts feature most prominently in the national highlevel negotiations, while district administrator posts tend to be subject to the twin dynamics of localised power play and political-economic network interests (often with a lobby at the central level). The process, as a result, is often quite messy with the various players questioning the other's authority to introduce candidates. One of the main features of the senior subnational appointments process has been the reshuffling of provincial governors and district administrators, usually regardless of their performance. For instance, in three (out of four) districts in Nimruz the district administrator positions have since 2002 changed hands several times between four individuals only. Reshuffles were generally initiated after sustained local complaints and demonstrations had necessitated the removal of the local *woleswal* [district administrator] from the district.

Provincial governors who are unhappy with the centrally appointed district administrators, or who are facing pressure not to accept the appointment, have a range of strategies they can employ. These include delaying the de facto deployment of the district administrator, withholding financial and practical support and locally appointing a caretaker administrator, or *sarparast*. Provinces with a high number of officially registered caretakers at the time of the research included Badghis (four out of six), Uruzgan (three out of five) and Paktika (seven out of 18), while there were several other districts with informal unregistered caretakers. Although a *sarparast* is meant to be a temporary feature, there are several provinces that have had a long succession of caretakers and a history of unclear appointment arrangements. Caretaker administrators are often a sign of a contested appointment process—the contest usually being between the governor and either the centre or the local strongmen (or both)—or of the difficulty of finding candidates who are acceptable to all parties and are willing to serve under difficult and dangerous circumstances. A further illustration of the high level of informality at district level is the fact that there have been at least two cases in the last two years of a relative replacing a district administrator who had been killed. These dynamics not only illustrate the difficulties involved in selecting, appointing and supporting the government's main representatives in some of the most embattled areas of the country, but are also an expression of the widespread tendency to create ambiguity and to apply discretion wherever possible.”

III. GOVERNMENT

Chapter 4 of the Afghan Constitution, entitled “Government,” focuses on the president's ministers and the administrative units they are designated to lead. In this section, we will focus on the constitutional text for both its structural provisions and delegations of power and highlight any issues those appear to create. We remind you to pay particular attention to the network of authority distributed among the various branches of government and the institutions created by the Constitution.¹⁰ You should also consider whether there are any conflicts between how this system might ideally work and how it works in practice.

A. Basic Structure

¹⁰ To avoid confusion, we will capitalize “Government” when referring to ministers and their administrative units as defined in the Constitution, and we will not capitalize “government” when referring to the national government consisting of the various branches.

Article 71 establishes the relationships among the president, the Government and its ministers, and the legislature: “The Government shall be comprised of Ministers who work under the chairmanship of the President. The number of Ministers as well as their duties shall be regulated by law.” The president is the chairman of the Government, which is made up of ministers. The legislature regulates the number of these ministers as well as their duties, and as discussed in Chapter 3 of this book, the president appoints ministers with the endorsement of the Wolesi Jirga under Article 64(11).¹¹ Through these few constitutional provisions we can already begin to see the complex network of authority that defines how these institutions interact with one another. The president, elected by the people, appoints ministers with the endorsement of the elected Wolesi Jirga, which also regulates the ministers through legislation.

An Example of Cabinet Nominations

It is important to note that the Wolesi Jirga does not always endorse the president’s cabinet nominations. In 2010 (1388-1389) the Wolesi Jirga forced President Karzai through several rounds of cabinet nominations. In the first round, the Wolesi Jirga rejected 17 out of 24 nominations, including 7 who were nominated for second terms.¹² President Karzai then submitted 17 nominations in a second round, of which the Wolesi Jirga rejected 10.¹³ Several months later the Wolesi Jirga endorsed 5 of 7 nominees, leaving 6 vacancies.¹⁴ As of June 2011, there remained vacancies for the following Ministries: Water and Energy, Women’s Affairs, Urban Development, Transport and Aviation, Telecommunications and Information Technology, and Higher Education.¹⁵

Article 77 contributes further to the fundamental bureaucratic structure of the Government, providing that “[t]he Ministers shall perform their duties as heads of administrative units within the framework of this Constitution as well as other laws.”¹⁶ This first clause of Article 77 is very similar to the second clause of Article 136, discussed above: “The central administration shall be divided into several administrative units, each headed by a Minister.”¹⁷ While Article 136(2) speaks only to the structure of the administrative institutions, Article 77(1) provides guidance for the exercise of ministers’ official authority. Under Article 77(1), ministers’ authority is explicitly limited by the Constitution and by any other relevant laws passed by the legislature.

¹¹ Article 90(4) states that the “creation, modification and or abrogation of administrative units” is a duty of the National Assembly. While the president nominates individuals to ministerial positions, the National Assembly creates, modifies, and eliminates the positions.

¹² Alissa Rubin, *Many Karzai Afghan Cabinet Choices Are Rejected*, N.Y. Times, Jan. 2, 2010, <http://www.nytimes.com/2010/01/03/world/asia/03afghan.html>.

¹³ Hamid Shalizi & Jonathon Burch, *Over Half of Karzai’s New Afghan Cabinet Picks Vetoed*, Reuters, Jan. 16, 2010, available at <http://www.reuters.com/article/2010/01/16/us-afghanistan-cabinet-idUSTRE60E5LJ20100116>

¹⁴ Abdul Waheed Wafa, *5 Confirmed for Cabinet in Afghanistan*, N.Y. TIMES, June 28, 2010, <http://www.nytimes.com/2010/06/29/world/asia/29kabul.html>.

¹⁵ Solomon Moore, *Afghan Lawmakers Boycott to Get Cabinet Nominees*, Real Clear Politics, Jun. 14, 2011, http://www.realclearpolitics.com/news/ap/politics_topics/2011/Jun/14/afghan_lawmakers_boycott_to_get_cabinet_nominees.html.

¹⁶ Article 77(1).

¹⁷ Article 136(2).

The second clause of Article 77 gives a rather vague answer to the obvious and critical question of who is responsible for supervising the ministers since both the president and the Wolesi Jirga play roles in appointing them. “The Ministers shall be responsible to the President and House of Representatives for their specified duties.”¹⁸ According to this clause, both the president and the Wolesi Jirga are responsible for the ministers, but no guidance is given as to how these two institutions should share responsibilities. Keep this question in mind as we proceed, and you will see how this disjointed supervisory hierarchy functions.

B. Qualifications

Constitution of Afghanistan

Article 72

The person who is appointed as the Minister, should have the following qualifications:

- (1) Must have only the citizenship of Afghanistan. Should a nominee for a ministerial post also hold the citizenship of another country, the Wolesi Jirga shall have the right to confirm or reject his or her nomination.
- (2) Should have higher education, work experience and, good reputation.
- (3) His age should not be less than thirty-five.
- (4) Should not have been convicted of crimes against humanity, criminal act, or deprivation of civil rights by a court.

Can the president appoint anyone to a ministerial position? What are the constitutional qualifications required to become a minister? Article 72 establishes four criteria, the first of which is Afghan citizenship. While the provision requires a candidate to have only Afghan citizenship, it permits the Wolesi Jirga to exercise its discretion to reject or accept a nominee who also has the citizenship of another country.

Discussion Questions

1. Why might dual citizenship be a problem for a minister?
2. Why do you think the drafters of the Constitution decided not to simply forbid dual citizenship for ministers?

The other three qualifications under Article 72 are the following: “2) Shall have higher education, work experience, as well as a good reputation; 3) Shall not be less than 35 years of age; 4) Shall not have been convicted of crimes against humanity, a criminal act or deprivation

¹⁸ Article 77(2).

of civil rights by a court.”¹⁹ These qualifications, as required minimum standards, should be considered limitations on the president’s power to appoint the ministers serving under him.

Article 73 provides one other limitation on the appointment of ministers, although not in the form of qualifications. Article 73 essentially states that while the president may select a member of the National Assembly for a ministerial position, the individual may not hold both positions simultaneously and therefore must resign his or her position in the National Assembly.²⁰ The vacant position will then be filled by another individual, “appointed in accordance with the provisions of the law.”

Discussion Questions

1. Do you see any reasons why it would be problematic to have one individual serving as both a member of the Wolesi Jirga and a minister in the president’s government?

2. What conflicts of interest can you identify?

One clear issue arises under Article 77(2), providing that ministers are responsible to the president and the Wolesi Jirga. It might be problematic for an individual minister to also be a member of the institution responsible for supervising his or her ministerial duties.

3. How else might this conflict of interests be addressed?

C. Oath

Article 74 requires all ministers to swear an oath in the presence of the president before taking office. “In the name of God, Most Gracious, Most Merciful, I swear in the name of God Almighty that I shall protect the Holy religion of Islam, respect the Constitution and other laws of Afghanistan, safeguard the rights of citizens as well as independence, territorial integrity and the national unity of the people of Afghanistan, and, in all my deeds consider the Almighty’s presence, performing the entrusted duties honestly.”²¹

As noted in Chapter 3, the minister’s oath is different from the oath taken by the president, particularly with regard to the role of Islam. Under Article 63 the president swears to “obey and protect the Holy religion of Islam,” while under Article 74 a minister swears to “protect the Holy religion of Islam,” not to obey it. The president must “respect and supervise the implementation of the Constitution as well as other laws,” while the minister must “respect the Constitution and other laws of Afghanistan.” The minister swears to “safeguard the rights of citizens,” which is not included in the president’s oath. Similarly, each minister must swear to safeguard “the national unity of the people of Afghanistan,” which is not an element of the president’s oath.

¹⁹ Article 72.

²⁰ “The Ministers shall be appointed from amongst members of the National Assembly or outside. If a member of the National Assembly is appointed as Minister, that individual loses membership in the National Assembly and instead, another individual shall be appointed in accordance with the provisions of the law.” Article 73.

²¹ Article 74.

Finally, each minister swears that he or she will “in all my deeds consider the Almighty’s presence, performing the entrusted duties honestly.” The president’s oath states that he or she “in seeking God Almighty’s help and support of the nation, shall exert my efforts towards the prosperity and progress of the people of Afghanistan.” These differences illustrate some of the ways the drafters of the Constitution envisioned the divergent roles of the two institutions, despite the president’s role as the Government’s chairman. In particular, it is interesting to note the inclusion of the protection of the rights of citizens in the minister’s oath but not in the president’s oath. Keep these differences in mind as we discuss the duties of ministers next.

D. Duties

Constitution of Afghanistan

Article 75

The Government shall have the following duties:

- (1) Execute the provisions of this Constitution, other laws, as well as the final decisions of the courts;
- (2) Preserve the independence, defend the territorial integrity and safeguard the interests and prestige of Afghanistan in the international community;
- (3) Maintain public law and order and eliminate every kind of administrative corruption;
- (4) Prepare the budget, regulate financial conditions of the state as well as protect public wealth;
- (5) Devise and implement social, cultural, economic and technological development programs;
- (6) Report to the National Assembly, at the end of the fiscal year, about the tasks achieved as well as important programs for the new fiscal year;
- (7) Perform other duties that, in accordance with this Constitution and other laws, fall within the Government responsibilities.

As mentioned above, Article 71, Clause 2 states that “[t]he number of Ministers as well as their duties shall be regulated by law.” The Constitution sets no other constraints on the number of ministers, but it does have more to say about the duties of ministers as heads of the administrative units making up the Government. Article 75 describes the duties of “the Government,” which as we know from Article 71 is “comprised of Ministers who work under the chairmanship of the President.” Under Article 75, the government has seven broad duties, covering a wide variety of areas. As you study the duties of the government and consider the various ministries required to execute them, always remember that in addition to leading the government, the president appoints the ministers and other key government officials with the endorsement of the Wolesi Jirga under Article 64, Clause 11.

The Government's first duty is to "[e]xecute the provisions of this Constitution, other laws, as well as the final decisions of the courts."²² This clause uses the word "execute" to define a primary duty of the ministers who form the Government under the president. The Government is meant to execute the laws of the land, to ensure the Constitution is followed, and to guarantee that the powers of the State give force and effect to the final decisions of the courts. When the National Assembly passes a law and the president signs it, the Government is responsible for making sure the law is enforced and executed. When a court adjudicates a dispute and reaches a final decision, the Government is responsible for executing the judgment and making sure the parties carry out their court-ordered obligations. In this way, Article 75 helps to firmly define the Government's role relative to the other branches of government. As you will see, most of the other Article 75 duties describe specific areas of responsibility now assigned to particular Government departments by statutes, not by the Constitution. It should become clear that the duties in Article 75 set the foundation for those Government institutions, which are established by statutes assigning responsibility for executing each duty.

The second duty of the Government under Article 75 is to "[p]reserve the independence, defend the territorial integrity and safeguard the interests and prestige of Afghanistan in the international community."²³ Look at the list of presidential duties in Article 64 discussed in Chapter 3 of this book. The third, fourth, fifth, and sixth clauses all pertain to the president's role in the defense of the nation and leadership of the armed forces. He is the commander in chief, with the power to declare war and peace, make decisions about the defense of the country, and dispatch the military outside of Afghanistan. Article 75 establishes that the ministers share responsibility for these duties with the president, thereby laying the foundation for the creation of certain essential government institutions.

Responsibility for the defense of a nation's independence and territorial integrity is usually delegated to its military, which in Afghanistan falls primarily under the president, the Ministry of Defense and the National Security Director. In concert with the Ministry of Defense and the president, the Ministry of Foreign Affairs is typically responsible for "safeguard[ing] the interests and prestige" of the nation in the international community. Article 64, Clause 14 authorizes the president to appoint the "heads of political representatives of Afghanistan to foreign states as well as international organizations," and Article 64, Clause 15 provides his or her authority to "accept credentials of foreign political representatives in Afghanistan."

According to Article 75, Clause 3, the Government must "[m]aintain public law and order and eliminate every kind of administrative corruption."²⁴ Maintaining public law and order is commonly regarded as a core government responsibility, one of the reasons for the formation of government. Law enforcement authority in Afghanistan is delegated to the police, under the Ministry of Interior Affairs. The Ministry of Justice is also involved in maintaining public law and order through a variety of functions, including management of the juvenile justice system and the prison system, and adjudication of cases brought against the government by the public. Additionally, the Ministry of Counternarcotics plays a focused role in enforcing laws against the

²² Article 75, Clause 1.

²³ Article 75, Clause 2.

²⁴ Article 75, Clause 3.

drug trade, and the Attorney General's office plays a prominent role in investigating and prosecuting crimes.

The fourth Government duty listed in Article 75 is to “[p]repare the budget, regulate financial conditions of the state as well as protect public wealth.”²⁵ The central bank is designed to play a major role in protecting public wealth and regulating the financial conditions of the state. Article 12 establishes that “Da Afghanistan Bank shall be independent and the central bank of the state.”²⁶ According to Article 12, the central bank is responsible for currency issuance and formulating and implementing the country's monetary policy in accordance with the law.²⁷ Its organization and operation are also regulated by law, and it must “consult the economic committee of the Wolesi Jirga about printing of money.”²⁸ Notwithstanding its independence, the president appoints the head of the central bank with the endorsement of the Wolesi Jirga under Article 64, Clause 11. Other ministries bearing some responsibility for these duties include the Ministry of Finance and the Ministry of Economy. The Ministry of Finance is responsible for preparing the budget, which it does in consultation with the Budget Committee. The cabinet reviews and eventually approves the draft prepared by the Ministry of Finance and sends it to parliament and finally the president for approval.²⁹

The National Assembly's role in the budget process is defined by several articles in Chapter 5 of the Constitution. Since the National Assembly is covered in detail in Chapter 5 of this book, here we will only discuss those aspects of its authority that touch on the duties and powers of the Government. Article 90, Clause 3 lists as one of the National Assembly's duties: “Approval of the state budget as well as permission to obtain or grant loans.”³⁰ Article 91, Clause 2 provides that the Wolesi Jirga shall have special authority to “decide on the development programs as well as the state budget.”³¹ Consistent with Article 75, Clause 4 described above, Article 95 clarifies the origin of budget proposals by providing that “proposals for drafting the budget and financial affairs laws shall be made only by the Government.”³² In other words, for state budget and financial affairs laws, the Government is the only body that can initiate a law to put before the National Assembly for approval.

Article 98 has much to say about the budget process. The first clause states that “The state budget and development program of the government shall be submitted, through the Meshrano Jirga to the Wolesi Jirga along with its advisory views.”³³ Note that the Meshrano Jirga does not have discretion in this process; it must send the Government's proposed budget on to the Wolesi Jirga. The fourth clause of Article 98 requires the Government to present the following year's

²⁵ Article 75, Clause 4.

²⁶ Article 12, Clause 1.

²⁷ Article 12, Clause 2.

²⁸ Article 12, Clauses 3-4; *see* Da Afghanistan Bank Law, Official Gazette (12/17/2003 or 30/10/1382) *available at* http://www.centralbank.gov.af/pdf/UpdatedOfDaAfghanistanBankLaw_1_.pdf.

²⁹ For information on the Afghan budget process, visit <http://www.budgetmof.gov.af/>, and see the Public Finance and Expenditure Management Law, *available at* <http://www.budgetmof.gov.af/NationalBudget/Regulation/Regulation.html>.

³⁰ Article 90, Clause 3.

³¹ Article 91, Clause 2.

³² Article 95, Clause 2.

³³ Article 98, Clause 1.

budget to the National Assembly during the fourth quarter of the financial year, along with a brief report of the current year's budget which must be supplemented within six months by a precise account of the previous year's budget according to the next clause of Article 98.³⁴

The fifth Government duty under Article 75 requires the Government to “devise and implement social, cultural, economic and technological development programs.”³⁵ As you might expect with such a broad duty, there are many government departments that share responsibility for its execution. In reality, every department has some responsibility touching at least one of these areas, but a few obvious examples include the Ministry of Women's Affairs, the Ministry of Rural Rehabilitation and Development, the Ministry of Urban Development, the Ministry of Martyred, Disabled, Labor and Social Affairs, the Ministry of Commerce and Industry, and the Ministry of Refugees and Repatriation.

Article 75, Clause 6 requires the Government to “report to the National Assembly, at the end of the fiscal year, about the tasks achieved as well as important programs for the new fiscal year.”³⁶ As you hopefully recognize, this provision is an important piece of the network of relationships connecting the various branches of the government. While the president is the chairman of the Government, Article 75, Clause 6 is a strong statement on the important connection between the ministries and the legislature. This reporting requirement ensures that the legislature has the opportunity to review the Government's performance over the last fiscal year and gain an understanding of the major programs planned for the upcoming year. Similarly, in the budget context, Article 98, Clause 5 requires that: “The precise account of the previous year financial budget shall be presented to the National Assembly during the next 6 months according to the provisions of the law.”³⁷ These oversight provisions establish tangible regular reporting requirements owed to the Wolesi Jirga by the cabinet. This is one important way the Constitution gives substance to Article 77's general requirement that ministers are responsible to the Wolesi Jirga as well as the president.

Article 75, Clause 7 operates as a kind of catchall provision to “perform other duties that, in accordance with this Constitution and other laws, fall within the Government responsibilities.” You should see that this clause gives the legislature broad authority to control the duties of the ministers and their administrative units through legislation. So long as the laws are constitutional and lawful, they are binding on the ministers under Article 75, Clause 7.

E. Government's Regulatory Power

Constitution of Afghanistan

Article 76

(1) In order to implement the main policies of the country, and regulation of its duties, the government shall devise and approve regulations.

³⁴ Article 98, Clause 4.

³⁵ Article 75, Clause 5.

³⁶ Article 75, Clause 6.

³⁷ Article 98, Clause 5.

(2) These regulations should not be contradictory to the text and spirit of any law.

Now that we have covered the fundamental duties of the Government under Article 75, we need to understand how the Constitution empowers the ministers to fulfill them. Article 76 empowers ministers, as the heads of administrative units charged with executing particular Governmental duties, to implement regulations. Regulations are rules issued by the executive branch of the government. While they are not laws, regulations have the force of law. They are adopted under authority granted by a statute, often to assist in the implementation of the statute. In Afghanistan, the permitted purposes of these regulations are to implement the fundamental lines of the policy of the country and to regulate the Government's duties.³⁸

You may recall from Chapter 3 that Article 64, Clause 2 authorizes the president to “determine the fundamental lines of the policy of the country with the approval of the National Assembly.”³⁹ As we discussed in detail there, the president establishes the fundamental lines of national policy with the approval of the National Assembly, and the Constitution does not require the cabinet's approval. The Government's “main task is to assist the president in the implementation of his policies. Unlike the Constitution of 1964, the Constitution of 2004 leaves no room for a politically autonomous role of the Government.”⁴⁰ When the president makes a policy decision in any particular area of his responsibility, it is up to the Government, under the executive authority of the State, to implement that policy. The relevant ministry or ministries must determine whether additional regulations are required in order to accomplish the implementation of the president's policy, and whether any law prevents or limits the creation of such regulations.

You should recognize that this is a fascinating area of convergence among government institutions with different authorities and responsibilities. It is worth taking a moment to parse out the individual and connecting parts in this network:

- The president determines the fundamental lines of national policy for which he must receive the approval of the National Assembly.
- Upon such approval, the Government, made up of ministers and their subordinate units, implements that policy.
- The president does not need the approval of his ministers to determine the fundamental lines of national policy, and if they refuse to implement his policy he may remove them from office under Article 64, Clause 11.
- The Government is empowered to create enforceable regulations to implement the president's policies, but those regulations may not contravene the “body or spirit” of any law, including the Constitution and any legislation passed by the National Assembly.⁴¹

This network of authority and responsibility balances such concerns as government efficiency, executive authority, democracy, and legislative oversight.

³⁸ Article 76.

³⁹ Article 64, Clause 2.

⁴⁰ Rainer Grote, *Separation of Powers in the New Afghan Constitution*, 64 Heidelberg Journal of International Law 897, 907 (2004).

⁴¹ Note that “body and spirit” are not defined anywhere, but a reasonable interpretation may be that a regulation may not conflict with the text itself or the purpose of any law.

The second permissible purpose of Government regulations under Article 76 is to “regulate its duties.” Clearly the Government may not use this grant of authority to eliminate duties assigned by the Constitution, and instead any such regulations must help to execute them. As we discussed above, Article 75 lists the general duties of the Government. Article 75, Clause 3 is a relatively clear example: “maintain public law and order and eliminate every kind of administrative corruption.” Under Article 76 the Ministry of Interior could (and does) create and enforce a regulation pertaining to the maintenance of public law and order as long as it did not contravene the body or spirit of any existing law.

Example: The Police Law of 2005

Regulations related to Government duties often serve to clarify or give content to abstract statutes that touch on those duties. Continuing with our example from Article 75, Clause 3, there are already many laws passed by the National Assembly pertaining to the maintenance of public law and order. The National Assembly enacted the Police Law in 2005 (1384) to create a legal framework for police operations. It was relatively specific and dealt with such issues as police duties and obligations, detention of persons, financial sanctions, use of force, and others. Article 32 of the Police Law states: “The Ministry of Interior can draft and adopt a regulation to better enforce the provisions of this law.”⁴² Any subsequent regulation adopted by the Ministry of Interior, under its Article 75, Clause 3 duty to “maintain public law and order,” may clarify or interpret language from the Police Law and must not contravene its body or spirit. The Government’s regulatory power is therefore a critical tool that enables the ministries to translate broad constitutional duties and abstract statutes into enforceable rules and manageable procedures, while preserving the National Assembly’s legislative power.

F. Government’s Legislative Power

As you saw above in the discussion on state budget and financial affairs laws, the Government does have some legislative powers in addition to its regulatory powers. We examined above the Government’s duty under Article 75, Clause 4 to prepare the budget and the provision under Article 95, Clause 2 specifying that the Government is the only body that may initiate a budget law. However, this is not the Government’s only legislative power. While it has exclusive authority to initiate state budget and financial affairs laws, it may also propose other types of legislation under Article 95, Clause 1. Furthermore, Article 79 authorizes the Government to make legislative decrees under certain circumstances, which may have the force of law after endorsement by the president.

Constitution of Afghanistan

Article 95

⁴² Police Law, Official Gazette No. 862 (September 22, 2005), *available at* <http://www.asianlii.org/af/legis/laws/plogn862p2005092213840631a346.txt/cgi-bin/download.cgi/download/af/legis/laws/plogn862p2005092213840631a346.pdf>.

(1) The proposal for drafting laws shall be made by the Government or members of the National Assembly or, in the domain of regulating the judiciary, by the Supreme Court, through the Government.

Under Article 95, the Government may introduce non-budgetary legislative proposals through a particular procedure established by the National Assembly's Rules of Procedures requiring the signature of the minister under whose area of jurisdiction the intended law falls.⁴³ The box below walks through the process step-by-step.

Government's Procedure for Proposing Legislation⁴⁴

Under this procedure:

- (1) The government's proposal is initiated according to the legislative plan of action drafted by the Ministry of Justice and approved by the Minister of Justice.⁴⁵
- (2) The final legislative plan of action is approved by the Council of Ministers in the Office of Administrative Affairs.⁴⁶
- (3) The bills in the final legislative plan of action are then prepared by ministerial committees appointed by the ministers to whom each bill refers. If a bill relates to multiple ministries then they establish a joint committee.
- (4) Once the draft of the legislative document is completed, it is sent to the Ministry of Justice for final scrutiny, and then to the Council of Ministers in the Office of Administrative Affairs to be reported upon and confirmed.
- (5) Before the legislative document is submitted to the National Assembly, it is reviewed by the General Department for Law Making and Academic Legal Research Affairs (Taqnin). The Taqnin ensures the proposed legislation does not conflict with the Constitution, international treaties, sharia, or existing legislation.
- (6) Article 97 requires that such proposals for drafting legislation must be submitted first to the Wolesi Jirga, which sends the bill to the Meshrano Jirga after approval.⁴⁷

⁴³ National Assembly, Rules of Procedures of the Wolesi Jirga, Rule 77, *available at* <http://www.sunyaf.org/images/pdf/leg-pub/Wolesi%20Jirga%20Rules%20of%20Procedure.pdf>.

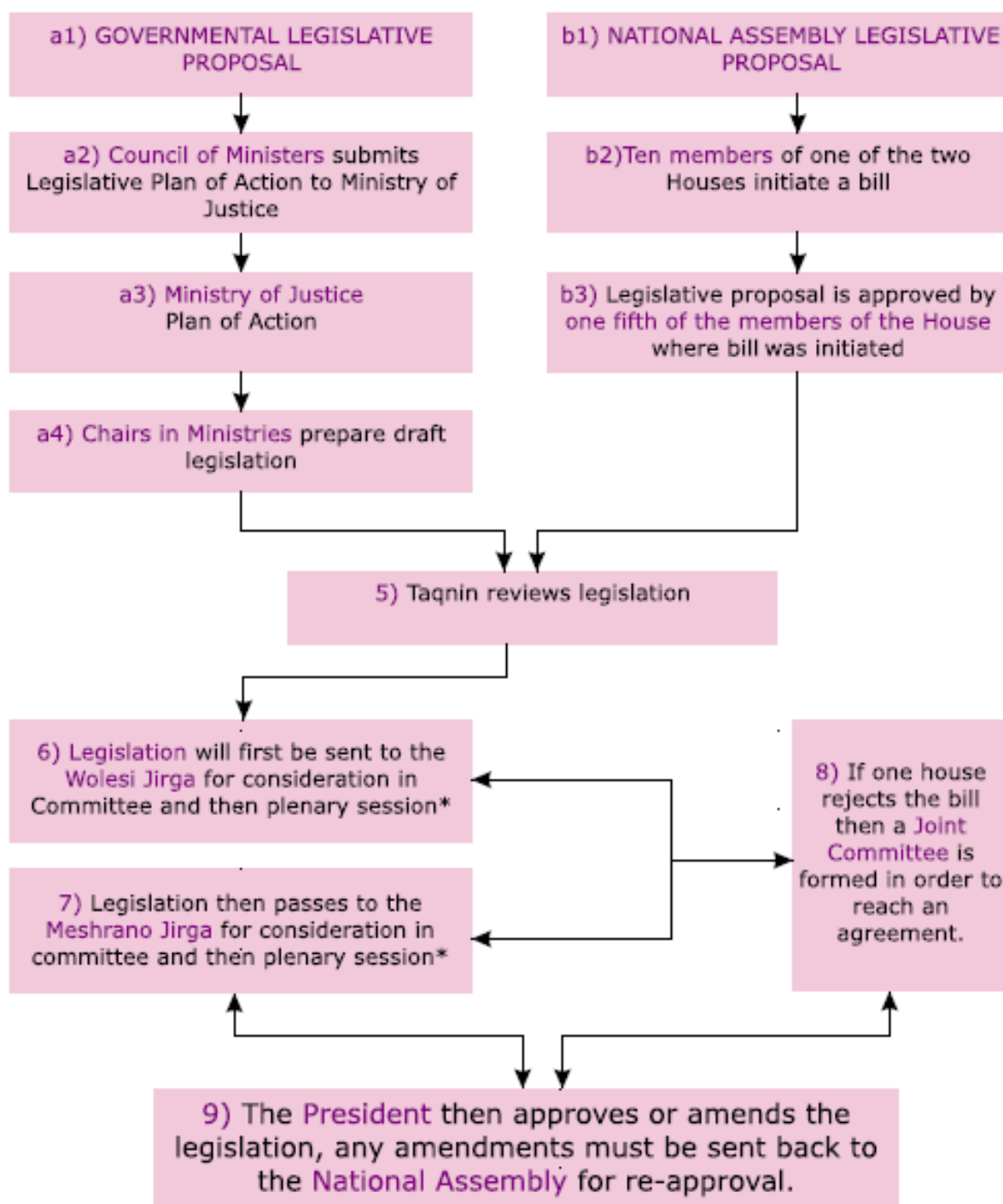
⁴⁴ Toolkit 3: Legislative Process, USAID Afghanistan Parliamentary Assistance Program, *available at* <http://www.sunyaf.org/images/pdf/leg-pub/Afghanistan%20Legislative%20Process.pdf>.

⁴⁵ The Legislative Plan of Action governs which Government legislative proposal is drafted, and while the Ministry of Justice drafts it and the Minister of Justice approves it, the Council of Ministers all have input.

⁴⁶ The Council of Ministers consists of the ministers appointed by the president to oversee the ministries.

⁴⁷ This is a confusing process, and we include a helpful diagram at the end of this chapter as a visual aid. You should turn to it now. This diagram was taken from the USAID Afghanistan Parliamentary Assistance Program Toolkit 3 cited in footnote 48.

Procedural Path for Government Proposed Legislation Under Article 95⁴⁸



⁴⁸ Toolkit 3: Legislative Process, USAID Afghanistan Parliamentary Assistance Program, *available at* <http://www.sunyaf.org/images/pdf/leg-pub/Afghanistan%20Legislative%20Process.pdf>.

Constitution of Afghanistan

Article 79

- (1) In cases of recess of the Wolesi Jirga, the government can adopt legislation in an emergency situation on matters other than those related to budget and financial affairs.
- (2) The legislative decrees become laws after they are signed by the President.
- (3) The legislative decrees should be submitted to the National Assembly in the course of thirty days beginning from the first session of the National Assembly.
- (4) In case of rejection by the National Assembly, the legislations become void.

The Constitution also gives the Government the authority to issue legislative decrees in certain circumstances and with particular limitations. As the text of Article 79 makes clear, the Government's power to issue legislative decrees is only operational while the Wolesi Jirga is on recess. Additionally, during the Wolesi Jirga's recess, the Government may only issue legislative decrees in case of an immediate need or an emergency. Finally, the Government may not issue legislative decrees for matters related to budget and financial affairs, which must follow the prescribed procedures of the Constitution.⁴⁹

Legislative decrees issued under the Government's Article 79 power "acquire the force of law" only after the endorsement of the president.⁵⁰ Furthermore, Article 79, Clause 3 provides that "legislative decrees shall be presented to the National Assembly within 30 days of convening its first session, and if rejected by the National Assembly, they become void." This final provision is a check on the Government's power and preserves the National Assembly's legislative supremacy. If the Government were to issue a legislative decree during the Wolesi Jirga's recess that the elected representatives of the parliament found objectionable, they would have the opportunity to nullify it upon their return.

G. Wolesi Jirga Oversight of the Government

We have discussed the Government's constitutional duties, the powers assigned to execute them, the checks on those powers, and the network of authority connecting the various branches of government. While we have discussed a number of ways the National Assembly supervises the activities of the Government, there is one final element of this relationship that we must address. The National Assembly has the authority to question and investigate ministers in a few different ways, and even the power to issue a no-confidence vote. This power has enormous value in terms of intimidation, and a minister called in to answer questions by the Wolesi Jirga has some reason to watch what he or she says.

⁴⁹ See Articles 90, Clause 3, 91 Clause 2, 95, 97, 98, 99.

⁵⁰ Article 79, Clause 2.

First, Article 93 provides that “any commission of both houses of the parliament can question any Minister about special issues.”⁵¹ This means, for example, that the Wolesi Jirga’s Commission on Internal Affairs can question the Minister of Interior about special issues regarding the Afghan National Police and security issues. In fact, according to the Wolesi Jirga’s Rules of Procedures, the commissions may question any of the government officials included in Article 64, Clause 11 regarding “specific issues within their jurisdiction.”⁵² That clause includes not only ministers, but also “the Attorney General, the Head of the Central Bank, the National Security Director as well as the Head of the Red Cross.”⁵³ Article 93 and Rule 27 of the Rules of Procedures both stipulate that “the individual questioned shall provide an oral or written response.”

In addition to standing commissions’ right to question ministers and other Government officials, Article 89 provides the Wolesi Jirga with “the authority to establish a special commission, on the proposal of one third of its members, to review as well as investigate the actions of the Government.”⁵⁴ This special commission’s sole purpose would be to investigate the actions of the Government, and so would likely only be approved for cases where those actions were suspected of being unlawful or possibly grossly incompetent. The Wolesi Jirga’s Rules of Procedures provide further details regarding the special commission in Chapter 7, consisting of Rules 34-36.⁵⁵ For example, the special commission must consist of at least 21 members representing the Wolesi Jirga, who must be approved during a plenary session of the Wolesi Jirga.

Finally, Article 92 provides that the Wolesi Jirga “on the proposal of 20 percent of all its members, shall make inquiries from each Minister.”⁵⁶ With a much lower threshold and no explicit investigatory basis, this authority allows the Wolesi Jirga to call in ministers to discuss issues and answer questions to facilitate good governance. Unfortunately, as in so many places, it is often used as a way to score political points instead of as a tool to help acquire information and understanding. Article 92 does provide a means to punish a minister who fails to adequately address the Wolesi Jirga’s concerns. The second clause states: “if the explanations given are not satisfactory, the Wolesi Jirga shall consider the issue of a no-confidence vote.”⁵⁷ The third clause goes on to state, “the no-confidence vote on a Minister shall be explicit, direct, as well as based on convincing reasons.”⁵⁸ The vote shall be approved by the majority of all members of the Wolesi Jirga.”⁵⁹ Again, the Wolesi Jirga’s Rules of Procedures supplement the constitutional provisions with additional details and procedures in Rules 99 and 100.⁶⁰ For example, Rule 100 states that each questioner may speak for no longer than ten minutes and that the minister may

⁵¹ Article 93, Clause 1.

⁵² National Assembly, Rules of Procedures of the Wolesi Jirga, Rule 27, *available at* <http://www.sunyaf.org/images/pdf/leg-pub/Wolesi%20Jirga%20Rules%20of%20Procedure.pdf>.

⁵³ Article 64, Clause 11.

⁵⁴ Article 89, Clause 1.

⁵⁵ National Assembly, Rules of Procedures of the Wolesi Jirga, Rules 34-36.

⁵⁶ Article 92, Clause 1.

⁵⁷ Article 92, Clause 2.

⁵⁸ Article 92, Clause 3.

⁵⁹ Article 92, Clause 3.

⁶⁰ National Assembly, Rules of Procedures of the Wolesi Jirga, Rules 99-100.

speak for no longer than one and a half hours. You read a detailed account of this no-confidence vote procedure in Chapter 2: The Separation of Powers.

IV. CONCLUSION

As previously discussed, this chapter is not meant to delve deeply into administrative law, or the rights of citizens with regard to Government institutions. Its purpose is to provide you with an understanding of the Constitution's structural mandates and its delegations of authority with regard to state administration. While the Constitution contains many high ideals and noble principles, it touches the Afghan people most directly through the Government institutions it creates, empowers, and restrains. In order to protect the people from the danger of tyranny, the Constitution distributes authority among a variety of institutions and compels them to work together in exercising it. This chapter explored the resulting complex network of relationships, the institutions charged with executing the nation's laws, and the principles supporting the structure. While this is an essential foundation, it is truly only the beginning.

CHAPTER 5: THE LEGISLATURE

I. INTRODUCTION

Constitution of Afghanistan

Article 4

National sovereignty in Afghanistan shall belong to the nation, manifested directly and through its elected representatives.

The National Assembly of Afghanistan has responsibility for drafting and passing legislation, among other crucial tasks. The structure and powers of the National Assembly are detailed in Articles 81 to 109 of the Constitution. The Constitution states that the National Assembly was created to represent the “voice of the people” in government.¹ The voice of the people forms the basic foundation of any democracy. The National Assembly is made up of two houses, an upper house and a lower house. Each has a separate process for electing members and different responsibilities. They are both discussed in detail below.

This system is not unique to Afghanistan. Legislatures have played important roles in governments across the world. In a democratic society, the role of the legislature is to represent the will of the people in government and to serve as a check on the power of the executive. In reality, however, not every legislature fulfills this mandate. Some are overshadowed by powerful executives and others struggle with corruption. As you read this chapter, think about ways in which these problems manifest themselves within Afghanistan and potential steps Afghan society can take to minimize their negative effects on governance.

There are different ways of structuring a legislature to enable it to fulfill its mandate and role in the government. In the discussion of the National Assembly, we will compare and contrast some of these different structures. As you read this chapter, think about the advantages and disadvantages to different legislative structures. Part Two will discuss the structure of the Afghan Legislature, Part Three its powers and Part Four will examine the Legislative Process. Lastly, there will be a discussion of the budget and the role of the Loya Jirga in the Afghan Government.

II. STRUCTURE OF THE LEGISLATURE

A. Wolesi Jirga

The Wolesi Jirga is the lower house of the Afghan Parliament and is responsible for drafting and approving all legislation, which is then sent to the upper house for approval. According to the Constitution, the people of Afghanistan directly elect members of the lower house to five-year terms. The election must be free and secret, and election law must be used to determine the constituencies.² The constituencies represent the districts of Afghanistan, and the Constitution

¹ Article 81.

² Article 83.

states in Article 83 that the election law must ensure that all people of Afghanistan are fairly represented.³

Each district of Afghanistan elects a number of representatives proportionate to the population. Each constituency is also mandated to have a certain number of women proportionate to its population, but there must be a minimum of two. In total, the Wolesi Jirga can be comprised of no more than 250 members.⁴

Before each term and after each election, the Wolesi Jirga elects an Administrative Team from among its members. The team consists of a President (the Speaker), First and Second Deputies, a Secretary, and an Assistant Secretary. These elections can be quite contentious, with the 2011 election of Speaker Abdul Raouf Ebrahimi taking place only after a full month of election stalemate.⁵ Duties of this Administrative Team are set by the Regulations on Internal Duties of the Wolesi Jirga.⁶

The Constitution also sets specific requirements for all candidates. Each candidate must be a citizen of Afghanistan, either by birth or have been a naturalized citizen for at least ten years.⁷ Candidates cannot have been convicted of a crime and must be at least twenty-five years of age.⁸ Before the election, the Independent Elections Commission reviews candidates for the specified qualifications and the candidates' credentials.⁹

Discussion Questions

1. Do you think that the election law has succeeded in creating a system that fairly and adequately represents all of the people of Afghanistan?
2. Are any groups underrepresented in Parliament?
3. What do you think of a quota for female members of the Wolesi Jirga? Do you think that women would be adequately represented without a quota or is the quota essential to enable them to play a role in parliament?
4. Do you think that the Constitution sets adequate criteria for parliamentary candidates? Would you suggest any changes?

B. Meshrano Jirga

³ *Id.*

⁴ *Id.*

⁵ Khushnood Nabizada, "Afghan Parliament Elects House Speaker," (Feb. 18, 2011), *available at* <http://www.khaama.com/afghan-parliament-elects-house-speaker>.

⁶ Article 87.

⁷ Article 85(1).

⁸ Article 85(2), 85(3).

⁹ Article 86.

The upper house of the National Assembly is the Meshrano Jirga. Although the Meshrano Jirga plays an important role in the legislative process, its powers are not as significant as those of the Wolesi Jirga as its role is limited to simply approving legislation coming from the lower house, as opposed to drafting the legislation.

Unlike the Wolesi Jirga, members of the Meshrano Jirga are not directly elected by the people of Afghanistan. One-third of the members are elected by the Provincial Councils. Each Council chooses one of its members to be a member of the Meshrano Jirga for a four-year term.¹⁰ The Constitution also requires the District Councils to elect one-third of the upper house. District Council representatives are set to serve three-year terms.¹¹ When these council members are chosen to be members of the Meshrano Jirga they give up their seats on their respective councils.¹²

The President appoints the remaining one-third of Meshrano Jirga members. They serve five-year terms.¹³ Article 84 states that the Presidential appointees must be selected from among “experts and experienced personalities.” Two seats are reserved for representatives with disabilities and two for members of nomadic groups.¹⁴ Fifty percent of these appointed members of the Meshrano Jirga must be women.¹⁵

An Administrative Team is elected by the Meshrano Jirga to fill the same positions as those in the Wolesi Jirga, including a Speaker. The qualifications for candidacy are also the same as those for the lower house with the exception of the minimum age, which is thirty-five for the Meshrano Jirga.¹⁶

Despite the theoretical composition of the Meshrano Jirga, elections and representation have worked quite differently in practice. To date, there have not been district elections because of expenses and the complex nature of determining what comprises a district – including issues like border disputes. This has meant that 34 seats that should have been filled for three-year periods by District Representatives have in fact been filled by an additional provincially-elected representative for four years. Thus, 68 members of the Meshrano Jirga are Provincial Representatives while the remaining 34 are the presidentially appointed representatives.¹⁷ As of 2013, there are still no district elections set for the near future.

The differing terms of service – three, four, and five years – may also have a practical difference on the power and influence of the representatives, as well as their effectiveness. According to the Internal Rules for the Administrative Team, the Speaker is to serve a five-year term. In 2011,

¹⁰ Article 84(1).

¹¹ Article 84(2).

¹² Article 84(3).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Article 84.

¹⁶ Article 87.

¹⁷ See International Federation for Electoral Systems, Election Guide: Afghanistan Country Profile (last visited March 31, 2013), available at <http://www.electionguide.org/country.php?ID=2>; see also Inter-Parliamentary Union, Afghanistan: Meshrano Jirga (last visited March 31, 2013), available at http://www.ipu.org/parline/reports/2382_E.htm.

the Speaker of the Meshrano Jirga was elected by the Provincial Representatives before President Karzai had appointed his 34 representatives. This raised controversy because technically, some argued, if the Speaker is to serve a five-year term, then the Speaker should only be selected from the Presidential appointees. Despite that argument, the Meshrano Jirga went forth with its selection prior to the Presidential appointments, electing a Provincial Representative.¹⁸

Discussion Questions

1. What do you think of the way in which the members of the Meshrano Jirga are appointed?
2. Do you think that appointing them provides any benefits that direct elections would not? Does the conflict between elected and appointed representatives pose a political power problem? Should the speaker be an appointed representative?
3. Do you think there are benefits to having different length terms for members of the Meshrano Jirga? What are the drawbacks?
4. Are Provincial Representatives an adequate substitute for District Representatives?

What follows are examples of how other nations have chosen to structure their legislative branches. Of course, many factors contribute to the success or failure of these systems, but try to imagine how each of these systems compare to the system in Afghanistan. Might it be better or worse than the current system?

Example 1: Grand National Assembly of Turkey

In contrast to the National Assembly of Afghanistan, the Turkish legislature, known as the Grand National Assembly, is unicameral. This means that there is only one house, not an upper and lower house as in Afghanistan. Another difference between the Turkish Parliament and the National Assembly is the way in which representatives are elected. In the National Assembly, the people vote directly for specific candidates in their district. In Turkey, they have a proportional representation system. This means that the people vote for a political party and each party is assigned a percentage of seats that is proportional to the number of votes they received. The winning party then gets to form the government and select the prime minister and cabinet ministers. A party must receive at least ten percent of the vote to qualify for any seats in parliament. This has the effect of keeping many smaller parties from being represented at all. Since 2002, the ruling party has had an absolute majority in the legislature.¹⁹

Discussion Questions

¹⁸Obaid Ali, "Even the Upper House does not listen to the President," (Feb. 22, 2011), *available at* <http://www.aan-afghanistan.org/index.asp?id=1516>.

¹⁹Constitution of Turkey, Articles 75-100.

1. Do you think that there are any advantages to having a single house of parliament rather than a bicameral legislature like Afghanistan's?
2. Compare the proportional representation electoral system in Turkey with the direct elections in Afghanistan. What advantages and disadvantages do you see with each method?

Example 2: Parliament of Egypt

The Egyptian Parliament is a bicameral legislative body, like the National Assembly of Afghanistan. The lower house is known as the House of Representatives while the upper house is the Shura Council. The House of Representatives is made up of at least 350 members. These members represent constituencies, but the division of these constituencies is done pursuant to additional law beyond the Constitution. All elected members are to serve five-year terms and election for all seats happens at the same time – 60 days prior to the new five-year term. The Shura Council is made up of at least 150 members. The President may also appoint additional members, but that number cannot exceed one-tenth of the total number of elected members. Members of the Shura Council serve six year terms and half of the seats are up for election every three years.²⁰

Discussion Questions

1. What do you think of the Egyptian system that only allows one-tenth of the upper house to be appointed? What impact could this have on the executive control of the legislature?
2. Do you think its wise to leave the division of constituencies to additional law, without specifying how many members must represent each constituency?

Example 3: Indonesian Parliament

The People's Consultative Assembly of Indonesia is a bicameral legislature like those in Afghanistan and Egypt. The lower house is the People's Representative Council, made up of 560 members. The upper house is the Regional Representative Council, which has 132 members. Elections in Indonesia follow the proportional representation system so the people do not vote for specific candidates, but rather vote for the party they support. Unlike in Turkey, no party in Indonesia has been able to gain an absolute majority. Consequently, the government is formed through coalitions of parties that join together and form a government.

In practice, the Indonesian parliament is widely considered to be an extremely corrupt institution. Consequently, the people of Indonesia are skeptical that the legislature will actually represent their interests, regardless of the system of representation in place.²¹

Discussion Questions

²⁰ 2012 Constitution of Egypt, Articles 114-131.

²¹ Constitution of Indonesia, Articles 19-23.

1. What difficulties do you think arise from the proportional representation in Indonesia?
2. What advantages and disadvantages do you see to a government formed by a coalition rather than single party rule?
3. Corruption is a serious problem in the Indonesian government. What impact do you think this has on the legitimacy of the legislature and its ability to pass effective legislation?

III. FUNCTION, PRACTICE, AND POWERS OF THE LEGISLATURE

Constitution of Afghanistan

Article 81

The National Assembly of the Islamic Republic of Afghanistan, as the highest legislative organ, shall manifest the will of its people as well as represent the entire nation. Every member of the Assembly, when voting, shall judge according to the general interests as well as the supreme benefits of the people of Afghanistan.

A. Functions

Reading Focus

As you read this section, focus on the role that the drafters of the Constitution intended for the National Assembly to play in the governing of Afghanistan. Consider whether you think that the National Assembly is able to carry out this role with the powers and authority that it exercises.

The National Assembly has three main functions. The first is the Assembly's legislative function that gives it the power to pass legislation and control over the national budget.²² The second function given to the National Assembly is the power to control the executive. It can do this through passing laws and by exercising its power of review over the actions of government ministers and government policies.²³ However, this function does not operate in reality in the way that was intended. Events surrounding the September 2010 parliamentary elections demonstrated the ongoing power struggle between Karzai's government, the National Assembly and the Supreme Court. This will be discussed in greater detail below.

The third function of the National Assembly is to represent the people of Afghanistan. The Assembly is directly elected by the people and its purpose is to serve as their voice in government in a more direct way than the President does. The National Assembly is supposed to

²² Ramin Moschtaghi, *Max Planck Manual on Afghan Constitutional Law, Volume One: Structure and Principles of the State* (3rd ed., March 2009).

²³ *Id.*

protect the rights and wellbeing of its constituents and act on behalf of their best interests.²⁴ This function is clearly manifested in Article 81 of the Constitution.²⁵

Discussion Questions

1. What do you think of the functions of the National Assembly? In your own experience, has it represented constituents in the way that the Constitution intended?
2. Do you think that the National Assembly is actually able to exercise its power to control the executive? Or, is the President able to ignore any attempts to curb his actions?

B. Process and Procedure

While the Assembly is in session, each house sets up committees to study areas and issues under discussion.²⁶ In most cases, decisions are made by a majority of the representatives present in each house. Situations that require more than a simple majority vote are stipulated by law. Quorum, the minimum number of members of parliament who must be present to allow the National Assembly to pass legislation, is achieved if a majority of the members of each house are present.²⁷

Both houses of the National Assembly hold sessions simultaneously but separately. However, they can meet in joint sessions when the President thinks its necessary and convenes a joint session.²⁸ Article 105 mandates that these sessions be open to the public to allow people to attend and see what their representatives are doing. However, if ten members of parliament (MPs) or the Chairman requests a closed session, the public can be barred if the rest of the Assembly approves the request.²⁹ Neither house can be dissolved by the government prior to the expiration of the house members' terms in office. This is an important way of preventing the executive from influencing or controlling actions of the Assembly by threatening it with dissolution.

Another safeguard is the prohibition on criminal prosecution of a member of the National Assembly for voting a certain way or expressing certain opinions.³⁰ For example, if members disagree with the President on an issue, the executive cannot criminally prosecute them for doing so. This is supposed to ensure that the representatives are free to vote in a way that they think best represents the interests of their constituents.

However, if a member of either house is accused of a crime not related to their opinions or votes in session, their house is informed and the member can be criminally prosecuted.³¹ The relevant house of Parliament can give its permission for the prosecution and imprisonment of one of its

²⁴ *Id.*

²⁵ Article 81.

²⁶ Article 88.

²⁷ Article 106.

²⁸ Article 104.

²⁹ Article 105.

³⁰ Article 101.

³¹ Article 102.

members if it chooses. MPs cannot, however, be detained or imprisoned without the permission of their house. The only exception to this is in the case of an “evident crime.” When an MP is accused of an evident crime, the authorities can investigate and imprison the individual without the permission of the National Assembly. The purposes of this restriction is to prevent the government from arresting MPs in advance of an important vote or using threat of arrest to pressure MPs to vote a certain way.

Example 4: Turkish Constitutional Safeguards for Legislators

The Constitution of the Republic of Turkey gives immunity from liability to MPs for any statements or votes they make or views they hold. However, it does allow the Assembly to decide that MPs should not repeat or reveal their opinions or votes to the public. MPs cannot be arrested, interrogated, detained or tried unless the Assembly gives its permission or the MP is caught in the act of committing an act that carries a heavy penalty. Additionally, any criminal sentences are suspended until the MP no longer holds office. To avoid problems caused by delayed investigations, the Constitution states that the statute of limitations does not apply to crimes as long as the suspect holds office.³²

Discussion Questions

1. Are the safeguards in place for the National Assembly sufficient? If not, how would you amend them?
2. Is it necessary to have a provision protecting representatives from prosecution for the way they vote?
3. Do you think the exception to immunity from criminal prosecution can be exploited by the government to undermine the purpose of parliamentary immunity?

C. Powers of the National Assembly

Reading Focus

The Constitution gives the Wolesi Jirga a number of powers intended to allow it to function as a check on the executive branch and the power of the President. As you read about these powers below, think about whether they actually function the way they were intended.

The National Assembly carries out its functions through varied and wide ranging powers and responsibilities that often also involve the executive branch. The Constitution grants the National Assembly the authority to ratify, modify or abrogate laws or legislative decrees.³³ This power is fairly straightforward. Both houses must approve these changes in order for them to go into

³² Constitution of Turkey, Articles 75-100.

³³ Article 90(1).

effect. It is also the responsibility of the Parliament to approve social, cultural, economic and technological development programs.³⁴ The National Assembly can also set up, change or eliminate administrative units.³⁵ Additionally, the National Assembly must approve the ratification or abrogation of treaties under international law.³⁶ This means that the President cannot simply choose which treaties to be party to on his own. The National Assembly must give its approval.

The Wolesi Jirga has the authority to create a special commission to investigate the actions of the government. One third of the members of the lower house must approve the creation of the commission before it is authorized.³⁷ For example, if members of the Wolesi Jirga think that an administrative agency under the power of the executive or even the President has acted in a way that is illegal or unethical, they can authorize an investigation into government behavior as long as they have the support of one third of the members. However, in practical terms, it is unclear whether or not the Wolesi Jirga has the institutional strength to exercise these powers. Divisions within the body and the influence of the executive have prevented the Wolesi Jirga from actually acting as a check on the president's power.

Article 92 gives the Wolesi Jirga the power to inquire into the actions of each Minister in government. Twenty percent of the members must support the proposal for an inquiry.³⁸ If the Wolesi Jirga is not satisfied with the result of the inquiry and thinks that the Minister is not fit to hold his position, they can hold a vote of no confidence. Article 92 states that the vote must be based on convincing reasons that have been presented explicitly. A simple majority is required for a vote of no confidence.³⁹ The Wolesi Jirga exercised this power in 2007, when it held a vote of no confidence in Foreign Minister Spanta in an effort to remove him from his position. President Karzai claimed that the Wolesi Jirga did not have the authority to remove ministers from office and took the issue to the Supreme Court.⁴⁰ The Court ruled that the Wolesi Jirga had not followed the proper procedures laid out in Article 92, and consequently the no confidence vote was invalid.⁴¹ The Wolesi Jirga responded by announcing that the Supreme Court did not have the authority to interpret the Constitution.⁴² This episode illustrates the difficulty of determining who will interpret the Constitution in the absence of an explicit granting of power in the text.

The Spanta Case also illustrates some institutional weaknesses in the Wolesi Jirga. Following the Spanta Case, the Wolesi Jirga moved to establish a commission to oversee and limit the actions of the government. However, internal divisions and in-fighting prevented the Wolesi Jirga from appointing more than two of the twenty-three members of the commission. Eventually, in the face of insurmountable internal divisions, the Wolesi Jirga gave up on the

³⁴ Article 90(2).

³⁵ Article 90(4).

³⁶ Article 90(5).

³⁷ Article 89.

³⁸ Article 92.

³⁹ *Id.*

⁴⁰ J. ALEXANDER THIER, U.S. INST. OF PEACE, RESOLVING THE CRISIS OVER CONSTITUTIONAL INTERPRETATION IN AFGHANISTAN 3 (2009).

⁴¹ *Id.*

⁴² *Id.*

commission and it was never created. This is an example of legal powers granted by the Constitution but not realized in practice.

Example 5: Elections, the National Assembly and the President

As you learned in Chapter 2: The Separation of Powers, one of the functions of the National Assembly is to act as a check on the power of the President. In some situations, the President may want to mitigate any limits that the Assembly tries to place on his power. An example of this is the struggle between the National Assembly and President Karzai over the results of the parliamentary elections in September 2010. Following the elections, there were widespread allegations of fraud, including stuffing ballot boxes and intimidating voters. Many losing candidates appealed the results and Karzai appointed a Special Court to deal with claims of misconduct. The Independent Elections Commission, the body that has the final say on election results, threw out 1.3 million votes that they found to be fraudulent, but certified the results of the election as final and legal.⁴³

Many of the losing candidates brought claims of fraud to the Special Court that Karzai had created, and a large percentage of these candidates were his Pashtun supporters. Critics questioned the legitimacy of the Special Court and claimed that it was unconstitutional. Karzai delayed the inauguration of the new National Assembly repeatedly over the next several months to enable the Special Court to deal with all of the allegations of fraud. In early January 2011, Karzai announced that he would delay the inauguration for another month but the elected members of the National Assembly refused to accept another delay. They announced that they would convene themselves if Karzai would not do so. This would have raised a number of constitutional issues because according to the text, only the President has the legal authority to convene a session of the National Assembly. After negotiations, however, these issues were avoided when Karzai agreed to inaugurate the National Assembly on 26 January 2011.⁴⁴

This situation exemplifies a struggle for power between the National Assembly and the President. Karzai's supporters lost seats in the September 2010 election leading some to suggest that he was apprehensive that the new Assembly would be less friendly and act contrary to his interests. Once the Assembly has been convened, there is much less that the President can do to ensure that legislation he supports gets passed. Thus, critics argue that Karzai tried to prevent an unfriendly parliament from being inaugurated in the first place.

Discussion Questions

1. What do you think that this struggle over the election results says about the relationship between the National Assembly and the Executive?
2. Should the National Assembly have the authority to convene itself if the President refuses to do so?

⁴³ Ray Rivera, "Afghan Political Crisis Grows as Legislators Vow to Defy Karzai and Open Parliament," NY TIMES, JAN. 20, 2011.

⁴⁴ Ray Rivera, "After Months of Turmoil Karzai Opens Parliament," NY TIMES, JAN. 26, 2011.

3. Has the National Assembly that was inaugurated on 26 January 2011 been able to carry out its functions? If not, did the struggle surrounding its election create difficulties between the legislative and executive branches of the government?

The Wolesi Jirga is also responsible for determining development programs and has the authority to approve the state budget after it has been proposed by the government.⁴⁵ Both the Wolesi Jirga and the Meshrano Jirga can question Ministers about special issues and require either a written or oral response under Article 93.⁴⁶

Discussion Questions

1. Does the Wolesi Jirga have the capacity to successfully carry out its powers and responsibilities?
2. Do you think that these powers are appropriate or would you grant the Wolesi Jirga more or different authority?
3. What do you think of the issues surrounding the no confidence vote in Minister Spanta? Do you think that the Wolesi Jirga was acting within its Article 92 powers? Do you think it should have the ability to remove ministers from power?

IV. THE LEGISLATIVE PROCESS

Constitution of Afghanistan

Article 94

Law shall be what both houses of the National Assembly approve and the President endorses, unless this Constitution states otherwise.

Article 95

The proposal for drafting laws shall be made by the Government or members of the National Assembly or, in the domain of regulating the judiciary, by the Supreme Court, through the Government.

The legislative process is laid out in Articles 94 to 100 of the Constitution. Article 94 defines a law as anything approved by both houses and ratified by the President.⁴⁷ There are a number of ways by which draft legislation can be made into law. Legislation can originate in either house of the National Assembly.⁴⁸ If ten members of one of the houses of the National Assembly propose a law, it must be approved by one-fifth of that house to be placed on the Agenda for

⁴⁵ Article 91.

⁴⁶ Article 93.

⁴⁷ Article 94.

⁴⁸ Article 97.

consideration.⁴⁹ Once a law is passed by one house, it goes to the other for its approval.⁵⁰ When both houses of the National Assembly have approved the law, it is sent to the President for his endorsement.⁵¹ The President has the power to veto legislation. If he exercises his veto power, the law must be sent to the Wolesi Jirga within fifteen days along with the reasons for the President's veto. The Wolesi Jirga can override the veto with a two-thirds majority vote.⁵² This system of checks and balances between the executive and the legislature is intended to prevent either body from having too much power over the legislative process.

Draft legislation can also be proposed by the Government. When laws affect the judiciary, the Supreme Court can propose them through the Government.⁵³ Laws that originate with the government are submitted first to the Wolesi Jirga for its approval.⁵⁴ In fact, the majority of legislative proposals are generated by the Government. Most of these proposals come from a department of the Ministry of Justice.⁵⁵

The Wolesi Jirga has one month to decide on the legislation.⁵⁶ Next the legislation is sent to the Meshrano Jirga, which must act within fifteen days. If both houses approve the legislation, it is sent to the President for his endorsement and enacted into law.⁵⁷ These time limits are intended to afford representatives who oppose the legislation the opportunity to effectively kill it by never letting it reach a vote. Such a strategy frequently happens in other legislative bodies, including the American Congress.

If one house rejects a law proposed and approved by the other house, a joint commission of members of both houses is created to address the disagreement.⁵⁸ If the commission reaches a compromise agreement, the law is submitted to the President for his approval. If they fail to agree on a solution, the legislation is considered to be rejected.⁵⁹ However, it can still be passed with a two-thirds majority vote of the Wolesi Jirga.⁶⁰

The paragraphs above describe how the National Assembly is intended to function under the Constitution. In reality, this process is much more difficult than the drafters of the Constitution intended. The National Assembly's work is made more complicated by internal divisions that can lead to delays and deadlocks in the legislative process. Additionally, corruption is a problem within the National Assembly. The divisions and lack of cohesion within political groups leads to a lot of back door deals reached outside the formal legislative process. All of these problems make the legislative process cumbersome and slow and adds to the difficulty that the National Assembly has in checking the power of the executive and even passing effective legislation.

⁴⁹ *Id.*

⁵⁰ Article 94.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Article 95.

⁵⁴ Article 97.

⁵⁵ Ramin Moschtaghi, *Max Planck Manual on Afghan Constitutional Law, Volume One: Structure and Principles of the State* (3rd ed., March 2009).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Article 100.

⁵⁹ *Id.*

⁶⁰ *Id.*

Discussion Questions

1. Do you think that this is an efficient and effective way to pass legislation in the National Assembly?
2. Do you think that the time limits on action by each house are a good idea? What are there the downsides to forcing a vote within a month or fifteen days?
3. What do you think of the method for dealing with legislation that has been rejected by one house?
4. Should the Wolesi Jirga have the power to override the veto of the President and rejection by the Meshrano Jirga with a two-thirds majority vote?

Example 6: The Legislative Process in Turkey

The Turkish legislative process is different from that in Afghanistan in that the Council of Ministers and their deputies have the exclusive power to introduce laws. The Turkish National Assembly does not introduce draft legislation. It only debates and adopts the draft bills and laws that are submitted to the legislators for their approval. Once the National Assembly approves laws, they go to the President for his approval. If the President thinks that a law is unsuitable, he can resubmit it to the National Assembly for further consideration with a list of his reasons for disagreeing with the legislation. In that case, the National Assembly can make changes based on the President's proposals. Therefore, in Turkey the President does not have an outright veto of legislation but he can force the National Assembly to reconsider laws he dislikes.⁶¹

Discussion Questions

1. Consider the Turkish National Assembly's lack of power to introduce legislation. How do you think that this impacts the Legislature's overall authority?
2. Discuss the role of the Turkish President in passing legislation? Do you think that the system of not giving him an outright veto is a good one or do you think that the executive should have a veto as it does in Afghanistan?

V. THE NATIONAL BUDGET

Constitution of Afghanistan

Article 95

Proposals for drafting the budget and financial affairs laws shall be made only by the Government.

⁶¹ Constitution of Turkey, Articles 75-100.

A. How the Budget is Passed

Only the Government has the power to propose the national budget or other financial programs.⁶² The proposed budget is sent to the Meshrano Jirga first. The upper house gives its opinion on the budget and makes recommendations before sending the proposal to the Wolesi Jirga.⁶³ The Wolesi Jirga then decides on the budget, which is implemented without being resubmitted to the Meshrano Jirga.⁶⁴ The Meshrano Jirga does not need to approve the final budget and it can be implemented with just the approval of the lower house.

The Wolesi Jirga has one month to act on the budget. If it fails to vote on it within that time, the budget is considered to be approved and is implemented.⁶⁵ This could limit the ability of the Wolesi Jirga to debate the budget as thoroughly as members wish. Additionally, if a new budget is not approved by the start of the fiscal year, the old budget continues to apply until a new one is passed and goes into effect.

Discussion Questions

1. What do you think of the fact that only the Government can propose the budget?
2. Do you think that the budget should be resubmitted to the Meshrano Jirga after its approval by the Wolesi Jirga or is a vote by only the lower house sufficient?
3. Do you think that failure to vote on the budget (see Art. 96) should have the same effect as passing the budget? What are some possible problems with this provision?

VI. LOYA JIRGA

A. Structure and Purpose

Constitution of Afghanistan

Article 110

The Loya Jirga is the highest manifestation of the will of the people of Afghanistan.

The Loya Jirga convenes when Afghanistan is dealing with difficult and important questions. Its purpose is to decide on issues involving Afghanistan's independence, national sovereignty, and territorial integrity. The Loya Jirga also discusses any other issues involving Afghanistan's most important national interests. In addition, the Loya Jirga has the power to amend the Constitution and impeach the President.⁶⁶

⁶² Article 98.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Article 111.

The Loya Jirga is composed of members of the National Assembly and the presidents of the provinces as well as the presidents of the district assemblies. The Chief Justice and members of the Supreme Court, ministers, and the Attorney General also participate in sessions of the Loya Jirga, but they do not have voting rights.⁶⁷

Similar to the houses of the National Assembly, the Loya Jirga elects a Chairperson, a Deputy-Chair, a Secretary and an Assistant Secretary from among its members.⁶⁸ Like the houses of the National Assembly, a majority of its members constitute a quorum, and decisions only require a simple majority unless the text of the Constitution specifies otherwise.⁶⁹

Sessions of the Loya Jirga are open to the public who may attend and view the proceedings unless one quarter of the members request a closed session. In this case, the entire body must approve a secret session.⁷⁰

Articles 101 and 102 of the Constitution apply to the Loya Jirga as well as to the Wolesi Jirga and the Meshrano Jirga. As you learned above, these articles prohibit criminal prosecution of any members for their political opinions or because they voted a specific way. They also detail the requirements for criminal prosecution or imprisonment of any members.⁷¹

Discussion Questions

1. What do you think of the role that the Loya Jirga plays in critical issues facing Afghanistan?
2. Do you think that the Loya Jirga is capable of fulfilling its mandate as the highest manifestation of the will of the people?

B. Recent Activities of the Loya Jirga

The Bonn Agreement of 2001 laid out the steps for the creation of the transitional administration that preceded the current government of Afghanistan. The agreement called for the convening of an Emergency Loya Jirga which was to “decide on a Transitional Authority, including a broad based transitional administration to lead Afghanistan until such time as a fully representative government can be elected through free and fair elections....”⁷² The Emergency Loya Jirga was also responsible for adopting a new constitution.⁷³

⁶⁷ Article 110.

⁶⁸ Article 112.

⁶⁹ Article 113.

⁷⁰ Article 114.

⁷¹ Article 115.

⁷² Michael Schoiswohl, “Linking the International Legal Framework to Building the Formal Foundations of a ‘State at Risk’: Constitution-Making and International Law in Post-Conflict Afghanistan,” 39 VAND. J. TRANSNAT’L L. 819 (May 2006).

⁷³ *Id.*

The Emergency Loya Jirga indirectly elected the transitional government headed by Karzai in 2002. This government then drafted the current Constitution of Afghanistan. In 2003 the Constitutional Loya Jirga convened. It was composed of members representing various groups within society, including “Special Category Groups” such as women, refugees abroad, internally displaced peoples, Kuchis, Hindus, and Sikhs.⁷⁴ The Constitutional Loya Jirga convened on 14 December 2003 and began debating the draft constitution. In spite of numerous deadlocks and disagreements over the text, the Constitutional Loya Jirga passed the Constitution on 3 January 2004.⁷⁵

Discussion Questions

1. What do you think of the representation of so many groups in the Constitutional Loya Jirga? Was it effective?
2. Do you think that the delegates managed to adopt a Constitution that was in the interests of all of the parties?

VII. CONCLUSION

As you have learned, the National Assembly of Afghanistan plays a critical role in governing Afghanistan. It is the representative of the people in government and its purpose is to look out for their interests and needs. The drafters of the Constitution structured the National Assembly to accomplish these goals. As you have also read, there are similarities and differences between the legislature of Afghanistan and other legislatures around the world. The drafters of the Constitution wanted to create a body that would work within the unique culture and political situation in Afghanistan. They created a bicameral legislature that is structured to ensure representation of all of the groups within Afghanistan. However, whether or not the National Assembly is able to fulfill its mandate will continue to be debated and dealt with for years to come. Regardless, the National Assembly will continue to play an important and high profile part in Afghan politics and governance.

⁷⁴ *Id.*

⁷⁵ *Id.*

CHAPTER 6: THE JUDICIARY

I. INTRODUCTION

Students of law often take particular interest in the judicial branch of government because it houses the courts, judges, and lawyers of the nation. On one level, the judiciary is the most important branch, as judicial decisions affect people's lives in a very real and tangible way—criminal cases result in punishment and civil cases determine people's rights and mandate action. However, on another level, the judiciary is the weakest and potentially least important of the three branches of government. The judiciary must rely on the executive branch to enforce its judicial decrees and can only apply laws passed by the National Assembly.

This chapter focuses on the structure of the Afghan court system, the constitutional articles addressing the judiciary, and the relationship between the judiciary and other branches of government. Part I details the constitutional and statutory organization of the judiciary so that you will have a firm understanding of what cases may be brought in what courts, the appeals process, and the finality of judgments. Part II focuses on judicial independence, which encompasses the constitutional structures that separate the powers of the judiciary from the other branches of government. Part III expands upon the duties of the Supreme Court, both administrative and judicial. This section explores the controversy over constitutional review and interpretation of the Constitution. Part IV briefly touches on the difference between informal and formal systems of justice. Finally, Part V addresses major challenges facing the judiciary today, including the lack of resources, corruption, and alternative court structures.

II. ORGANIZATION OF THE JUDICIARY

While the Constitution gives a brief overview of the organization of the judiciary, it leaves much to be determined through legislation. Article 123 declares that additional “statutes related to the formation, authority, as well as proceedings of courts and matters related to judges, shall be regulated by law.” Accordingly, in 2005, the National Assembly passed the Law on the Organization and Jurisdiction of the Courts (LOJC). This law provides the details that fill in the outline of the judiciary provided by the Constitution.

Why not spell out the entire structure of the judiciary in the Constitution itself? First, the Constitution would be too long. A constitution should be short enough that it can be read and understood by everyone—not only lawyers and experts. Second, while statutes can be easily repealed or changed by the National Assembly, it is much harder to change the Constitution. According to Article 150, any Amendment to the Constitution must be approved by two-thirds (66%) of the Loya Jirga to become effective. In contrast, a simple majority (51%) of the National Assembly can change a law. The drafters of the Constitution intended the provisions on the judiciary to be foundational principles for the judicial system of Afghanistan and to be permanent. In contrast, the LOJC represents the modern National Assembly's first attempt to create a national judicial system and it can be amended comparatively easily to fix problems as they arise.

Reading Focus

Read the Law on the Organization and Jurisdiction of the Courts in your statutory supplement. Keep in mind the differences between Statutes and the Constitution throughout this Part.

Discussion Question

Given what you know about constitutions from Chapter 1, what happens if a provision of the LOJC conflicts with the Constitution? Does the Constitution always prevail?

Constitution of Afghanistan

Article 116

- (1) The judiciary shall be an independent organ of the state of the Islamic Republic of Afghanistan.
- (2) The judiciary shall be comprised of one Supreme Court, Courts of Appeal as well as Primary Courts whose organization and authority shall be regulated by law.
- (3) The Supreme Court shall be the highest judicial organ, heading the judicial power of the Islamic Republic of Afghanistan.

Article 116 gives a rough outline of the judicial branch, codifying several important concepts using the word “shall,” an imperative command. Therefore, we know that (1) the judiciary will be “an independent organ,” (2) it will have one Supreme Court, Courts of Appeals, and several lower courts, and (3) the Supreme Court will be the head of the judiciary. Many of the details, such as how many Courts of Appeals and what types of lower courts, are left to the LOJC.

A. Primary Courts (Mokakem e Ebtedaje)

Starting at the local level, Article 40 of the LOJC establishes that certain lower courts will exist within each province. Although some courts remain to be staffed or built, by law each province or urban area will eventually have one or more of the following specialized Primary Courts (Mokakem e Ebtedaje) and at least one general court in each district: (1) Central Provincial [or Urban] Primary Court; (2) Juveniles Court; (3) Commercial Primary Court; (4) District Primary Court; (5) Family Issues [or Personal Status] Primary Court. The Central Provincial Primary Court is then broken down further into the following dewans, or specialized divisions within the Court that handle specific cases: (1) General Criminal; (2) Civil; (3) Public Rights¹; (4) Public Security²; and (5) Criminal, including traffic violations. Currently, 409 Primary Courts exist throughout Afghanistan. In the Central Provincial Primary Court of Kabul an additional dewan serves as the Chamber of Crimes related to Narcotic Substances. This dewan was established by

¹ Public Rights Courts handle cases such as those between an individual and a governmental agency.

² Public Security Courts handle cases of drug trafficking, terrorism, and other serious crimes that pose a threat to the community.

the Counter Narcotics Law after the National Assembly and President saw a need for such a court.

Primary Courts

Central Provincial or Urban Primary Court	District Primary Court	Special Primary Court	Special Primary Court	Special Primary Court
<ul style="list-style-type: none"> •General Criminal Dewan •Civil Dewan •Public Rights Dewan •Public Security Dewan •Traffic Criminal Dewan •Chamber of Crimes related to Narcotic Substances [Kabul only] 	<ul style="list-style-type: none"> •General Civil and Criminal Jurisdiction 	<ul style="list-style-type: none"> •Juvenile Court 	<ul style="list-style-type: none"> •Commercial Court 	<ul style="list-style-type: none"> •Family / Personal Status Court

Not only does each geographic region have several courts, but the lower courts are broken down along lines of specialization. If you have a business dispute, you would never take it to the Juvenile Court. Likewise, if you were getting a divorce, you would not bring the case to the Commercial Court. Why might the court system be broken into specialized areas? First, specialization allows judges to become experts in one area of the law by seeing the same type of cases over and over again. Specialized judges bring more expertise and therefore consistency and knowledge to the courtroom. Second, specialization allows courts to have slightly different procedural rules tailored to the situation. For example, Juvenile courts employ special regulations that are sensitive to the needs of minors. Judges in the Juvenile court must have special training and are chosen for their experience and willingness to work on juvenile trials.

Article 122 gives the judiciary the power to hear “all” cases. How is this true if the Primary Courts are so specialized? Article 122 is a bit more complicated than it seems—the National Assembly cannot exclude any case from the judiciary, but it can further divide and define the responsibilities of the various courts. The LOJC regulates the jurisdiction of the Primary Courts. First, since there are Primary Courts in each province, those courts may only hear the cases that arise within their territorial jurisdiction, that is, within the province. Accordingly, if a crime happens in Helmand Province, the General Criminal Dewan of the Central Provincial Primary Courts of Helmand (or the relevant District Primary Court) have jurisdiction over the case. The prosecutor cannot decide to take the case to the Primary Court in Kandahar simply because it is closer to his office.

Furthermore, the specialized courts may only hear cases within their specialty, also known as subject matter jurisdiction. Juvenile Courts only hear juvenile cases and Commercial Courts only hear commercial cases. According to Article 46 of the LOJC, all cases of public rights and public security must be initiated in the relevant dewan of the Central Provincial Primary Court. The District Primary Courts, on the other hand, are courts of general jurisdiction and may hear any “ordinary criminal, civil and family cases which are legally presented to them.” (LOJC Art. 48).

In short, while not every court has jurisdiction over every case, at least one court will have jurisdiction over each case. A good lawyer must find the right one.³

Practice Problems

1. The prosecutor brings the following case of theft to a District Primary Court Judge: A 12-year-old boy stole some sweets from the local store. Can the District Primary Court Judge hear the case?
2. You have a dispute with your neighbor. He has been dumping trash onto your property and refused to stop when you asked him to. What Primary Court could hear your case?
3. A criminal kidnaps a man in Kabul and then takes the hostage to Ghowr where the criminal murders him. Does Kabul or Ghowr Primary Court have jurisdiction over the case? (*Hint: see LOJC Art. 51*)

At the Primary Court stage, three-judge panels hear cases. The losing party may appeal the decision to the Court of Appeals for that province as long as they meet the deadline and the value of the case is greater than 100,000 Afghani for civil cases, or involves a penalty or fine greater than 50,000 Afghanis for criminal cases.

B. Courts of Appeals (Mohakem e Estinaf)

Article 31 of the LOJC states that Courts of Appeals (Mohakem e Estinaf) shall be established in each and every province. The Courts of Appeals are divided into six dewans, although the Supreme Court, with approval of the President, can create other dewans within the structure as needed. The dewans are: (1) General Criminal (which also resolves traffic cases); (2) Public Security; (3) Civil and Family; (4) Public Rights; (5) Commercial; and (6) Juveniles.

Courts of Appeals Dewans

Court of Appeals	Court of Appeals	Court of Appeals	Court of Appeals	Court of Appeals	Court of Appeals
•General Criminal	•Public Security	•Civil & Family	•Public Rights	•Commercial Court	•Juvenile Court

A three-judge panel of the relevant dewan of the Court of Appeals hears all appealed cases within its territorial and specialized jurisdiction, reviewing both the law and facts as decided by the lower court. While the Supreme Court can only review the case for mistakes in law or

³ Ramin Moschtaghi, Max Planck Manual on the Organisation and Jurisdiction of Afghan Courts (Amended 2d ed. 2009).

procedure, the Court of Appeals can review the Primary Court's decision as to law and fact, as if it were viewing the case for the first time itself and can change the decision to correct, overrule, amend, approve or nullify the decision of the lower court (LOJC Art. 33). Thus, the Courts of Appeals have the final and binding decision regarding the factual circumstances of a case (LOJC Art. 35).

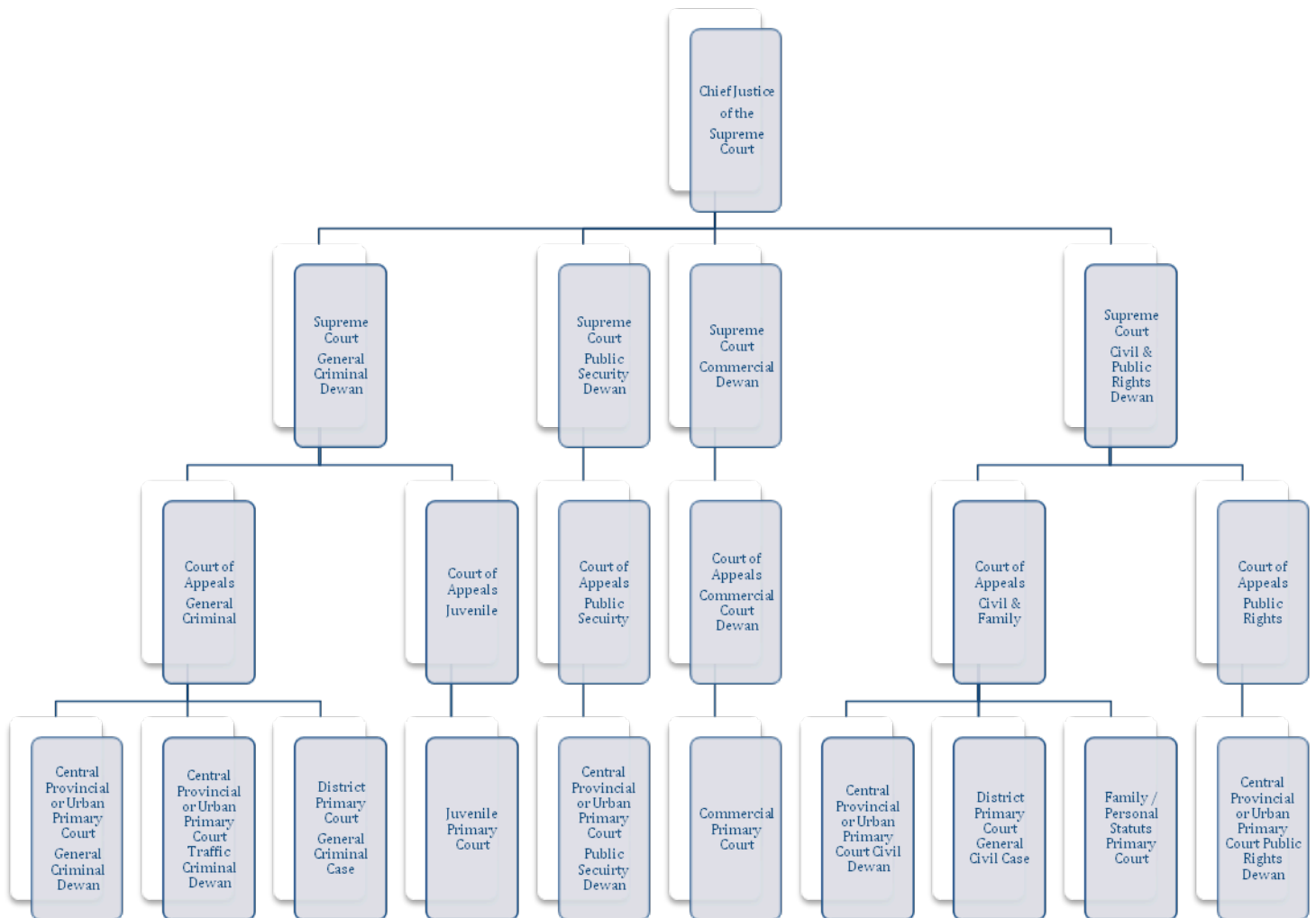
C. The Supreme Court (Stera Mahkama)

Article 117 of the Constitution states that the Supreme Court shall have nine members appointed for ten-year terms (after an initial staggered appointment) by the President and with the endorsement of the Wolesi Jirga. Article 18 of the LOJC divides the Supreme Court (Stera Mahkama) into four dewans: (1) General Criminal; (2) Public Security; (3) Civil and Public Rights; and (4) Commercial. Each of these dewans shall be headed by one of the Supreme Court members and at least two members will participate in each decision (LOJC Art. 6). These dewans have the power to review decisions from the lower courts that are appealed to the Supreme Court. The Supreme Court does not hold a new trial. Rather, it reviews the case "only in terms of accurate application of the law" (LOJC Art. 6). In other words, the Supreme Court reviews the case for a mistake by the lower court, not to judge the facts anew or take new testimony from witnesses.

Supreme Court Dewans

Supreme Court	Supreme Court	Supreme Court	Supreme Court
•General Criminal Dewan	•Public Security Dewan	•Civil & Public Rights Dewan	•Commercial Dewan

Ultimately, the Supreme Court ensures that the final order in any case complies with the law and the principles of justice enshrined in the Constitution. A judicial order is final after the period to appeal has expired or after the Supreme Court has ruled. The Executive Branch then has the constitutional responsibility to enforce final judicial orders, under Articles 75 and 129 of the Constitution. One exception exists to this responsibility—the President has the power to pardon and must review and confirm all capital sentences. President Karzai has used his pardon power liberally (See Example 3 at the end of this Chapter). In theory, however, pardons are only rarely granted and judicial orders are final.



As you can see, navigating the judicial system can be complicated. Try the following problems to see if you understand the judiciary's structure. Return to the LOJ in your course supplement and the Constitution for reference.

Discussion Question

What happens if the President or the relevant Executive official refuses to enforce the final judicial order? Might the chance of this happening affect the judiciary's decision-making process?

Practice Problems

1. The Prosecutor in Badakhshan Province receives a case involving almost 65 kilograms of heroin. What Primary Court can he take the case to?

2. The government shuts off all water, electricity, telephone, and internet running to an apartment building in central Kabul. The owner of the apartment building wants to bring a case to have the utilities reinstated and to recover the lost rent after several tenants move out. Which Primary Court should he go to? If he loses, where can he appeal? Under what circumstances could he appeal to the Supreme Court?
3. The National Assembly decides that cases involving rights to natural resources and mining have grown in importance and complexity over the past few years. It wants to pass a law creating a new specialized court in Kabul that deals only with these cases. Can the National Assembly pass this law?

Discussion Questions

1. Do you think juveniles should have their own court? Should they be tried alongside adults if the crime is serious enough?
2. Should there be a special Court of Appeals for family law? Are civil law and family law so similar that the same Courts of Appeals judges can handle both? How many people do you think appeal their divorces?
3. Is this the most efficient system? Should the Courts of Appeals hear the facts of the case again? Or, should they take the facts of the Primary Court as final and just decide if the Primary Court applied the law incorrectly?

III. Judicial Independence

Judicial independence is often considered to be a hallmark of democratic governance and one of the key methods of protecting human rights. One major component of judicial independence is *impartiality*—the administration of justice without bias or a predetermined outcome. This encompasses both the ability of judges to make individual decisions without outside interference, also called decisional independence, as well as the ability of the judicial branch as a whole to function as a check on legislative and executive power, also called structural or branch independence. This section focuses on the Constitutional structures that aim to guarantee impartiality in the administration of justice while recognizing the limiting factors of corruption and lack of resources.

Definition – Judicial Independence

Judicial independence means that individual judges and the judicial branch as a whole should work free from external influence. This can be understood in two parts: (1) Decisional Independence: a judge's ability to render decisions based only on the facts and law of that case,

free from political, monetary, or other influence; and (2) Branch or Structural Independence: the separation of the judicial branch from the executive and legislative branches of government.⁴

The constitutional drafters clearly had judicial independence in mind—the very first sentence of the Constitution’s Chapter on the Judiciary, Article 116, proclaims: “The judiciary shall be an independent organ of the state of the Islamic Republic of Afghanistan.” When the Constitution uses “shall be,” it gives an imperative command of how the judiciary must be structured. This section focuses on how the Constitution attempts to safeguard and attain the goal of judicial independence. The next sections discuss: (1) decisional independence; (2) judicial competence and full jurisdiction; (3) judicial appointments; (4) impeachment; (5) an independent budget; and (6) judicial qualifications and responsibility. As you read, keep in mind how effective these constitutional guarantees have been so far, where they may have fallen short, and what their potential is for a more stable future.

A. Decisional Independence

Judicial independence includes decisional independence—the impartiality a judge brings to a case when he or she makes a decision based only on the facts of the case and applicable law, not corruption or pressure from the higher courts.⁵ Its importance in a constitutional government cannot be overstated. Decisional independence is both the goal of all the other provisions relating to judicial independence as well as a component part. The two Articles below specifically relate to how a court must operate to ensure that the public may serve as a check on decisional interference.

Constitution of Afghanistan

Article 128

(1) In the courts in Afghanistan, trials shall be held openly and every individual shall have the right to attend in accordance with the law.

(2) In situations clarified by law, the court shall hold secret trials when it considers necessary, but pronouncement of its decision shall be open in all cases.

Article 129

(1) In issuing decision, the court is obligated to state the reason for its verdict.

(2) All final decisions of the courts shall be enforced, except for capital punishment, which shall require Presidential approval.

Article 128 commands that trials shall be open to the public. Although certain trials may be held in secret, and indeed many have been, the default of open trials guarantees that the public, including journalists, may monitor the judiciary. This assumes that judges are less likely to be corrupt if they know someone from the public is watching. Article 129 commands that the court

⁴ The Constitution Project, Newsroom Guide to Judicial Independence (2010).

⁵ *Id.*

“state the reason for its verdict.” Importantly, this forces the court to think through why the case should be resolved in favor of one party or the other and gives the losing party a better idea of whether or not it may appeal the decision. The better the reasoning in the verdict, the more legitimacy and faith the public will have in the judicial system. Finally, Article 129 ensures that the President or executive officials cannot revise a court’s ruling after-the-fact. Except in capital punishment cases, where the approval of the President serves as a check on the judiciary, this provision gives courts decisional independence to use their education and good judgment.

B. Judicial Competence and Full Jurisdiction

As important as decisional independence is, perhaps more important is that all cases may be heard in a court. Competence or jurisdiction refers to whether the court has the authority to hear a case. Articles 120 and 122 below outline the breadth of the judiciary’s jurisdiction:

Constitution of Afghanistan

Article 120

The authority of the judicial organ shall include consideration of all cases filed by real or incorporeal persons, including the state, as plaintiffs or defendants, before the court in accordance with the provisions of the law.

Article 122

No law shall, under any circumstances, exclude any case or area from the jurisdiction of the judicial organ as defined in this chapter and submit it to another authority. This provision shall not prevent formation of special courts stipulated in Articles 69, 78, and 127 of this Constitution, as well as cases related to military courts. The organization and authority of these courts shall be regulated by law.

First and foremost, Article 120 specifies that the courts can hear “all cases” that come before it, filed by “real or incorporeal persons,” which includes individuals as well as organizations and companies. This even includes “the state as plaintiffs or defendants,” which means that private individuals can sue the state. Importantly, the ability to sue the government in court for redress of grievances or rights constitutes a fundamental part of democracy. Does this mean that the courts can hear any case?

Not quite. The courts of Afghanistan have broad power to hear cases, but that does not imply that they can or should decide every dispute that is brought before them. For example, it would be absurd if the losing Kabaddi team could ask the judge to decide who won the game. Why? Because Afghanistan does not have a law, secular or religious, that can resolve that dispute. Similarly, a citizen cannot go to a court and ask the judge to make a law when the legislature has declined to pass a similar one. The citizen must petition National Assembly to see the change in the law. Article 120 concludes “in accordance with the provisions of the law,” which tells us what sorts of claims may be brought—the parties must have a right under law, not merely a dispute. In short, the judiciary has complete jurisdiction to hear any case that arises under the law of Afghanistan. Article 122 goes on to protect this jurisdiction from interference by another

branch of government. The National Assembly cannot pass a law that takes power to hear a case away from the judiciary. It goes on to list a few exceptions to this general rule.

Why is this important? Prior to the 1964 Constitution, the judiciary did not have complete authority to hear cases, and many cases were simply decided by governors or other officials without ever coming before a judge.⁶ The judiciary also has problems with corruption but, unlike judges, government officials sit outside of the constitutional protections for impartial decision-making that apply to the judiciary. Article 122 serves to ensure that every case receives the same basic judicial independence protections.

You might be wondering why the National Assembly would ever want to take a case away from the courts. A controversial example currently facing the United States may help:

Jurisdiction Stripping and the War on Terror

The United States engaged in a controversial (and as many argue – illegal) practice of detaining unlawful enemy combatants at a military base in Guantanamo, Cuba. A key piece of the controversy was whether or not U.S. courts could review the detainees' cases.

In contrast to Article 122 of the 2004 Constitution of Afghanistan, Article III, Section 2 of the United States Constitution permits Congress to make "Exceptions and Regulations" to the judiciary's jurisdiction. Throughout history Congress has threatened to take away some of the judiciary's jurisdiction, but it has only very rarely done so. However, Congress did utilize this power in 2005 when it passed the Detainee Treatment Act and "stripped" the courts of jurisdiction over the Guantanamo detainee cases. Why? Congress worried that the Supreme Court would force the U.S. Military to close Guantanamo or give the detainees full trials in U.S. courts. The Supreme Court could have decided these cases in a way contrary to the wishes of Congress and the President, but by stripping courts of jurisdiction, Congress attempted to guarantee that they would remain silent.

The American Supreme Court, however, decided in *Boumediene v. Bush* (2008) that Congress could not take jurisdiction away from the judiciary in this particular instance because it violated another provision of the U.S. Constitution (the Writ of Habeas Corpus, Article I, Section 9).

Discussion Questions

1. Can you think of any types of cases the National Assembly would want to take away from the Afghan courts? What about corruption trials of National Assembly members or other well-connected people?

⁶ Ramin Moschtaghi, Max Planck Manual on the Organisation and Jurisdiction of Afghan Courts (Amended 2d ed. 2009).

2. Reflect on the implications of Article 122 for cooperation between formal and informal justice systems. Does “No law shall . . . exclude any case or area from the jurisdiction of the judicial organ . . . and submit it to another authority” refer to local shuras and jirgas? If the National Assembly passed a law that gave shuras and jirgas full control over family law claims, this would violate Article 122. Perhaps, however, the two bodies could have concurrent jurisdiction. Would it be unconstitutional for the National Assembly to give people the option to resolve family law disputes in either the formal system or the informal system?

C. Judicial Appointments

As you learned in Chapter 5 on the Legislative Branch, elections hold representatives accountable to the people. In contrast, many judges are appointed by government officials. Why might we not want judges to obtain their positions through elections? Elected judges might be beholden to voters in their district and biased in favor of those voters. If a case presented a conflict between a party who also resides in the judge’s election district and someone living outside the district, the fact that only one can vote should not determine the outcome. It would not be fair if judges decided cases based on who could re-elect them. Similarly, elections cost money and judges who must seek reelection might favor a party who could contribute to their campaigns. Another reason to appoint rather than elect judges is that elected judges might be tempted to decide in a manner that matches public opinion.⁷

For example, imagine a court had to decide a case between a lithium mining company in Ghazni Province that employed almost fifty-percent of the people in a rural area and a landowner who lived far away, but held the mineral rights to land the company already mined. The law says that if the landowner owned the mineral rights, the company must pay him for the extracted lithium. But, if the company threatened to discharge several of its employees to pay the fees from the lawsuit, these employees may put pressure on the judge to find in favor of the company, regardless of the law and facts. If the judge finds for the landowner, the community may be very angry at the judge. The appointment mechanism, as opposed to elections, does not solve the problems of corruption, bribery, and public influence, but it removes the judges from direct political accountability and signals that the judicial officer owes allegiance first and foremost to the law.

Constitution of Afghanistan

Article 117

(1) The Supreme Court shall be comprised of nine members, appointed by the President and with the endorsement of the House of People, and in observance of the provisions of clause 3 of

⁷ Many states in the United States elect their judges, although the federal (or national) judges are all appointed. Critics of elected judgeships argue this leads to dysfunction. In Wisconsin, for example, a state Supreme Court Justice has been accused of not recusing himself from a case that would directly benefit business organizations that contributed to his election fund. Editorial, *A Study in Judicial Dysfunction*, New York Times (August 19, 2011). <http://www.nytimes.com/2011/08/20/opinion/a-study-in-judicial-dysfunction.html>

Article 50 as well as Article 118 of this Constitution, shall be initially appointed in the following manner:

(2) Three members for a period of 4 years, three members for 7 years, and three members for 10 years. Later appointments shall be for period of ten years. Appointment of members for a second term shall not be permitted.

(3) The President shall appoint one of its members as Chief Justice of the Supreme Court.

(4) Members of the Supreme Court, except under circumstances stated in Article 127 of this Constitution, shall not be dismissed till the end of their term.

Article 132

(1) Judges are appointed at the proposal of the Supreme Court and approval of the President.

(2) Appointment, transfer, promotion, punishment and proposals for retirement of judges, carried out according to provisions of the laws, shall be within the authority of the Supreme Court. . . .

Structurally, Article 117 provides that members of the Supreme Court (“Justices”) will be appointed for a term of ten years and that “[a]ppointment of members for a second term shall not be permitted.” Why not? What if the Justice is particularly good and the people would benefit from another ten years of service?

The constitutional ten-year limit on Supreme Court office is intended to make justices beholden to no one, since no one has the power to extend their terms or remove them from office. Article 117 states that, “[m]embers of the Supreme Court, except under circumstances stated in Article 127 of this Constitution, shall not be dismissed till the end of their term.” Except for the impeachment procedures, which are discussed in the next section, the President can neither fire nor reappoint a Justice. Despite these protections, the President has in fact permitted the current Supreme Court Justices to stay in their positions well past the time that they should expire. This is another example of the difference between theory and practice.

Discussion Questions

Not every system protects judicial independence in the same manner:

1. The Supreme Court of the United States appoints Supreme Court Justices for life tenure. What are the advantages and disadvantages of that system when compared to ten year appointments?
2. The people of 39 states in the United States elect their judges to state courts.⁸ What are the advantages and disadvantages of that system?

⁸ Katherine A. Helm, *Appointed vs. Elected Justices: States' High Courts Take a Hit*, The National Law Journal, Nov. 8, 2010.

D. Impeachment

In any system that appoints judges, there must also be a corresponding procedure for removal of judges who fail to meet their judicial responsibilities. Strict limitations on impeachment often serve as an additional protection for judicial independence. The Constitution of Afghanistan establishes a specific procedure to remove members of the Supreme Court and judges who commit crimes related to their judicial role:

Constitution of Afghanistan

Article 126

Supreme Court judges shall receive lifetime pension at the end of their term of service provided they do not hold state and political office.

Article 127

(1) If more than one-third of the members of the House of People demand the trial of the Chief Justice of the Supreme Court or any of its members accused of a crime related to job performance or committing a crime, and, the House of People approves this demand by two-thirds majority of all members, the accused shall be dismissed and the issue referred to a special court.

(2) The formation of the court and procedure of the trial shall be regulated by law.

Article 133

(1) When a judge is accused of a crime, the Supreme Court shall, in accordance with the provisions of the law, consider the case.

(2) After hearing the defense, if the Supreme Court considers the accusation valid, it shall present a proposal to the President for dismissal of the judge.

(3) After Presidential approval, the accused judge shall be dismissed and punished according to the provisions of the law.

Thus, at least one-third of the Wolesi Jirga must come together to impeach a member of the Supreme Court for either a misdemeanor committed in connection with his judicial role or a felony. Then, two-thirds of the Wolesi Jirga must agree to remove the individual from office and refer the case to a special court.

Such strict impeachment procedures make it harder for the President to simply remove a member of the Supreme Court from office because he does not approve of his rulings. There must be an actual criminal charge, and a two-thirds majority of the Wolesi Jirga must agree. The impeachment Articles guarantee that Justices and judges will not be threatened or intimidated into ruling a certain way. This safeguard for judicial independence protects decisional independence. At the same time, some procedure must exist for removing judges who actually commit crimes. This procedure can be used to remove corrupt judges from office.

Finally, Article 126 states, “Supreme Court judges shall receive lifetime pensions at the end of their term of service provided they do not hold state and political offices.” If the member of the Supreme Court is impeached and removed from office, he will not be eligible for a lifetime pension. Otherwise the member will be eligible as long as he does not go on to hold other office. This provision also guarantees independence as neither the President nor National Assembly can withhold or threaten to withhold the Justice’s pension to influence his decisions during the 10 years he is in office.

Discussion Questions

1. A Justice of the Supreme Court is about to complete her ninth year and the President calls to ask if she would like to work at the Ministry of Justice when she has completed her term. Can she take the job? Can she still receive her pension?
2. Now imagine that instead of a job at the Ministry of Justice, the President says that he has secured her a position as Chief Legal Compliance Officer at a thriving mining company. Is the result the same?

E. Independent Budget

Control over the budget is an essential element of judicial independence. Courts must ensure that they have adequate resources to effectively carry out their functions. Budgetary control also ensures that the legislature or executive cannot use financial incentives or limitations to pressure for certain outcomes from the courts. Adequate resources and salaries may also encourage more qualified people to become judges and lower the likelihood of financial corruption. The experience of courts in Latin America suggests, however, that merely increasing budgets will not lead to better judicial performance.⁹ Sufficient resources must be combined with an effective court structure and political environment to support real judicial independence.

The Supreme Court, under Article 125, has power to prepare a budget with the National Assembly and then has control over implementation of the budget. Thus, the judiciary technically has financial independence. The National Assembly or President cannot threaten to cut its budget to influence rulings. In practice, however, the President exerts tremendous control over the Court’s budget.

F. Judicial Responsibility

Not only does the Constitution aim to insulate the judiciary from outside influence, it also places an immense responsibility on each and every member of the judiciary to use his power in accordance with the laws and Constitution of Afghanistan and principles of Islam. Each Justice and judge takes and must follow his judicial oath of office as declared in Article 119.

Constitution of Afghanistan

⁹ Daniel Hall et al., *Professional Court Administration: The Key to Judicial Independence*, National Center for State Courts, 2003.

Article 119

Members of the Supreme Court shall take the following oath of office in the presence of the President:

“In the name of God, Most Gracious, Most Merciful, I swear in the name of God Almighty to attain justice and righteousness in accordance with tenets of the Holy religion of Islam, provisions of this Constitution as well as other laws of Afghanistan, and to execute the judicial duty with utmost honesty, righteousness and impartiality.”

Additionally, the Constitution safeguards the appointment process and judicial independence through constitutionally mandated qualifications. Think about why the following qualifications might be necessary to become a member of the Supreme Court:

Constitution of Afghanistan

Article 118

Supreme Court members shall have the following qualifications:

- (1) At time of appointment the age of the Chief Justice of the Supreme Court and its members shall not be less than 40 years.
- (2) Shall be a citizen of Afghanistan.
- (3) Shall have higher education in legal studies or Islamic jurisprudence as well as expertise and adequate experience in the judicial system of Afghanistan.
- (4) Shall have good character as well as good reputation.
- (5) Shall not have been convicted, by a court, for crimes against humanity, crimes, or deprivation of civil rights.
- (6) Shall not be a member of any political party during his term of duty.

Do any of these qualifications seem trivial? While the difference between a 39-year-old and a 40-year-old applicant may be minor, these qualifications must be taken as a whole to achieve their purpose. Each qualification stands for a value or a trait that should be reflected in the applicant. Together, the qualifications ensure that all Supreme Court appointees are (1) mature; (2) tied to the community of Afghanistan; (3) educated and has judicial experience; (4) respected in the community; (5) moral; and (6) unbiased.

The final qualification, that a Justice “shall not be a member of any political party during his term of duty” is also in the Turkish Constitution, although not in most others. Scholars suggest that this qualification actually promotes the appearance of impartiality, not necessarily actual impartiality. Nonetheless, the legitimacy of the Supreme Court stems from both its actual and perceived independence from the political branches. Can you think of other qualifications that

would reduce the actual or perceived problem of corruption? The qualifications listed in Article 118 represent judgments made by the constitutional drafters as to what the baseline qualifications should be to hold Supreme Court office. Ultimately, these serve as the last line of defense for judicial independence. If the judges and Justices are moral, upstanding, educated, well-reputed, and mature members of Afghan society, the chances are better that they will uphold the laws and be less tempted by corruption.

Remember that the theme of judicial independence runs throughout the entire judiciary, from top to bottom. The constitutional provisions relating to open trials, appointments, impeachment, jurisdiction, and qualifications all work together to define the relationship between the judiciary and the other branches as well as set the groundwork for how the judiciary should function.

IV. The Duties of the Supreme Court

A. Administrative Duties of the Supreme Court

Article 116 mandates that “The Supreme Court shall be the highest judicial organ, heading the judicial power of the Islamic Republic of Afghanistan.” In this role, the Supreme Court must do more than just hear cases on appeal; it also serves as the main administrator for all the courts across Afghanistan. Although many European nations give this administrative power to the Ministry of Justice, the 2004 Constitution, like the 1964 Constitution before it, purposefully puts control in the Supreme Court’s hands as another guard against influence by the other branches of government.¹⁰

The concentration of administrative tasks within the judiciary developed in reaction to the lack of judicial independence under the 1923 Constitution of Afghanistan. Although that Constitution also declared that “all courts of justice are free from all types of interference and intervention” (1923 Constitution Art. 53), in reality judges had very little decisional independence. The administration of the courts, including the regulation of judicial employees, fell under the King’s authority. Judges, like other civil servants, were obliged to obey the orders of their superiors, including orders regarding how a particular case should be decided.

Compare the 1923 system to the administrative system that the Constitution prescribes today:

Constitution of Afghanistan

Article 124

Provision of Laws related to civil servants as well as other administrative staff of the state shall also apply to the officials and the administrative personnel of the judiciary; but the Supreme Court in accordance with the law shall regulate their appointment, dismissal, promotion, retirement, rewards and punishments.

Article 125

¹⁰ Ramin Moschtaghi, Max Planck Manual on Constitutional Law in Afghanistan Vol. 1: Structure and Principles of the State (Amended 3d ed. 2009).

- (1) The budget of the judiciary shall be prepared by the Supreme Court in consultation with the Government, and shall be presented to the National Assembly as part of the national budget.
- (2) The Supreme Court shall implement the budget of the judiciary.

Article 132

- (1) Judges are appointed at the proposal of the Supreme Court and approval of the President.
- (2) Appointment, transfer, promotion, punishment and proposals for retirement of judges, carried out according to provisions of the laws, shall be within the authority of the Supreme Court.
- (3) To better regulate judicial as well as judicial administrative matters and attain necessary reforms, the Supreme Court shall establish the Office of General Administration of the Judiciary.

The administrative independence granted by the Constitution makes the judiciary more independent, although it is not completely insulated from influence by the other branches, particularly the President.

Articles 124 and 132 explain that the Supreme Court has authority over all judges and civil servants employed by the judiciary. These employees not only include the judges, but also their secretaries, the clerks of court, the bailiffs, and even those who clean the courthouses. It also includes up to 36 Judicial Advisors, who have the role of analyzing issues before the Supreme Court and making a report that informs the Justices' decision-making (LOJC Art. 20-22). While the Supreme Court has overall control, the President still has final approval of appointments and dismissals from the lower courts, which grants the President a great deal of influence over the judiciary.¹¹

Because the Supreme Court has such a heavy administrative burden, Article 132 of the Constitution gives the Supreme Court power to establish the Office of General Administration of the Judiciary to assist with the administrative tasks. The LOJC explains more of its duties:

Law on the Organization and Jurisdiction of the Courts

Article 29 LOJC

- (1) The Supreme Court shall have the following duties and jurisdictions in its relevant administration affairs:
 1. To prepare the budget for the judiciary in consultation with the government.
 2. To lead and control the administrative activities of courts of Islamic Republic of Afghanistan
 3. To approve rules and regulations to regulate matters concerning judicial and administration of courts.

¹¹ Lorenzo Delesgues and Yama Torabi, *Reconstruction National Integrity System Survey*, The National Integrity System 52 (2007).

4. To evaluate the results of judicial scrutiny and studies and taking measures to remove defects and coordinate courts' procedures.
5. To propose on the appointment of judges and judicial advisors to the president's office according to provisions of this law.
6. To propose on the appointment, transfer, upgrading, extension of the appointments' duration and retirement of judges according to the provisions of this law.
7. To propose on the establishment of courts and legal document registration directorates, and their specification of judicial and administration jurisdiction to the president's office.
8. To implement the budget of the judiciary.
9. To provide necessary facilities for the activities of the courts.
10. To hold judicial practice courses.
11. To take appropriate measures for enhancing the knowledge and experience of judges.
12. To monitor the performance and activities of employees of the judicial authority.
13. To prepare annual statistic report of all courts' judicial activities.
14. Other duties and jurisdictions which are delegated to Supreme Court according to this law and all other laws.

(2) The powers set forth in clause one of this Article shall be implemented through the General Administration Office of the Judiciary.

The Chief Justice of the Supreme Court monitors and has final authority over the Office of General Administration.

Discussion Question

What if the National Assembly wants to expand the courts so that there are two Courts of Appeals or twelve Supreme Court members? Can it do so? [Hint: Pay attention to the difference between statutes and the Constitution.]

B. Judicial Duties of the Supreme Court

In addition to its administrative duties, the Supreme Court is the final interpreter of Afghan law. The box below lists perhaps the most important article relating to the Supreme Court and certainly the most controversial:

Constitution of Afghanistan

Article 121

At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.

Article 121 gives the Supreme Court the power to determine if a law, legislative decree, or treaty conflicts with the Constitution at the request of "the Government, or courts." In Chapter 2 on the Separation of Powers, you learned that judicial review serves as a check by the judiciary on the

other two branches of government, making certain that they act in conformity with the Constitution. Article 121 gives the Supreme Court a very limited form of judicial review. This provision has proved to be one of the most controversial in the entire 2004 Constitution for three reasons: (1) questions remain over whether the Supreme Court can also interpret the Constitution; (2) questions remain over whether the Supreme Court can review executive actions; and (3) questions remain over whether another branch or entity also shares the power of constitutional review.

First, controversy exists over whether the Supreme Court can do more than just review laws for compliance with the Constitution. Can it also interpret those Articles of the Constitution that remain unclear? The text does not say.

Complicating this ambiguity, the 2004 Constitution rejected the idea of a Constitutional Court. As you learned in the 2 on Separation of Powers, many nations employ a Constitutional Court system, wherein the function of constitutional review is centralized into one separate body. Often, that judicial body only decides constitutional issues.¹² Similarly, in summer 2003, the draft Constitution of Afghanistan contained provisions for a Constitutional Court:

Afghanistan 2003 DRAFT Constitution

Article 146 (2003 draft)

The Constitutional High Court has the following authorities:

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

Notice that the draft specifically gives the Constitutional High Court power to interpret the Constitution. The final draft that went to the Loya Jirga in 2004, however, did not include a provision for a Constitutional High Court. Although the final draft gave the majority of the Constitutional High Court's power to the Supreme Court, it omitted one key phrase: "interpretation of the Constitution."¹³ Reread Article 121 of the 2004 Constitution. Was omission of the phrase "interpretation of the constitution" merely an oversight or an intentional distinction to limit the powers of the new Supreme Court?

The distinction between "review" and "interpret" is important. Some governmental entity must have the power to interpret the Constitution. Written constitutions do not interpret themselves, and undoubtedly instances will arise where the Constitution is not clear. As you learned in *Marbury v. Madison*, the power of constitutional review only became clear for the United States nearly twenty years after the Constitution was written. This might also be the case in Afghanistan.

¹² Mauro Cappelletti & William Cohen, *Comparative Constitutional Law: Cases and Materials* 76 (1979).

¹³ J. Alexander Their, United States Institute of Peace, *The Status of Constitutional Interpretation in Afghanistan* (2009).

Political Party-Goer

Article 118(6) states that a Member of the Supreme Court “shall not be a member of any political party during his term of duty.” One of the Justices has informally been holding gatherings for the Afghan Mallat Party at his house. His brother leads the party and has asked him to contribute money and his time. The Justice has demonstrated support for the party by contributing money and attending many meetings of the Afghan Mallat, but he never declared that he was a member. The President brings this to the attention of the Chief Justice and formally asks the Chief Justice to (1) give a ruling under Article 121; (2) determine if the Justice’s actions make him a “member” of the Afghan Mallat Party.

Can the Chief Justice do what the President asks without violating Article 121 of the Constitution? What may the Chief Justice do in this situation?

Second, controversy exists over whether the Supreme Court has any authority to review legislative actions taken by the executive branch, such as Presidential legal decrees. Article 121 clarifies that the Supreme Court has the power to review the conformity of formal laws, legal decrees (referring to those in the interim period (*farāmin-e taqnīnī*)) and international treaties with the Constitution; however, this does not include the legislative acts of the executive (*moqararāt*) governed by Article 76 of the Constitution.¹⁴ As you learned in Chapter 3 on the Executive, the President has broad and sweeping authority to issue legal decrees, independent of the legislative branch. Although these decrees may have a similar effect on the nation, they are not technically “laws” and therefore do not fall within the judiciary’s Article 121 power of review. Thus, from the text, the Constitution does not give the judiciary explicit power to review legislative acts done by the executive. However, many scholars and other nations believe that judicial review over executive as well as legislative actions constitutes a key component of any separation of powers or constitutional structure.

Third, and finally, controversy exists over whether any other institution has the power of constitutional review.¹⁵ Ambiguities in the text and power struggles between the executive and legislative branches have led to the creation of two parallel bodies that interpret the Constitution – the Supreme Court and the Independent Commission for the Supervision of the Implementation of the Constitution (ICSIC).

Both the Supreme Court and the ICSIC have constitutional authority to interpret the document. Article 121 of the Constitution appears to give the Supreme Court the power of judicial review. However, Article 157 calls for the establishment of the ICSIC. The provision states that members of the Commission shall be appointed by the President and approved by the Wolesi Jirga but gives no indication of how the role of the Commission differs from that of the Supreme Court. This apparent contradiction did not become a significant conflict until 2007.

¹⁴ Ramin Moschtaghi, *Max Planck Manual on Constitutional Law in Afghanistan Vol. 1: Structure and Principles of the State* (Amended 3d ed. 2009).

¹⁵ *Id.*

On May 10, 2007, the Wolesi Jirga attempted a vote of censure against then Foreign Minister Rangin Dadfar Spanta. The initial effort failed by one vote, but two days later, the Wolesi Jirga succeeded in “stripping” him of his minister status. President Karzai refused to recognize the legitimacy of the Wolesi Jirga’s vote, arguing that the lower house lacked the authority to censure a sitting Minister and that the power to remove a sitting Minister was the sole prerogative of the President.

President Karzai formally requested that the Supreme Court review the decision. The President argued that judicial review is a necessary part of a functioning judiciary, and therefore the Supreme Court must have the power to review legislative actions. Members of the Wolesi Jirga challenged the President, arguing that the constitutional drafters must have intended to exclude actions such as ministerial appointments from the purview of the Supreme Court because they took the time to specifically list those actions which are included – laws, decrees, and treaties.

Article 121 of the Constitution explicitly gives the Supreme Court the authority to interpret the laws, treaties, and legislative decrees for their conformity with the Constitution. However, the Constitution is silent about the authority of the court to interpret the constitutionality of other actions, such as ministerial appointments or censures.

On June 3, 2007, the Supreme Court declared that the second vote violated the Constitution because the Wolesi Jirga had no authority to censure sitting Ministers. The Wolesi Jirga responded by asserting that the Supreme Court lacked the authority to interpret the Constitution with respect to ministerial appointments and pledged not to follow the Court’s ruling. However, in defiance of the Wolesi Jirga, Spanta continued serving as foreign minister for several more years.

The National Assembly responded to the Court’s decision by passing, over the veto of President Karzai, a statute creating the ICSIC. In September 2008, the National Assembly passed legislation giving the ICSIC the power to “interpret” the Constitution when asked by the President, Parliament, or the Supreme Court. The Supreme Court was asked to review the constitutionality of the act and declared it in violation of Article 121 of the Constitution. Not surprisingly, the Court found that it had the sole power to interpret the constitutionality of legislation and other governmental acts.

The Supreme Court questioned the Commission’s authority to interpret the Constitution. Article 157, the Supreme Court argued, only called for “supervising” the implementation of the Constitution, not acting as another body of review. The Supreme Court also took issue with the appointment and removal powers given to the National Assembly over the Commissioners, which should instead only be given to the President who has the constitutional power to dismiss ministers and other officials.

In this uncertain environment, both the Supreme Court and ICSIC appear to be exercising powers of constitutional review. Other government agencies may ask both bodies to determine the proper way to implement controversial legislation or decisions, resulting in a potential conflict if the Court and the Commission should issue contradicting decisions.

To make the situation more confusing, the executive also has a constitutional role in interpretation. Article 64 of the Constitution charges the President with the authority to “supervise the implementation of the Constitution,” a provision identical to the goal set forth in Article 157. Of perhaps equal importance is the fact that under Article 157, the members of the Commission shall be appointed by the President and confirmed by Wolesi Jirga.

Further complicating matters, the ICSIC also has a role in drafting legislation. The Commission would face a conflict of interest if it were asked to decide on the constitutionality of legislation that it assisted in writing.

Spanta vs. Constitutional Commission

How did the exercise of judicial review of the law creating the ICSIC differ from judicial review in the *Spanta* case? Reread Article 121 of the Constitution.

In the *Spanta* case, the Wolesi Jirga gave a **vote of no confidence**. Unlike a **law**, which Article 92 of the Constitution defines as being passed by both houses of National Assembly and signed by the President, a vote of no confidence only represents the Wolesi Jirga’s opinion. Is a “vote of no confidence” listed as one of the acts the Supreme Court can review under Article 121?

In the case of the Law on the Independent Commission on Supervision of the implementation of the Constitution, however, the **law** had been passed in accordance with the Constitution and thus fell under the Article 121 powers of the Supreme Court. The **President referred it to the Supreme Court** and they returned with their ruling on its compliance with the Constitution.

Only the case of the Constitutional Commission met the constitutional requirements of Article 121.

V. Informal and Formal Judicial Systems

The Constitution focuses on the system of state-run courts. The Constitution does not mention the variety of other systems of justice that exist throughout Afghanistan. However, as you learned in *An Introduction to the Law of Afghanistan*, in addition to the “formal” systems of justice (state-run courts), a variety of parallel “informal” systems of justice exist throughout Afghanistan. Alternative methods of dispute resolution, like shuras or jirgas, serve as the primary system of justice. The formal system stands apart from these systems because it is constitutionally bound to apply the laws of Afghanistan, or Hanafi jurisprudence if no such law exists. Informal systems of justice, like shuras or jirgas, may turn to other religious law, customary tribal law, or the collective wisdom of elders.¹⁶

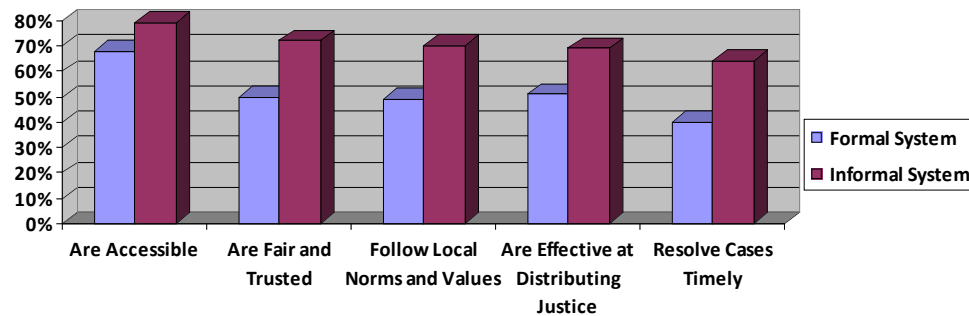
Although the formal courts are open to all cases in Afghanistan, informal systems of justice are still widely utilized for disputes involving non-commercial property, family disputes, and personal status issues. The graph below displays public opinion regarding the formal and

¹⁶ Afghanistan Legal Education Project, *An Introduction to the Law of Afghanistan* 1-5 (2d ed. 2009).

informal systems of justice. Those who responded to the survey expressed a more favorable impression of the informal system than the formal system:

Perceptions of the Formal and Informal Dispute Resolution

Percentages of respondents who agreed with the statement below referring to formal and informal systems of justice:¹⁷



In another survey conducted in 2010, 50% of the respondents stated that they had turned to informal mechanisms. The data shows that more Afghans overall (mostly outside of Kabul) currently favor informal systems of justice for several reasons.¹⁸ First, in some areas, the Primary Courts are hard to reach or are not yet open. Second, for some cases, it may be faster and less expensive to resolve the dispute in an informal system. Third, the formal courts may be more corrupt than traditional courts. Finally, the formal courts do not take account of restorative justice, but merely announce a winner and a loser. Restorative justice means resolving a dispute in a manner that aims to rebuild the relationship between the wrongdoer and the victim as well as between the wrongdoer and the community. Some traditional customs for resolving disputes include traditional forms of apology (nanawati and shamana) and compensation for wrongs calculated in a flexible manner.

Discussion Question

Can you think of other reasons informal systems of justice might be preferable to the formal system?

The formal system of justice offers a different set of advantages: (1) The system of oversight and appeal may be more clearly and consistently applied; (2) For cases involving high stakes, the outcome could be more predictable; (3) The informal courts may have too much discretion in administering justice; (4) The formal courts at least have the ambition of applying justice equally regardless of the gender or status of the parties involved, particularly important to women. Although many instances of discrimination against women exist in the formal courts today, the

¹⁷ The Asia Foundation, Afghanistan in 2009: A Survey of the Afghan People 87, 91 (2009).

¹⁸ Integrity Watch Afghanistan, Afghan Perceptions and Experiences of Corruption: A National Survey 2010 at 76-77 (2010).

Constitution makes such discrimination illegal. Moreover, as Afghanistan develops and more people travel and live away from their place of birth, they might not be as comfortable going to the local jirga of another community—they may want to ensure that the system of justice will be consistent and the outcome will be the same wherever they live or travel. This demand for consistency requires a country-wide system employing the same procedure regardless of the province or local custom.

These advantages, however, depend on a corruption free formal system and widespread trust for the state-run courts. Afghanistan currently faces a “what comes first” problem: Does corruption need to end before people will use the courts? Or, do people need to use the courts first to put political pressure on the government to end corruption?

Afghanistan, through the political process, will have to answer the question of whether or not the formal courts should have a monopoly on justice. The Constitution itself neither protects nor prohibits these informal systems. Accordingly, the people must decide what role the traditional shuras and jirgas should play. One possible solution would be to treat the decisions of the informal system the same way decisions of arbitration are treated in international law. If both parties agree to use and be bound by the informal system through a contract, a court will uphold that decision as a form of private law. Or, the government could regulate the informal system by statute to create standards for treatment of women and an appeals process if one party feels they were treated unjustly. The current co-existence of the two systems may have several advantages, but it poses one major problem—inconsistent application of justice.

Discussion Question

What role do you think informal systems of justice should play in Afghanistan? More importantly, why?

VI. Challenges Facing the Judiciary Today

The Constitution creates the outline of a system very conducive to rule of law. However, it cannot complete the task on its own. Several obstacles continue to destabilize the government and threaten the rule of law.

A. Resource Constraints

The formal justice system still suffers from a lack of sufficiently qualified judges, prosecutors, and lawyers, as well as poor physical infrastructure, such as courthouses, to administer justice fairly and effectively. For example, in Bamiyan province, as of July 2010, only 30 of the 41 authorized judicial seats and only 11 of 18 staff positions are filled, leading to huge backlogs in cases.¹⁹ Worse, only 12 of 90 judicial slots had been filled in Kandahar as of Autumn 2010.²⁰ The government still has not built many courthouses throughout the rural areas and many courthouses have shut down due to security threats. Moreover, few seated judges are sufficiently

¹⁹ International Crisis Group, *Reforming Afghanistan's Broken Judiciary* 18 (2010).

²⁰ International Crisis Group, *Reforming Afghanistan's Broken Judiciary* 18 (2010).

trained or qualified to fulfill their judicial role. A wide range in quality of education presents a huge problem for merit-based appointment of judges and judiciary personnel.

The curriculum at Shari'a and Law faculties across the country are not focused on practical skills that would be useful to a judge. Only about half of all judges have a bachelor's degree or the equivalent.²¹ Judges also do not have access to all necessary resources. In February 2009, the Honorable Chief Justice of the Supreme Court, Abdul Salam Azimi stated:

*Afghanistan, while having its own Civil and Penal Codes, which are inspired by the Egyptian legal system, is one of the richest countries in the region from a legal point of view. It has developed its own Civil, Penal and Commercial Laws: Unfortunately interpretation, explanation and enrichment of these laws have not been done so far, due to the war and conflict over the last three decades. Today, we are in need of legal glossaries and other legal text books explaining our laws to the judiciary and for use as references by judges and lecturers. For this purpose I have ordered establishment of a translation unit for interpretation, explanation, compilation of laws and legal texts.*²²

The Chief Justice's words point to a crucial fact—if the law is not widely available, it serves no greater purpose. Moreover, one NGO reports that no complete set of the criminal and civil procedure codes and other laws is presently available in Afghanistan. Those that existed in the libraries of the Ministry of Justice, the Supreme Court and the Kabul University Law Faculty were destroyed and have yet to be made available to the public.²³ Judges need access to new legal opinions and commentary on the new laws to utilize in their rulings. Without these, they must rely on old laws or on their own experience and judgment.

The Interim Criminal Procedure Code of 2004

The Interim Criminal Procedure Code of 2004 intended to simplify the large and complicated code of 1965, which contained over 500 articles. Simplified criminal procedure should lead to more efficient and fair trials. However, the government never trained judges or distributed adequate guiding information. Many judges reacted by not utilizing the new Code and instead relying on the old procedural rules.

What if the new code is being used in Kabul but the old code still predominates in provinces like Helmand? Perhaps the creation of the new code did more harm than good. Or, perhaps the government merely failed in training judges on the new procedure.

The international community and donor agencies have played a major role in contributing resources in the form of training, documents, and technical assistance to this effort; yet much

²¹ *Id.*

²² Press Release, The International Development Law Organization, IDLO Produces Key Legal Resources For Afghan Justice Institutions (Feb. 12, 2009).

²³ Lorenzo Delesgues and Yama Torabi, *Reconstruction National Integrity System Survey*, The National Integrity System 54 (2007).

remains to be done. Rural areas and areas of poverty greatly need access to legal resources in their native language or through qualified legal professionals.

B. Corruption

The closely related problem of corruption presents a second major challenge facing the judiciary. According to a 2009 ranking by Transparency International, a non-profit organization, Afghanistan was the second most corrupt country in the world (179 out of 180).²⁴ Corruption can take many forms, including bribes to win or influence the outcome of a case, favoritism in hiring and promotion of government and judicial officers, overcharging of lawyer fees and court fees, and impunity for certain individuals from criminal prosecution. At its worst, immorality in the justice system includes threats or violence against officials to intimidate and influence their work, such as the 2008 killing of Judge Alim Hanif, who headed the Central Narcotics Tribunal Appeals Court. Unfortunately, corruption still runs rampant throughout the legal system as well as government more generally. The negative effects of corruption cannot be understated, the unequal application and access of the judiciary runs counter to the very foundation of justice.

Perhaps equally devastating to the judiciary is the perception of corruption. Twenty-two percent of Afghans, in a 2010 survey done by Integrity Watch Afghanistan, ranked corruption as the “biggest problem the government need[ed] to address.”²⁵ Even when the judiciary functions smoothly and without bias, the perception of corruption may stop individuals from bringing their cases in the formal system or make them question the legitimacy of the outcome. Without faith in the judicial system and the corresponding demand for the formal courts as methods of dispute resolution, the government and people may not see a reason to allocate the resources necessary to make the system better.

Although the evidence demonstrates that the problem of corruption is getting worse, not better, several governmental mechanisms have been introduced to address it. As these solutions are in the first stages of implementation, we have yet to see what their impact on the problem will be. The Anti-Corruption Tribunal, which has eleven judges, has tried 70 cases as of July 2010 and 90% of those cases ended in convictions.²⁶ The High Office of Oversight for the Implementation of Anti-Corruption Strategy, which you learned about in Chapter 3 on the Executive, has the responsibility to identify and refer corruption cases to state prosecutors. Critics have noticed that it remains completely under the President’s control and risks becoming just another political tool of the executive.

President Karzai releases drug traffickers

In late December of 2010, journalists discovered that President Karzai had been releasing certain prisoners, charged with drug trafficking, instead of transferring them from the Bagram International Detention Center to the Afghan National Detention Facility. In 2007, one prisoner

²⁴ Liana Sun Wyler & Kenneth Katzman, Congressional Research Service, R41484, Afghanistan: U.S. Rule of Law and Justice Sector Assistance 6 (2010).

²⁵ *Id.*

²⁶ *Id.*

was released; in 2008, 104 were released; and halfway through 2009, 45 more prisoners were released.²⁷

Article 64 of the Constitution gives the President power to “reduce and pardon penalties in accordance with the provisions of the law.” Most other constitutions also give the President power to pardon, although the pardon power is traditionally exercised *after* the individual has stood trial and been convicted.

Is this an instance of corruption? What effect does this have on the public perception of fairness in the judicial system? Does it undermine public trust?

Corruption also permeates the appointment and retention of judges. President Karzai has final approval of nominations, which has led to patronage networks and personal relationships playing an important role in who is appointed to judgeships. A merit-based system has yet to be actualized. As one survey found, appointment of “head judges of the primary and provincial courts is often based not on the merit of their legal education and expertise, but rather on their personal, tribal, ethnic, or political affiliations with the district or provincial leadership.”²⁸

Without peace and security, corruption and lack of resources will likely continue. Similarly, the corruption and ineffective judicial system fuels the insecurity throughout Afghanistan. The challenge for the next generation of leaders will be to tackle the problems of corruption, drug trafficking, and violence without sacrificing the integrity of the judicial system.

C. Alternatives to State Courts

The state judicial system faces an additional challenge from the so-called shadow courts established by the Taliban. For several years, the Taliban has had standing courts in many parts of Afghanistan, though since 2010 they have often resorted to mobile courts in response to increasing pressure from international military forces.²⁹ These courts have their own complex structure and rules of procedure, which we will not detail here. Notably, however, these courts challenge the ability of the central state to enforce its laws throughout all Afghan territory. While they are not free of problems, Taliban courts are widely perceived to be faster, fairer, and less corrupt than state courts.³⁰

VII. CONCLUSION

In this Chapter we have explored the details of the judiciary under the 2004 Constitution. The concepts of judicial independence and separation of powers run throughout what you have learned, although the Constitution does not address either directly. By studying these concepts,

²⁷ Ryan Grim, *Karzai Releasing Scores of Drug Traffickers in Afghanistan, Wikileaks Cables Show*, Huffington Post (Dec. 27, 2010).

²⁸ Lorenzo Delesgues and Yama Torabi, *Reconstruction National Integrity System Survey*, The National Integrity System 54 (2007).

²⁹ Antonio Guistozi et al., *Shadow Justice*, Integrity Watch Afghanistan, 2012, at 12.

³⁰ *Id.* at 36 – 37.

you will be better prepared to understand how justice should function in a constitutional system and know how to navigate the Afghan judiciary.

CHAPTER 7: FUNDAMENTAL RIGHTS OF CITIZENS

CIVIL & POLITICAL RIGHTS AND ECONOMIC, SOCIAL, & CULTURAL RIGHTS

I. INTRODUCTION

In 2007, Sayed Parwiz Kambakhsh, a 24-year-old journalist and student at Balkh University was arrested and charged with blasphemy after he downloaded and distributed writings from the internet on women's rights in Islam.¹ A court in Mazar-i-Sharif sentenced Kambakhsh to death before a court of appeals lowered the sentence to 20 years in prison.² The Supreme Court of Afghanistan affirmed the 20-year prison sentence.³ After two years in detention, however, President Karzai signed a pardon in secret, and Kambakhsh was flown out of Afghanistan.⁴ Many *human rights* activists protested Kambakhsh's prosecution, arguing that it violated his right to freedom of expression. Supporters of Kambakhsh's prosecution argued that the material he distributed was critical of the role of women in Islam, and therefore blasphemous. The Constitution of Afghanistan includes the right to freedom of expression, but it also states that all *provisions* of the Constitution are intended to be consistent with Islam.

Constitution of Afghanistan

Article 3

No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.

Article 34

(1) Freedom of expression shall be inviolable.

(2) Every Afghan shall have the right to express thoughts through speech, writing, illustrations as well as other means in accordance with provisions of this constitution.

(3) Every Afghan shall have the right, according to provisions of law, to print and publish on subjects without prior submission to state authorities.

Discussion Questions

1. If you were a judge, how would you have resolved Kambakhsh's case?

¹ Zaineb Mineeia, *Afghanistan: Journalist Serving 20 Years for "Blasphemy,"* Inter Press Service (Oct. 21 2008), available at <http://ipsnews.net/news.asp?idnews=44383>; Abdul Waheed Wafa & Carlotta Gall, *Death Sentence for Afghan Student*, New York Times, Jan. 24, 2008.

² Zaineb Mineeia, *Afghanistan: Journalist Serving 20 Years for "Blasphemy,"* IPS, Oct. 21, 2008, available at <http://ipsnews.net/news.asp?idnews=44383>; Abdul Waheed Wafa & Carlotta Gall, *Death Sentence for Afghan Student*, New York Times, Jan. 24, 2008; Abdul Waheed Wafa, *No Death Sentence for Afghan Journalist*, New York Times, Oct. 21, 2008.

³ Abdul Waheed Wafa & Carlotta Gall, *Afghan Court Backs Prison Term for Blasphemy*, New York Times, Mar. 11, 2009.

⁴ Kim Sengupta, *Free at Last: Student in Hiding After Karzai Intervention*, The Independent (Sept. 7, 2009), available at <http://www.independent.co.uk/news/world/asia/free-at-last-student-in-hiding-after-karzais-intervention-1782909.html>; *Journalist Jailed for Blasphemy is Released Early in Afghanistan*, Associated Press (Sept. 7, 2009).

2. Was a presidential pardon a good solution to the case? Why or why not?
3. What are the good points and bad points of addressing such cases through the official court system vs. a presidential pardon?
4. Was there a conflict between the right to freedom of expression and Islam in this case?
5. How should a case be resolved when it must comply with Islamic principles and religious leaders interpret these principles in different ways?

In addition to outlining how the government of Afghanistan is structured, Chapter 2 of the Constitution of Afghanistan grants a number of *rights* to both the citizens of Afghanistan and foreign citizens. The next two chapters will explore these rights.

A. The Development of Human Rights

Under international human rights *norms*, human rights must be protected by the State. These norms rest on the belief that it is the *duty* of governments to ensure that the human rights of those under their authority are protected and respected. International human rights only began to develop as a force in international politics after World War II (circa 1948).⁵ Responding to the horror of their citizens at the atrocities of the war, governments were determined to put a structure in place that would prevent such things from happening again.⁶ While human rights violations still occur, the international community is much more critical when governments violate the rights of their people, and are more likely to take steps to pressure violators to change their behavior.⁷ In recent years, some have even advocated for armed intervention, like in Kosovo in 1998 and Libya in 2011, to prevent civilian populations from suffering human rights abuses.⁸

Discussion Questions

1. Consider the development of international human rights. Do you think that human rights norms are something that should be developed at the international level and applied to all states?

⁵ Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law* 201-249 (2000). Andrew Moravcsik, *The Origins of International Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *International Organization* 217 (2000); Tim Dunne & Nicholas J. Wheeler, *Human Rights in Global Politics* 1-24 (Cambridge Univ. Press 1999).

⁶ *Id.* UNESCO, *Philosophical Foundations of Human Rights* (1996); See also Antonio Cassese, *International Law in a Divided World* (1986); Louis Henkin, *The Age of Rights* (1990).

⁷ Charlesworth & Chinkin, at 201; Henry J. Steiner, *International Protection of Human Rights*, in *International Law* (Malcolm D. Evans ed., 2d ed. 2006); Andrew Moravcsik, *The Origins of International Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *International Organization* 217 (2000); Tim Dunne & Nicholas J. Wheeler, *Human Rights in Global Politics* 1-24 (Cambridge Univ. Press 1999); Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell Univ. Press 2002) 9-27.

⁸ Henry J. Steiner, *International Protection of Human Rights*, in *International Law* (Malcolm D. Evans ed., 2d ed. 2006); See also Gareth Evans, *The Responsibility to Protect: An Idea Whose Time Has Come...And Gone?*, 22(3) *International Relations*, 283-98 (2008).

2. Do you think that international human rights should trump state *sovereignty*? What do you think of increasing interventions by the international community in states where violations occur?

B. Entitlement, Legal Personality, & Citizen Rights

Under international human rights norms, all human beings are *entitled* to basic human rights under the law of whichever country they live in. In order for an individual to demand that he or she be granted the rights to which he or she is entitled, he or she must have *legal personality*, or the right to be recognized as a person with legal rights before the law.⁹

Under international law, all human beings have certain rights, regardless of where they are. These tend to be basic human rights generally considered to be required for human dignity, such as the right to life, and the right to be free from slavery. The *Universal Declaration of Human Rights* enshrines these universal human rights.¹⁰ If a country agrees to uphold the Universal Declaration of Human Rights, then it agrees to protect the universal human rights of all human beings within the State's jurisdiction. In addition to these universal human rights, countries may grant certain rights to their citizens in their constitutions. These *citizen rights* apply only to citizens of that country, as opposed to all human beings who happen to be under a State's jurisdiction.¹¹ The Constitution of Afghanistan contains numerous provisions granting citizen rights to the citizens of Afghanistan.

Political rights are by definition citizen rights. Political rights include the right to vote, the right to run for election, and the right to public participation.¹² Such acts, which work to define a sovereign nation, are reserved for those people who are part of the nation. It would not make much sense, for example, if Italian citizens had the right to run for election or vote in Afghanistan, because Italians are not part of the nation of Afghanistan.

You may be wondering how countries are able to grant certain rights only to their citizens if they are also required to grant rights to all human beings under international law. According to international law, nations may distinguish between citizens and foreigners so long two conditions are met. First, the country must provide the opportunity for people with valid claims to citizenship to become citizens.¹³ In other words, states cannot arbitrarily deny citizenship to people who qualify under the state's domestic laws. Second, all citizens must have the right to

⁹ Mandana Knust Rassekh Afshar, Max Planck Institute for Comparative Public Law & International Law, 2 Max Planck Manual on Afghan Constitutional Law: Constitutional Practice & Human Rights 31 (2007).

¹⁰ Universal Declaration of Human Rights, *available at* <http://www.un.org/en/documents/udhr/>.

¹¹ Mandana Knust Rassekh Afshar, Max Planck Institute for Comparative Public Law & International Law, 2 Max Planck Manual on Afghan Constitutional Law: Constitutional Practice & Human Rights 31 (2007).

¹² *Id.* at 32.

¹³ Universal Declaration of Human Rights, art. 15, *available at* <http://www.un.org/en/documents/udhr/> (“(1) Everyone has the right to a nationality; (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”).

participate in the political system without discrimination.¹⁴ In fact, international law considers political participation to be a citizen right rather than a universal human right.¹⁵ As you will notice while reading this chapter, the Constitution of Afghanistan grants most political rights solely to Afghan citizens. At the same time, it guarantees basic rights to foreigners under Afghan jurisdiction in compliance with international law.

Reading Focus

Before you read this chapter, review Chapter Two: Fundamental Rights and Duties of Citizens of the Constitution of Afghanistan. As you read this chapter, think of to whom different rights are granted. Are rights being granted to Afghan citizens? Foreigners? Both? Then think of whether the specific grant of rights satisfies the international legal conditions discussed above.

C. Obligations of the State & State Action

Whereas individuals are *entitled* to certain rights, the State has an *obligation* to grant those rights to individuals. This means that the State is *bound to uphold* the Constitutional rights of individuals.¹⁶ For example, pursuant to Article 36 of the Constitution of Afghanistan, Afghan citizens have the right to “unarmed demonstrations.” The State of Afghanistan, therefore, has the obligation to uphold this right. In other words, according to the Constitution, the State of Afghanistan may not prevent Afghan citizens from holding such unarmed demonstrations. This is called a *vertical effect* because it regulates the relationship between the State and individuals.¹⁷

On the other hand, Constitutional rights do not regulate *horizontal effects*, or the relationship between private citizens.¹⁸ To return to the previous example, individuals are not obligated to uphold the rights of other individuals to hold unarmed demonstrations because that is the job of the government. If Haroon and his friends were holding a demonstration it would not be a constitutional violation—though it might be some other sort of violation—for Hamid to disrupt the demonstration if he were acting in a private capacity. If, however, Hamid worked for the government and was disrupting the demonstration on behalf of the government, then it would be a constitutional violation for him to disrupt the demonstration. In fact, all persons acting on behalf of the State, including the executive, the legislature, and the judiciary, are bound to uphold Constitutional rights.

Another way to think about the State’s obligation to uphold rights is to keep in mind that there

¹⁴ International Covenant on Civil & Political Rights art. 25, *available at* <http://www2.ohchr.org/english/law/ccpr.htm> (“Every *citizen* shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.”) (emphasis added).

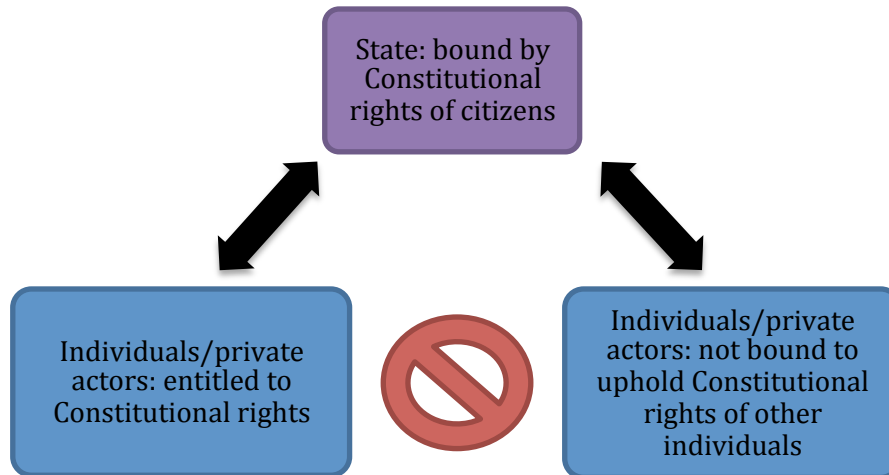
¹⁵ Mandana Knust Rassekh Afshar, Max Planck Institute for Comparative Public Law & International Law, 2 Max Planck Manual on Afghan Constitutional Law: Constitutional Practice & Human Rights 32 (2007).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

must be *state action* in order for a constitutional violation to occur. Because only the State is obligated to uphold constitutional rights, a constitutional violation requires state involvement. This is why Hamid would not commit a constitutional violation by disrupting an unarmed demonstration, but the State would commit a violation by disrupting the same demonstration. As you will learn below, State action can also occur when a State fails to prevent something that it should. For example, there could be state action if the State allowed Hamid and his friends to prevent Haroon's demonstration.



Hypotheticals: Vertical Effects & State Action

Hypothetical 1: Burglary

Suppose the Rohullah breaks into Kamal's house and steals some of his property. Article 40 of the Constitution of Afghanistan states: "Property is immune from invasion." Has Rohullah violated one of Kamal's Constitutional Rights?

While at first you may want to answer yes because Rohullah has clearly done something wrong and has stolen from Kamal, Rohullah himself has not committed a *constitutional* violation. Remember that constitutional rights regulate only the relationship between the government and individuals, not between two individuals. As a private actor, Rohullah is not bound by constitutional rights. This does not mean that Rohullah has not done something wrong. What he did almost certainly violates the Afghan criminal code, and he could be prosecuted for that. But, Rohullah himself did not commit a constitutional violation.

Hypothetical 2: Mail Inspection

Suppose that the Government of Afghanistan hired a private company called Mail Services Inc. to run the national postal service. Employees of that private company start opening people's private packages and letters while transporting them. Sometimes they remove portions of packages and keep those portions for themselves. Article 37 of the Constitution of Afghanistan states: "Freedom and confidentiality of correspondence, as well as communications of

individuals, whether in the form of a letter or via telephone, telegraph, as well as other means, shall be secure from intrusion.” Is the situation described above a constitutional violation?

Even though Mail Services Inc. is a private company, this would be a constitutional violation because Mail Services Inc. is working on behalf of the government. The government hired the company to perform a public duty, and Mail Services Inc. is being paid to carry out a public function. Therefore, there is state action.

Hypothetical 3:

Simin works for the government. She decides that she wants to hire someone as a housekeeper and gardener at her home. She decides that she only wants to hire a woman for the job, so she tells men not to apply and refuses to review applications from men. She knows that some of the men who applied might actually be better at doing the job than the women, but she still only considers women for the job. Article 50 of the Constitution of Afghanistan states: “The citizens of Afghanistan shall be recruited by the state on the basis of ability, without any discrimination, according to the provisions of the law.” Has Simin committed a constitutional violation?

Even though Simin works for the government, she has not committed a constitutional violation because she was acting in her capacity as a private actor in this instance. If Simin had engaged in gender discrimination when hiring someone to work in her government office, she would be violating the Constitution because she would be acting on behalf of the State. In this instance, however, Simin is acting as a private individual, hiring someone to work in her home.

As you may have noticed in the burglary hypothetical above, even though Rohullah himself isn’t bound by constitutional rights, Kamal’s constitutional rights have been violated. For this reason, some judicial bodies have ruled that while there are no *direct* horizontal effects that regulate the relationship between two private citizens, the State can be obligated to protect the constitutional rights of citizens from violation by third party actors. This is called an *indirect horizontal effect*.¹⁹

D. Civil & Political Rights vs. Economic, Social, & Cultural Rights

Human rights theorists have traditionally distinguished between *negative rights*, which dictate what the State *cannot* do, and *positive rights*, which dictate what the State *must* do.²⁰

Civil and political rights protect individuals from certain actions by the state or government.²¹ In other words, an individual has the right to freedom of expression precisely because the government cannot restrict the expression of individuals. Likewise, an individual has the right to privacy because the government is not permitted to intrude on her home or personal correspondence. Civil and political rights are sometimes called negative rights because they

¹⁹ Alex Conte & Richard Burchill, *Introduction to Defining Civil & Political Rights: The Jurisprudence of the United Nations Human Rights Committee* 6 (Alex Conte & Richard Burchill, eds. 2009).

²⁰ Mandana Knust Rassekh Afshar, Max Planck Institute for Comparative Public Law & International Law, 2 Max Planck Manual on Afghan Constitutional Law: Constitutional Practice & Human Rights 33 (2007).

²¹ Alex Conte & Richard Burchill, *Introduction to Defining Civil & Political Rights: The Jurisprudence of the United Nations Human Rights Committee* 2 (Alex Conte & Richard Burchill, eds. 2009).

place restrictions on the government by dictating what the government is not allowed to do. Civil and political rights are also called “traditional” or “first generation” human rights because they are the first types of rights that the international community made into international law.²² In addition, the term “civil and political rights” encompasses two different types of rights. As human rights scholars Alex Conte and Richard Burchill state, “While civil rights are those rights which are calculated to protect an individual’s physical and mental integrity, to ensure that they are not victims of discrimination, and to preserve their right to a fair trial, political rights are those which ensure that individuals are able to participate fully in civil society. Such rights include rights of democratic participation, such as the right to participate in the public life of the State, freedom of expression and assembly, and freedom of thought, conscience and religion.”²³

Definitions: Civil & Political Rights

Civil Rights: Rights that ensure people’s *physical and mental integrity, life, and safety*.

Examples of Civil Rights:

- Right to nondiscrimination
- Right to privacy
- Right to life
- Right to freedom of thought, conscience, speech, expression, and religion, *in the sense that these rights preserve people’s mental integrity*

Political Rights: Rights that ensure the ability to *participate in civil society and politics*.

Examples of Political Rights:

- Freedom of association & assembly
- Right to vote
- Right to petition the government
- Right to freedom of thought, conscience, speech, expression, and religion, *in the sense that these rights allow people to participate in civil society and politics*

You may have noticed that some rights can qualify as both civil and political rights. For example, freedom of expression qualifies as a civil right because the right to express one’s thoughts helps to preserve their mental integrity. At the same time, freedom of expression qualifies as a political right because when people express their thoughts and opinions on politics and political figures, it allows them to participate in civil society.

Economic, social, and cultural (“ESC”) rights, by contrast, are affirmative rights granted to people.²⁴ ESC rights are sometimes referred to as “second generation” human rights because the international community addressed them later than civil and political rights.²⁵ For example, the right to education and the right to healthcare are both ESC rights because they affirmatively grant people the right to pursue an education or access healthcare. They are sometimes called *positive rights* because they grant people the right to do something *through* the State. Because of

²² *Id.*

²³ *Id.* at 3-4.

²⁴ *Id.* at 2.

²⁵ *Id.*

this, ESC rights are often *aspirational* in nature, meaning that they are something that a State can only *aspire* to because they are very difficult to *implement* and enforce. For example, for a government to establish an effective healthcare system that all citizens can access, it must implement training systems for doctors, build health *infrastructure* throughout the country, and ensure that medical supplies are consistently transported to these health facilities. Establishing a universal educational system is similarly complicated and expensive. Even a well-meaning government may find such rights difficult to implement and enforce.

In addition, *enforcement* of ESC rights is more difficult than for civil and political rights. For example, suppose that an individual brings a case against the government for violating his freedom of expressing by imprisoning him for publishing a particular story. If the judge decides that the individual should win the case, she can rule that the government must release him. Suppose, on the other hand, that an individual brings a case against the government alleging that the government has not established adequate education in his province and is thus violating the right to education (an ESC right). Even if the judge rules that the individual should win the case, it is much more difficult for the government to establish an adequate educational system in that province. This would require actions such as building schools and training teachers, as well as resources to take these steps.

While civil and political rights can generally be categorized as negative and ESC rights can generally be categorized as positive, there is overlap between the two categories. For example, the right to vote (a negative right) requires not only that the State refrain from restricting access to polls, but also that the State provide polling stations and ballots. Similarly, the right to health (a positive right) requires both that the State affirmatively establish a health infrastructure system, and also that the State refrain from restricting access to that healthcare system.

Civil & Political vs. Economic, Social, & Cultural Rights

Civil & Political Rights

--**Negative or Defensive** Rights

--Freedom *from* the State

--Set limits on State action

--Impose a duty on the State not to interfere with the basic rights of citizens

--“Traditional” or “first generation” human rights

Examples: Freedom from slavery, freedom of expression, freedom from discrimination, freedom of association, privacy rights, property rights, electoral rights

Economic, Social, & Cultural Rights

--**Positive** Rights

--Freedom *through* the State

--Requires the State to take affirmative action

--“Second generation” human rights

Examples: Right to education, right to healthcare, right to housing, right to work, right to an adequate standard of living

Civil & Political Rights vs. Economic, Social, & Cultural Rights: An International Debate

When the UN adopted the non-binding Universal Declaration of Human Rights (UDHR), the international community initially intended to enshrine the rights expressed in the UDHR in a legally binding agreement.²⁶ However, states disagreed on how civil and political rights vs. ESC rights should be prioritized with regard to one another.²⁷ In addition, each category of rights requires a different method of implementation. Because civil and political rights are *restraints* on government action, they can be implemented and enforced relatively quickly.²⁸ ESC rights, on the other hand, require states to establish comprehensive social and economic programs, so depend heavily on resource availability and cannot be implemented immediately.²⁹

As a result, the international community separated the rights enumerated in the UDHR into two categories of rights: (1) civil and political rights, and (2) ESC rights.³⁰ States then passed two separate binding legal *instruments*, one to protect each category of rights: the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR).³¹ There is more international consensus over the applicability of civil and political rights as opposed to ESC rights. For example, the ICCPR has a few more signatories than the ICESCR: while there are 167 *state parties* to the ICCPR, there are only 160 state parties to the ICESCR.³²

While civil and political rights are less controversial within the international community, many countries have acknowledged the value of the ESC rights, but have chosen different ways to achieve them. The United States, which has signed but not ratified the treaty, explains that adopting the ESC makes little sense, given its free-market system of allocating resources. People sympathetic to this position might argue that decisions about resource allocation are best left in the hands of legislatures and the executive. On the other hand, many opponents of this view argue that without a treaty obligation akin to the ICESCR, societies will fail to ensure adequate resources for all people. On this view, ratifying the ICESCR is a necessary first step in the struggle to ensure equality for all.

Discussion Question

1. Do you think that a citizen should be able to bring a case against his or her government for violating ESC rights?

²⁶ Alex Conte & Richard Burchill, *Introduction to Defining Civil & Political Rights: The Jurisprudence of the United Nations Human Rights Committee 2* (Alex Conte & Richard Burchill, eds. 2009).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 2-3.

³⁰ *Id.* at 3.

³¹ *Id.*

³² Status of Treaties: International Covenant on Civil and Political Rights [hereinafter ICCPR], http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en; Status of Treaties: International Covenant on Economic, Social, and Cultural Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.

2. In Afghanistan, the media and the Wolesi Jirga have frequently raised the issue of unequal enforcement of ESC rights throughout Afghanistan. Critics have complained that the Government of Afghanistan promotes ESC rights unequally or treats the provinces differently. In response, the government has argued that it lacks the resources to develop all of the provinces.³³ Do you think this criticism is valid? Is the government's response legitimate? What is the best solution when the law mandates that the government must enforce ESC rights, but the government lacks the capacity or resources to do so?

E. The Duty to Respect, Protect, & Fulfill

More recently, scholars have categorized rights according to the state duty. Keep in mind that categorizing rights as positive vs. negative or according to types of duties are merely different ways of conceptualizing rights. The categories may therefore overlap. Three such duties are widely recognized: the duty to respect, the duty to protect, and the duty to fulfill.³⁴

The **duty to respect** aligns with the traditional notion of negative rights. Under the duty to respect, the State must respect the basic rights of individuals such that it refrains from acting in any way that denies individuals those rights. For example, under the right to vote, the State must respect individuals' right to vote by not denying people access to polling stations.

The **duty to protect** obliges the State to prevent third party actors from violating an individual's rights. For example, under the right to vote, the State must pass and enforce laws that prohibit people from preventing others from voting. The duty to protect is similar to the concept of indirect horizontal effects that you read about above.

The **duty to fulfill** is similar to the traditional notion of positive rights. Under the duty to fulfill, the State must establish economic and social systems that allow all people to access rights. For example, under the right to vote, the State must ensure that polling places are established throughout the country, print ballots, and that people are present to run the polling stations.

The following table demonstrates how several different civil and political rights contain the duty to respect, the duty to protect, and the duty to fulfill.

Right	Aspect of Right		
	Duty to Respect	Duty to Protect	Duty to Fulfill
Right to Life	The State may not end someone's life without due process of law	The State must prevent third party actors from ending the lives of others by passing laws criminalizing homicide.	The State must create a social structure that will help people live out their natural lives; e.g. by preventing armed violence and/or

³³ Information provided by Professor Mohammad Isaqzadeh, Assistant Professor, Department of Political Science and Law, American University in Afghanistan.

³⁴ Mandana Knust Rassekh Afshar, Max Planck Institute for Comparative Public Law & International Law, 2 Max Planck Manual on Afghan Constitutional Law: Constitutional Practice & Human Rights 35 (2007).

			providing health services.
Freedom of Assembly	The State may not prevent people from holding lawful demonstrations.	The State must prevent third party actors from preventing others from holding lawful demonstrations. For example, in some countries, police protect lawful demonstrators from violence.	The State must create a social structure that allows people to organize to demonstrate for common causes.

It is important to keep in mind that, as explained above in the box on the international debate over economic, social, and cultural rights vs. civil and political rights, nearly all countries recognize the importance of the duty to respect. The duty to protect is somewhat more controversial, though international bodies such as the Human Rights Committee (an independent body that monitors the implementation of the ICCPR) have recognized the importance of the duty to protect and indirect horizontal effects.³⁵ The duty to fulfill is even more controversial—some countries strongly support it but others believe that the duty to fulfill is not properly framed as a universal human right or a constitutional right.

Discussion Question

Do you think that States should be *constitutionally* required to uphold positive rights and the duty to fulfill? Where in the legal framework should a State's responsibility to create social, economic, and political structures that benefit citizens fit? In the Constitution? In statutory laws? Through the incorporation of international human rights norms into domestic law? Why?

F. The Constitution of Afghanistan & Human Rights

The second chapter of the Afghan Constitution is entitled “Fundamental Rights and Duties of Citizens” and details all of the individual rights guaranteed to the citizens of Afghanistan. The Constitution contains much more detailed provisions of individual rights than previous Afghan constitutions. By including these provisions in the Constitution, the *drafters* demonstrated a commitment to human rights.³⁶ In this respect, the Constitution of Afghanistan is following a pattern in the development of constitutions more generally. With the development of human rights, as discussed above, constitutions have begun to include more and more specific provisions guaranteeing individual rights to citizens.³⁷

The Constitution of Afghanistan contains two primary types of civil and political rights: (a) civil rights that ensure personal security and integrity, and (b) democratic and political rights that allow individuals to participate in the political system and civil society, as well as ESC rights. The rights in these three categories that are included in the Constitution of Afghanistan outlined

³⁵ See UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant para. 8, adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add. 13.

³⁶ Constitution of Afghanistan, Chapter 2.

³⁷ Jack Donnelly, *Universal Human Rights in Theory and Practice* 9-27 (Cornell Univ. Press 2002); see also A. Mark Weisburd, *Using International Law to Interpret National Constitutions*, 22 ASIL Proceedings (2005).

below.

Discussion Questions

1. Why do you think the Constitution includes detailed individual rights?
2. Do you think that it is a meaningful way of protecting the rights of the people of Afghanistan? Why or why not? What limitations can you identify?

Reviewing claimed violations of constitutional rights as a legal practitioner³⁸

You may want to consider using the following three-step process for determining whether an individual can properly bring a claim for violation of a constitutional right:

1. *Identify the scope of protection* of the right claimed. Then determine whether it covers the behavior, situation, or interest *alleged*, and whether the individual asserting the claim is entitled to the right.
2. If the claimed right covers the behavior, situation, object, or interest alleged and the person bringing the claim, there is a right at issue. Then we next examine whether that right has been *infringed*.
3. If the right has been infringed, determine whether the infringement is *justified*.

Reading Focus: The Importance of Legal Translation

When analyzing the text of an English translation of the Constitution of Afghanistan, it is always important to keep in mind that translations can be imprecise. Translation might even explain why some provisions may appear to be unclear in meaning the English translation. Precise and accurate legal translation is very important. Without it, people around the world might have misconceptions about what is written in the Constitution and laws of Afghanistan. When you are studying the Constitution or laws of Afghanistan in English, always go back and read the same provisions in Dari or Pashto. This will allow you to think about whether the translation is accurate, or if the English translation could possibly change the meaning of the law.

II. CIVIL RIGHTS: RIGHTS TO PERSONAL SECURITY & INTEGRITY

A. The Right to Life

The Constitution of Afghanistan

³⁸ For the three-step process, see Mandana Knust Rassekh Afshar, Max Planck Institute for Comparative Public Law & International Law, 2 Max Planck Manual on Afghan Constitutional Law: Constitutional Practice & Human Rights 38 (2007).

Article 23

Life is the gift of God as well as the natural right of human beings. No one shall be deprived of this except by legal provision.

The right to life is considered to be the most fundamental right because without it, other human rights are not meaningful. The Human Rights Committee has described it as the “supreme right.”³⁹ The right to life is not subject to *derogation* in international legal instruments,⁴⁰ and the Constitution of Afghanistan does not subject the right to life to *suspension* under the state of emergency. Under the right to life, the State is required to protect life by preventing and punishing arbitrary *deprivation* of life, both by state authorities and by third parties.

B. The Right to Liberty & Human Dignity**The Constitution of Afghanistan****Article 24**

(1) Liberty is the natural right of human beings. This right has no limits unless affecting the rights of others or the public interest, which shall be regulated by law.

(2) Liberty and human dignity are inviolable.

(3) The state shall respect and protect liberty as well as human dignity.

Article 49

(1) Forced labor shall be forbidden.

(2) Active participation in times of war, disaster, and other situations that threaten public life and comfort shall be among the national duties of every Afghan.

(3) Forced labor on children shall not be allowed.

The right to liberty is another fundamental human right that the Constitution of Afghanistan enshrines. The right to liberty is usually interpreted narrowly as the right to freedom from bodily restraint or imprisonment, and it is not absolute. Article 24 provides that the right to liberty can be limited if it affects the “rights of others or the public interest.” The law must regulate what constitutes a legitimate “right of others” or “public interest” that justifies government infringement on the freedom of liberty.

What do you think might justify the government infringing on an individual’s right to liberty? The penal code often determines what types of acts justify infringement on the right to liberty via imprisonment. The penal code lists different types of acts (such as homicide, burglary, larceny,

³⁹ Alex Conte, *Security of the Person*, in *Defining Civil & Political Rights: The Jurisprudence of the United Nations Human Rights Committee* 141 (Alex Conte & Richard Burchill, eds. 2009).

⁴⁰ International Covenant on Civil and Political Rights, art. 4(2) [hereinafter ICCPR].

etc.) that are considered to be serious enough infringements on the “rights of others” or “the public interest” that they justify government infringement on the perpetrator’s liberty rights.

Article 24 also mentions the right to human dignity, which is often considered to be a right independent from the right to liberty. What do you think the right to human dignity means? How may it be upheld or infringed? When looked at one way, infringement on *any* human right also violates the right to human dignity. If an individual is imprisoned, tortured, killed, has her privacy invaded, or has her property confiscated, you could also say that her human dignity has been violated.

Article 49 provides that forced labor shall be forbidden. Article 49(1) provides that forced labor shall be forbidden, generally. Article 49(3) provides that forced labor on children shall be forbidden, specifically. Notice that Article 49(1) does not specify that it applies only to forced labor for adults. Is Article 49(3) *superfluous*, meaning that it says the same thing as 49(1)? To the contrary, do you think that 49(3) has meaning independent from Article 49(1)? Is there a reason to include both 49(1) and 49(3) or is this an instance of sloppy drafting?

Article 49(2) provides a limitation on the freedom from forced labor, stating that all Afghan citizens have the duty of “active participation in times of war, disaster, and other situations that threaten public life and comfort.” What do you think this means? One possible interpretation is that it could justify a wartime draft. A draft occurs when the government requires citizens to serve in the military during a war. What else do you think Article 49(2) could justify?

Article 49(2) may in fact be the reason that the drafters of the Constitution of Afghanistan included both 49(1) and 49(3). One possible interpretation of Article 49 is that 49(2) serves as an exception that modifies only 49(1), and not 49(3). This would mean that forced labor on children would be categorically forbidden and that children do not have the duty of “active participation in times of war, disaster, and other situations that threaten public life and comfort.” If this was the intent of the drafters, it is not clearly expressed. Why wouldn’t the drafters merely have added a sentence to 49(2) stating that children are not subject to that duty? Or why wouldn’t 49(2) state that active participation in times of war, disaster, and other situations that threaten public life and comfort shall be among the national duties of every Afghan *adult*? The true meaning of Article 49 is unclear. What do you think is the best interpretation? Why?

C. The Freedom from Discrimination

The Constitution of Afghanistan

Article 22

(1) Any kind of discrimination and *distinction* between citizens of Afghanistan shall be forbidden.

(2) The citizens of Afghanistan, man and woman, have equal rights and duties before the law.

Article 50

(4) The citizens of Afghanistan shall be recruited by the state on the basis of ability, without any

discrimination, according to the provisions of the law.

Equality is a cornerstone of civil rights, and the freedom from discrimination helps to achieve a situation of equality. The Constitution of Afghanistan discusses the freedom from discrimination (also referred to as the freedom to nondiscrimination) in Articles 22 and 50. Discrimination occurs when *similarly situated people are treated differently*.

Note that Articles 22 and 50 apply only to citizens of Afghanistan. This means that the government of Afghanistan *may not* discriminate between citizens of Afghanistan, but it *may* discriminate against Afghan citizens and foreigners so long as two conditions are met: (1) individuals with valid claims to citizenship have an opportunity to become citizens, and (2) citizens are permitted to participate in the political system without discrimination. You will see that these two conditions are met in Article 4 and Article 33, both discussed below. You should also note that Article 22(1) forbids any kind of discrimination or distinction between citizens, while Article 22(2) specifically forbids gender discrimination? Wouldn't 22(1) also include gender-based discrimination? Why do you think that the drafters of the Constitution included both 22(1) and 22(2)?

Equality has two components: (1) equality before the law, and (2) equal treatment of the law.⁴¹ Equality before the law means that all individuals have *legal personality*, or the right to be recognized as a person before the law. While the Constitution of Afghanistan does not explicitly mention legal personality, it can be inferred from Article 22. Equal treatment of the law means that the law must treat all people equally, without discrimination on such bases as race, gender, religion, language, political affiliation, etc. The right to equal treatment does not mean the government must treat all individuals and groups identically. Sometimes *disparate* treatment can be justified. For example, since only women give birth to children, it makes sense for the government to provide prenatal healthcare during pregnancy to women, but not to men. Generally, only distinctions that are considered *unreasonable* or *subjective* are forbidden.⁴² There is a clause in Article 50 that states that the government may not discriminate in employment decisions “according to the provisions of the law.” This provision may be designed to permit the government to engage in reasonable discrimination in its hiring decisions. For example, when hiring judges or lawyers who will have to read the law, it would be reasonable to require that applicants are literate and have attended law school, even though this requirement would discriminate against applicants who are illiterate or who have not attended law school.

The prohibition on discrimination covers both *direct* and *indirect* discrimination.⁴³ *Direct discrimination* occurs when a law explicitly distinguishes between different types of people. This would occur, for example, if a law stated that children from Herat province could attend school, while children from Balkh province could not attend school. *Indirect discrimination* occurs when a law doesn't explicitly discriminate against one group, but the law has a *disparate impact* on one group of people vs. another. For example, a law mandating that employees could not take family-related leave of more than two weeks might have a disparate impact on women, who

⁴¹ Mandana Knust Rassekh Afshar, Max Planck Institute for Comparative Public Law & International Law, 2 Max Planck Manual on Afghan Constitutional Law: Constitutional Practice & Human Rights 55 (2007).

⁴² *Id.* at 56.

⁴³ *Id.* at 57.

frequently have to take longer leave to recover from childbirth.

D. The Right to Citizenship

The Constitution of Afghanistan

Article 4

(5) No member of the nation can be deprived of his citizenship of Afghanistan.

Article 4 grants the right of citizenship to all “members of the nation.” As discussed above, this permits the government to grant rights that only apply to Afghan citizens, as opposed to foreigners. Article 4, however, does not define what “member of the nation” means. This makes it difficult to determine who has the right to become a citizen of Afghanistan. Is it anyone born on Afghan soil? Anyone who has a parent who is Afghan? What if a foreigner moves to Afghanistan, lives here for 20 years, and wants to become a citizen? How do you think that “member of the nation” should be defined? Why?

When considering these issues, it is helpful to look at the Afghan citizenship law, which was passed in 1936.

Law of Citizenship In Afghanistan 16 Aqrab 1315 [16 November 1936]⁴⁴

Chapter 1: Original Citizenship, Naturalization, Citizenship Rights

(1) All residents of Afghanistan are Afghans and are citizens of Afghanistan, except those who hold other valid citizenship documents, provided the Afghan Government has no claim against such documents.

(2) All persons born of Afghan mothers and fathers, whether inside or outside Afghan territory shall be considered Afghan and shall hold Afghan citizenship.

(3) All persons born as *foundlings* in Afghanistan shall be considered Afghan citizens.

(4) Persons born of foreign parents in Afghanistan, provided that one of their parents was born and has continuously lived in Afghanistan, shall be considered as Afghan citizens.

(5) Persons born in Afghanistan of a foreign mother or father or two foreign parents, and who continue to live in Afghanistan until their coming of age, shall be considered citizens of Afghanistan.

Note that the Afghan citizenship focuses on citizenship through lineage. In other words, Afghan mothers and fathers pass on their citizenship to their children. This is common in predominantly

⁴⁴ Available at

http://www.mpil.de/ww/en/pub/research/details/know_transfer/afghanistan_project/legal_documents/public_and_administrative_law.cfm and <http://www.afghan-web.com/politics/>.

Muslim countries. By contrast, some western countries, such as the United States, define citizenship by place of birth as well. For example, anyone born on U.S. soil is an American citizen, regardless of his or her parents' citizenship.

E. The Rights of Foreign Citizens

The Constitution of Afghanistan

Article 57

(1) The state shall guarantee the rights and liberties of foreign citizens in Afghanistan in accordance with the law.

(2) These people shall be obliged to respect the laws of the state of Afghanistan within the limits of the provisions of international law.

Article 57 clarifies that even though many rights are granted only to Afghan citizens, the government must guarantee a certain level of treatment to foreigners in Afghanistan as well. Article 57 grants the government the authority to pass laws outlining the “rights and liberties” of foreign citizens. Importantly, however, 57(2) provides that the laws of Afghanistan governing the rights of foreigners are limited by “the provisions of international law.” This means that Afghanistan may not pass any law restricting the rights of foreigners that violates international law. The ICCPR provides that, “[e]ach State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴⁵ This means that, under international law, Afghanistan must respect the basic civil rights of foreign citizens in Afghanistan. Such rights include the right to life, the right to liberty, and protections for criminal defendants. The ICCPR specifies that political rights such as the right to vote or run for office apply only to citizens of a country,⁴⁶ so the Constitution of Afghanistan properly grants those rights only to citizens.

Discussion Question:

The Expulsion of Foreign Journalists from Meshrano Jirga Chamber⁴⁷

On October 23, the Meshrano Jirga banned all journalists from covering *plenary* sessions on behalf of foreign media organizations. The ban was in response to an Iranian cameraman covering a Meshrano Jirga plenary session. Mr. Basheer Samim (Badakhshan) offered the following reasoning: “Suicide bombers might enter the chamber pretending to be journalists.” Is this decision consistent with Article 57 on the treatment of foreign citizens in Afghanistan? Does it respect the provisions of international law as required by Article 57(2)? Find specific legal provisions to support your answer.

⁴⁵ ICCPR, art. 2 (emphasis added).

⁴⁶ See, e.g., ICCPR, art. 25.

⁴⁷ APAP Legislative Newsletter, Oct. 28, 2011, Vol. 6, No. 13, available at www.sunyaf.org.

F. Freedom of Movement

The Constitution of Afghanistan

Article 39

- (1) Every Afghan shall have the right to travel and settle in any part of the country, except in areas forbidden by law.
- (2) Every Afghan shall have the right to travel outside Afghanistan and return, according to the provisions of the law.
- (3) The state shall protect the rights of the citizens of Afghanistan outside the country.

Freedom of movement is closely linked to the right to citizenship. A part of citizenship is the right to move around the country and live wherever one chooses within the country, as well as to travel outside the country and return. Afghanistan may, on the other hand, limit the freedom of movement and entry to Afghanistan of foreigners. One way countries frequently do this is by requiring visas for entry. Article 39(1) exception stating that Afghans may not travel or settle in “areas forbidden by law.” What do you think this means? What types of areas may the government prevent citizens from traveling to or settling in? The ICCPR permits states to restrict the freedom of movement of its citizens only for the purpose of protecting national security, public order, public health or morals and the rights and freedoms of others.⁴⁸ The exception in Article 39(1) is broader than this, allowing the government of Afghanistan to limit movement as it chooses so long as it does so through legislation. What do you think of the ICCPR approach to restricting freedom of movement vs. the approach in the Constitution of Afghanistan?

G. Privacy Rights

The Constitution of Afghanistan

Article 37

- (1) Freedom and confidentiality of correspondence, as well as communications of individuals, whether in the form of a letter or via telephone, telegraph, as well as other means, shall be secure from intrusion.
- (2) The state shall not have the right to inspect personal correspondence and communications, unless authorized by provisions of the law.

Privacy rights grant individuals the right to have a private sphere into which the State may not intrude. The right to privacy is present in many international human rights instruments and domestic constitutions and is considered to be an important aspect of individual liberty. By respecting an individual’s right to privacy, the state is respecting her individual liberty.

⁴⁸ Alex Conte, *Democratic and Civil Rights*, in *Defining Civil & Political Rights: The Jurisprudence of the United Nations Human Rights Committee* 68 (Alex Conte & Richard Burchill, eds. 2009).

Note that Article 37 applies to all individuals, as opposed to citizens of Afghanistan. Why do you think this is? Could there be national security implications in protecting the correspondence from government inspection? Note that 37(2) contains an exception for instances “authorized by provisions of law.” This provision is probably to allow the government security services to read or record personal correspondence and communications to protect the national security. However, government officials could easily abuse this exception without proper regulation and oversight.

H. Property Rights

The Constitution of Afghanistan

Article 40

- (1) Property shall be safe from violation.
- (2) No one shall be forbidden from owning property and acquiring it, unless limited by the provisions of law.
- (3) No one's property shall be confiscated without the order of the law and decision of an authoritative court.
- (4) Acquisition of private property shall be legally permitted only for the sake of public interests, and in exchange for prior and just compensation.
- (5) Search and disclosure of private property shall be carried out in accordance with provisions of the law.

Article 41

- (1) Foreign individuals shall not have the right to own immovable property in Afghanistan.
- (2) Lease of immovable property for the purpose of capital investment shall be permitted in accordance with the provisions of the law.
- (3) The sale of estates to diplomatic missions of foreign countries as well as international organization's to which Afghanistan is a member, shall be allowed in accordance with the provisions of the law.

Property and privacy rights are closely linked. Both require the State to respect individual liberty by respecting peoples' rights to maintain private aspects of their lives. The right to own property is considered to be a fundamental element of capitalism. Interestingly, the ICCPR does not include property rights because of ideological divisions among states at the time it was written. At the time, the world was divided into two blocs: capitalist states supporting the United States, and communist states supporting the Soviet Union. Communism did not provide for private

property ownership, and so it was not included in the ICCPR.⁴⁹

Property rights cover three different types of property: (1) real estate or land, (2) personal property or possessions, and (3) intellectual property, which includes the rights over inventions and artistic creations. Property ownership enjoys free use, enjoyment, and disposal of one's property. The right to own property includes the right to exclude others from the use of one's property and the right to freely dispense of one's property.

Articles 40(3) and 40(4) protect people against *takings*, or when the government confiscates someone's personal property to put it to another use. Article 40(3) provides that the government cannot take someone's private property without a valid judicial order. Article 40(4) provides that the government may only take someone's private property if two conditions are met: (1) the taking is for the "sake of public interests," and (2) if the government provides the property owner with "prior and just compensation" for the confiscated property. First, this means that the government may only take someone's private property to use it for the public good. For example, the government may be able to take part of a farmer's land if that piece of land is necessary to build a railroad that will benefit the entire country. The government may not, however, take a farmer's land so that a government official can build himself a nice house on it. Second, the government must provide "prior and just compensation" for the property subject to the taking. Usually, "just compensation" is measured by fair market value. This means that the government must pay the farmer the amount that his land would sell for on the open market *before* it takes the property. Takings are a frequent subject of *litigation* around the world. For an example of a well-known takings case in the United States, read the box on *Kelo v. City of New London* below.

Kelo v. City of New London⁵⁰

The city of New London wanted to develop a piece of land so that businesses could establish themselves there offer employment to the city's residents. Susette Kelo owned a house on this piece of land, and she refused to sell her house for the development project, even though the city was offering to pay her for the value of her house. The U.S. Constitution provides that the government may not take private property unless it is for "public use," and unless the government provides "just compensation" to the property owner. Ms. Kelo took the city to court, alleging that her property rights were violated because the city would not be using the land for a permissible "public use." The court held that the economic development project was a permissible "public use," so the city had not violated Ms. Kelo's property rights. Eventually, the city agreed to move Ms. Kelo's house to a new location and to provide substantial additional compensation to her and other homeowners.

Illegal Takings in Afghanistan⁵¹

⁴⁹ Mandana Knust Rassekh Afshar, Max Planck Institute for Comparative Public Law & International Law, 2 Max Planck Manual on Afghan Constitutional Law: Constitutional Practice & Human Rights 80 (2007).

⁵⁰ 545 U.S. 469 (2005).

⁵¹ Tom Bowman, *Karzai's Brother Tied to Corrupt Afghan Land Deals*, National Public Radio, Feb. 1, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=123223248>.

Effective enforcement of property rights requires the rule of law and a functioning judiciary. Entrenched corruption at high levels of the Government of Afghanistan and within the judiciary have undermined the protection of property rights in Afghanistan. In the past several years, there have been increasing reports of government officials taking control of both public and private land in order to make a profit from developing that land. In 2009, the Afghan Independent Human Rights Commission received more than 500 complaints of such property seizures.

For example, there have been complaints that Kabul residents were evicted from their property so that their land could be given to political allies of the government. In another case, the Kandahar Provincial Council seized land owned by the Ministry of Defense and turned it into a gated residential community. In yet another case in Kandahar, the provincial council took control of water rights owned by a local tribe.

You just learned that according to Article 40 of the Constitution of Afghanistan, property “shall [not] be confiscated without the order of the law and decision of an authoritative court,” and the government may seize private property only “for the sake of public interests, and in exchange for prior and just compensation.” Do you think that the government’s seizure of property in Afghanistan fulfills these constitutional requirements?

The constitution requires that the government obtain a court order before taking property so that there is another actor making sure that the government only takes control of property in accordance with the law. If there is entrenched corruption within both the executive and the judiciary, however, the judiciary can act merely to give the executive’s actions the appearance of legitimacy, perhaps in exchange for receiving a portion of the profits.

The government established a commission to investigate the issue, and the commission made recommendations regarding who needed to be compensated for seized land. It is reported, however, that the government has not implemented those recommendations.

Note that Article 40 and 41 restrict land ownership to the citizens of Afghanistan, with the exception of foreign countries and international organizations. Foreign individuals may only lease immovable property for the purpose of capital investment. Why do you think the drafters included this provision in the Constitution? Many international disputes arise when a foreign company invests in a country, then the government of that country decides to take, or *expropriate*, the foreign company’s property. This has recently happened in some Latin American countries, when the government has decided to *nationalize* the oil industry, or to bring the entire industry under government control, when private oil companies were at the time operating the oil industry. To do so, the government expropriated all of the oil companies’ property. Such situations can lead to international judgments against the State, as well as foreign investors deciding that they don’t want to invest in that country anymore. Do you think that Article 41 might expose foreign investors to confiscation or expropriation of their property by the government? Could this discourage foreign investment?

III. POLITICAL & DEMOCRATIC RIGHTS

A. Freedom of Opinion & Expression

The Constitution of Afghanistan

Article 34

- (1) Freedom of expression shall be inviolable.
- (2) Every Afghan shall have the right to express thoughts through speech, writing, illustrations as well as other means in accordance with provisions of this constitution.
- (3) Every Afghan shall have the right, according to provisions of law, to print and publish on subjects without prior submission to state authorities.
- (4) Directives related to the press, radio, and television as well as publications and other mass media shall be regulated by law.

Freedom of expression has traditionally been a core value of democracies. The right of the individual to hold her own opinions and to express them freely is an important aspect of the State respecting individual dignity and autonomy. Freedom of expression often protects the rights of individuals and the press to openly criticize their government, thus allowing people to participate in the political process by openly expressing how they would like it to function.

As you can see above in Articles 34(1) and 34(2), the Constitution of Afghanistan protects individual freedom of opinion and expression nearly absolutely. As stated in 34(2), individual thought and expression is subject to limits only “in accordance with provisions of this constitution.” Unlike many other rights, individual thought and expression are *not* subject to limitation by statutory laws that have yet to be written. What other provisions of the Constitution might be relevant limitations on freedom of expression?

While the Constitution provides strong protections for private individual expression, it allows more intrusive regulation for expression in the public sphere. States generally have more authority to limit expression in the public sphere because it has the potential to harm others. Many countries deal with this by allowing individuals to bring claims against publications that have published information about them that is untrue and that has harmed their reputation. The Constitution of Afghanistan does this by allowing the government to regulate the media in Article 34(4).

The state of Afghanistan is not, however, allowed to pass any type of regulation on the media. Article 34(3) prohibits *prior restraints* and prior *censorship*. A prior restraint is when the government prevents certain items from being published prior to publication, thus preventing given material from being heard or distributed at all. Governments may do this by requiring publishers to acquire a government license before they publish anything. A government could also discover that a particular item was going to be published and then prevent publication. In eighteenth century England, the government controlled the press primarily by using prior restraints, so the prohibition of prior restraints became the cornerstone of a free press in the

Anglo-American legal tradition.⁵² As you can see in 34(3), the Constitution of Afghanistan limits prior restraints “according to provisions of law.” What do you think this means? When might the ban on prior restraints justifiably be limited?

Discussion Questions: Freedom of Expression

1. Imagine that Rona, the editor of a newspaper called *Kabul Daily*, published an article about Aziza that contained many details that were false and that damaged Aziza’s reputation in the community, even causing her to lose her job. Should the government be able to protect Aziza by outlawing such harmful and false publications? Should the government be allowed to tell Rona what she can or cannot publish according to Article 34? How can the government at the same time protect Aziza from this harm and allow freedom of the press consistent with Article 34?
2. After reading this section on freedom of opinion and expression in the Constitution of Afghanistan, would you change any of your answers to how you would decide on the case of Sayed Parwiz Kambakhsh discussed in the introduction to this chapter? Why or why not?

A Comment on Apostasy & Blasphemy in Islamic Law⁵³

As you saw in the case of Sayed Parwiz Kambakhsh, the liberal value of freedom of expression can sometimes conflict with principles of Islamic jurisprudence. The two principles commonly said to conflict with freedom of expression are:

Blasphemy: Similar to *kufer* in Islamic law, questioning or denying part of a religion.

Apostasy: Similar to *irtedad* in Islamic law, abandoning a religion entirely.

Traditionally, Islamic legal *theory* on apostasy has been severe.⁵⁴ During the Medieval period, most jurists believed that apostates should be tried and, if they did not recant (formally withdraw the statement), should be subject to the death penalty. There were a few jurists who disagreed with this stance. For example, Ibrahim al-Nakha‘i⁵⁵ believed that apostates should be imprisoned indefinitely rather than be killed, in order to keep society safe from their harmful ideas. In *practice*, however, apostasy was dealt with more leniently throughout Islamic history. Some modern scholars state that apostates were frequently found in Muslim societies, but that they

⁵² 4 William Blackstone, Commentaries 151, 152 (1769).

⁵³ This comment was written with contributions by Usaama Al-Azami, PhD Candidate in Religion at Princeton University; Naqib Ahmad Khpulwak, Visiting Legal Scholar at Stanford University; and Nafay Choudhury, Assistant Visiting Professor of Political Science & Law at the American University in Afghanistan.

⁵⁴ Abdullah Saeed & Abdullah; Hassan Saeed, *Freedom of Religion, Apostasy and Islam* 38-39 (Ashgate Publishing, 2004).

⁵⁵ Major Kufan is a jurist from the early 8th century and was a significant influence on Abu Hanifa, the founder of the Hanafi school of thought. Similarly, the prominent 8th century jurist Sufyan al-Thawri took the position that apostasy does not necessitate the death penalty.

were not interfered with unless their activities were deemed a danger to society.⁵⁶ This is still very different from the value of freedom of expression in the Constitution of Afghanistan. The right to freedom of expression is a *liberal* value, or a value that comes from a belief that freedom of the individual should serve as the basis of law and society. This is an example of a tension at the heart of the Constitution of Afghanistan, which includes both liberal values and principles of Islamic law, without explaining what should happen when the two norms conflict.

Throughout the world, scholars of Islamic jurisprudence have differing viewpoints on how blasphemy and apostasy should be approached. One such scholar is the president of the International Union of Muslim Scholars, Yusuf al-Qaradawi, who in the early 2000s wrote to the Taliban appealing to them not to destroy the Buddhist statues in Bamyan Province. At the same time, al-Qaradawi defends the majoritarian medieval tradition on apostasy.⁵⁷ On the other hand, the prominent present-day Muslim intellectual, Dr. Tariq Ramadan, holds the opposite opinion, commenting that the Islamic tradition evidences several instances where apostates were not put to death.⁵⁸ Modern Muslim scholarship, including the jurisprudence of the four schools of Sunni Islam, present a range of ideas that can be considered when exploring the intersection of freedom of expression and apostasy in Afghanistan.

Within Afghanistan, there has been a historical debate over the proper application of Islamic law. The majority of Afghanistan follows the Hanafi *madhhab* (school), one of the four schools of Sunni thought. Furthermore, prior to start of the Soviet war in Afghanistan in 1979, the mystical, inner-focused Sufism had widespread appeal in Afghanistan. According to Peter Tomsen, “Sufism settled naturally into Afghanistan’s moderate tribal culture.”⁵⁹ During the years of war with the Soviet Union, “there were religious tensions between the Arab fighters and the Afghan Mujahidin. . . . Some Saudis lectured Afghans to discard their Sufi practices such as worshipping at the graves of saints. In 1989, an Islamic court in Kandahar declared that Wahabis were unbelievers (Kafir).”⁶⁰ In the past 30 years, however, ideologies, such as Salafism/Wahhabism, Deobandism, and Ikhwanism, have gained prominence in Afghanistan. Clerics who promote these new ideologies in the country have influence on many segments of the population. Previous debates within Islam in Afghanistan, therefore, have been overshadowed since the collapse of President Dawood’s government in 1978 by Soviet-backed socialists, and as a consequence hard-line ideologies have been empowered in the country. The rise of the Taliban’s strict interpretation of Islam further strengthened these ideologies.

The Tension between Freedom of Expression & Blasphemy

⁵⁶ Patricia Crone of the Institute for Advanced Studies at Princeton University has stated that apostates in Medieval Islamic lands tended not to fear for their lives, although they kept to themselves for fear of other social consequences, such as the annulment of their marriages and ostracism.

⁵⁷ See Gudrun Krämer, *Drawing Boundaries: Yusuf Al-Qaraiwi on Apostasy*, in *Religious Authorities in Muslim Societies* (Gudrun Krämer & Sabine Schmidtke, eds., 2006).

⁵⁸ The Pew Forum on Religion & Public Life, A Conversation with Tariq Ramadan: Islam, the West and the Challenge of Modernity (April 27, 2010), <http://www.pewforum.org/Politics-and-elections/A-conversation-With-Tariq-Ramadan.aspx>.

⁵⁹ Peter Tomsen, *The Wars of Afghanistan* (2011), at xxi, 60.

⁶⁰ Peter Tomsen, *The Wars of Afghanistan* (2011), at 378-79.

When analyzing situations in which legal norms seem to conflict, it is always important to think about the legal tradition and history that produced those norms. In this case, both the freedom to criticize religious establishments and individual rights were key motivating factors in the development of Western European legal and political systems. Because of this, the liberal legal tradition deems it important to protect individual rights such as privacy and expression but to allow criticism of religion. On the other hand, the Islamic legal tradition has generally deemed it more important to protect the sacred values of religion by outlawing apostasy and blasphemy.

In most liberal societies, certain forms of expression may be restricted under specific circumstances. For example, in 2012 the British Royal Family sued magazines around the world that sought to publish topless images of the Duchess of Cambridge Kate Middleton on the grounds that the pictures violated her right to privacy. This lawsuit is an example of how, according to liberal Western norms, freedom of expression may be limited to protect individuals such as in the case of personal privacy. Because the freedom to criticize religious establishments (in this case, the Christian Church) played such an important role in the historical development of Western European legal traditions, most liberal Western legal systems do not allow an exception to the freedom of expression for blasphemy.

Around the same time that the British Royal Family was attempting to use the legal system to prevent magazines from publishing the above-mentioned photographs, certain Muslim groups were protesting a film entitled the *Innocence of Muslims*, which depicted the Prophet Muhammad very negatively.⁶¹ Because most liberal legal systems do not allow an exception to the freedom of expression for blasphemy, many Western governments such as the United States denounced the film but said that no legal action could be taken against the creators of the film because while extremely offensive, the film does not violate any laws of those countries. This frustrated some Muslim groups who viewed blasphemy as a serious offense in their legal traditions. By contrast, some countries that have incorporated Islamic principles into their legal systems may create an exception to the freedom of expression for blasphemy but may not have an exception to the freedom of expression to protect the right to privacy.

Discussion Questions

1. Given these differences in how Western and Islamic legal traditions approach exceptions to freedom of expression, how should Afghan law address criticisms of Islam?
2. Imagine that someone publishes an article on Islam that most Afghans do not find provocative or offensive. A court in Afghanistan, however, determines that the publication was blasphemous. How does this affect freedom of speech? What is the best way to deal with such a situation?

B. Freedom of Association & Assembly

The Constitution of Afghanistan

⁶¹ Note that it is estimated that only 0.001 percent of the Muslim-majority areas of the world protested the film. See <http://www.aljazeera.com/indepth/opinion/2012/09/20129168313878423.html>.

Article 35

(1) To attain moral and material goals, the citizens of Afghanistan shall have the right to form associations in accordance with provisions of the law.

(2) The people of Afghanistan shall have the right, in accordance with provisions of the law, to form political parties, provided that:

Their manifesto and charter shall not contravene the Holy religion of Islam and principles and values enshrined in this constitution;

Their organizations and financial resources shall be transparent;

They shall not have military or quasi-military aims and organizations; and

They shall not be affiliated with foreign political parties or other sources.

(3) Formation and operation of a party on the basis of tribalism, parochialism, language, as well as religious sectarianism shall not be permitted.

(4) A party or association formed according to provisions of the law shall not be dissolved without legal causes and the order of an authoritative court.

Article 36

The people of Afghanistan shall have the right to gather and hold unarmed demonstrations, in accordance with the law, for attaining legitimate and peaceful purposes.

The freedoms of association and assembly are essential to the functioning of a democratic society because they allow people to organize themselves into groups in order to participate in government and make their voices heard. Imagine what would happen if individuals were not allowed to organize to participate in the political process. One individual would not have very much effect on who was elected. People would not be able to form political parties or interest groups that allow them to mobilize support for a certain cause or a certain candidate for office. Because each individual has a limited ability to influence government and society, coming together to form interest groups and to support common goals allows individual citizens to have a significant voice in and influence on the political process.

Article 35 enshrines the freedom of association in the Constitution of Afghanistan. This freedom must be exercised “in accordance with the provisions of the law.” Article 35(4) states that the government may not dissolve a legal association unless two conditions are met: (1) there is legal cause, and (2) a court has issued a dissolution order. This provision is to prevent the government from dissolving associations for arbitrary or unjust reasons. Articles 35(2) and 35(3) place several limits on the formation of political parties: (1) they cannot contravene Islam, (2) they cannot contravene the Constitution, (3) their finances must be transparent, (4) they cannot be military in nature, (5) they may not be affiliated with foreign parties, and (6) they may not be formed on the basis of tribalism, parochialism, language, or religious sectarianism. Why do you think that the drafters included these particular limits on the freedom of association? Limits (1)

and (2) might be designed to ensure that associations obey two supreme sources of law in Afghanistan: the Constitution and Islam. Limits (3), (4), and (5) might be designed to protect the sovereignty of the government of Afghanistan by ensuring that political parties will not be able to overthrow the government. Limit (6) may be designed to protect national unity. Can you think of other possible motivations for the limits on the freedom of association?

Article 36 of the Constitution of Afghanistan protects the freedom of assembly. The freedom of assembly is closely related to the freedom of association. While the freedom of association allows people to form organized groups, the freedom of assembly allows those groups to express themselves publicly by holding demonstrations. People may choose to do this to show either support or dissatisfaction with government policies, allowing them to participate in the political system. Article 36 places three limits on the freedom of assembly: (1) demonstrations must be unarmed, (2) demonstrations must be in accordance with the law, and (3) demonstrations must be “for attaining legitimate and peaceful purposes.” Why do you think the drafters chose to place these particular limits on the freedom of assembly. Do you think that these limits are reasonable and appropriate? Why or why not? Do you think there is any chance that the government could use the requirement that demonstrations must be for “legitimate purposes” to suppress demonstrations that oppose the government by claiming that their purpose is not “legitimate.” Why or why not? Can you think of any other limits that might be place on the freedom of assembly?

Freedom of Assembly & Association in Practice: The Arab Spring

The Arab Spring that began in 2010 put the freedom and assembly and association at the center of the world stage. A recurring theme throughout the Middle East has been protestors claiming a right to hold demonstrations against their governments, while governments assert a need to suppress demonstrations for safety reasons. Starting in January 2011, demonstrators filled Cairo’s Tahrir Square to protest the rule of then-President Hosni Mubarak. While demonstrations started as nonviolent, protestors later engaged in looting, violence, destruction of property, and clashes with state security forces. For example, looters broke into the Egyptian museum in Cairo and destroyed Pharaonic mummies and other ancient antiquities,⁶² and several female journalists reported brutal sexual assaults.⁶³ President Mubarak directed state security forces to suppress the demonstrations, and security forces followed those orders by using brutal force against the protestors. An April 2011 fact-finding mission found that at least 846 people were killed and more than 6,400 injured during the uprising, during which state security forces fired live ammunition into the crowd, located snipers on rooftops, and drive tanks into the crowds.⁶⁴

In July 2011, five months after former President Hosni Mubarak stepped down on February 11, protestors again filled Tahrir Square. Now they were protesting the slow pace of reform under

⁶² *Looters Destroy Mummies in Egyptian Museum*, Reuters, Jan. 29, 2011, available at <http://www.reuters.com/article/2011/01/29/us-egypt-museum-idUSTRE70S1YU20110129>.

⁶³ See, e.g., *CBS News' Lara Logan Out of Hospital After Sexual Assault in Egypt*, ABC News, Feb. 15, 2011, available at <http://abcnews.go.com/US/lara-logan-hospitalized-sexually-attacked-egypt-protesters-celebration/story?id=12925235#.TzvysqfCR8>.

⁶⁴ *At least 846 Killed in Egypt's Revolution*, Associated Press, Apr. 19, 2011, available at <http://www.egyptindependent.com/node/406169>.

the ruling Supreme Council of the Armed Forces (SCAF).⁶⁵ Protests again devolved into violence, looting, and property destruction. This time, SCAF dispatched security forces to control the protests. In defense of this decision, SCAF member Major General Abdel Emara asked at a press conference, “What are we supposed to do when protesters break the law? Should we invite people from abroad to govern our nation?”⁶⁶

The 1971 Constitution of Egypt provides the following. Remember, however, that Egypt had been under an official state of emergency for decades, which allowed for certain constitutional provisions to be suspended.

1971 Constitution of Egypt Article 54

Citizens shall have the right to peaceful and unarmed private assembly, without the need for prior notice. Such private meetings should not be attended by security men. Public meetings, processions and gatherings shall be allowed within the limits of the law.

The 2011 Provisional Constitution of Egypt, written after the revolution forced Mubarak out of office, provides the following. Note that minor language differences may be the result of translation to English.

2011 Provisional Constitution of Egypt Article 16

Citizens have the right to private assembly in peace without bearing arms or need for prior notice. It is not permitted for security forces to attend these private meetings. Public meetings, processions and gatherings are permitted within confines of the law.

Discussion Questions

1. If you were a judge at the trial of protestors charged with assault and the destruction of property, would you rule that their actions were protect by Egypt’s constitutional right to assembly? Why or why not?
2. If you were a judge at the trial of security officers charged with assault against protestors, would you rule that their actions were justified because the demonstrations were not completely unarmed, peaceful, or “within the confines of the law” as required by the Constitution of Egypt?
3. How should the law deal with situations such as the Egyptian revolution described above, where unarmed and peaceful demonstrators are intermixed with violent protestors and looters? Should state security forces refrain from all interference so that protestors can exercise their right to assembly? What if protestors within the crowds are sexually assaulting women and destroying ancient artifacts? Doesn’t the government have an obligation to protect those women and artifacts? If the government does intervene, how can it protect the peaceful protestors right to assembly while at the same time controlling violence and ensuring that demonstrations remain peaceful and otherwise “within the confines of the law”?

⁶⁵ *Egypt: Cairo’s Tahrir Square Fills with Protestors*, BBC News, July 8, 2011, available at <http://www.bbc.co.uk/news/world-middle-east-14075493>.

⁶⁶ *Egypt Unrest: Cairo Clashes Reveal Deep Divisions*, BBC News, Dec. 19, 2011, available at <http://www.bbc.co.uk/news/world-middle-east-16258290>.

Violent Protests in Afghanistan

Afghanistan has also encountered problems of protests wherein both the protestors and the police begin engaging in violent acts. In February 2012, for example, after foreign troops at Bagram Airbase almost disposed of confiscated Qurans by incinerating them, mass protests broke out across Afghanistan. Protesters were armed with bombs, and police in return opened fire on the crowds. Numerous Afghans and foreigners were killed. The police chief of Parwan province, General Mohammad Akram Bekzad, said: “The constitution gives them the right to peaceful protests, but they were violent and destroying anything in their way, including government buildings.”⁶⁷ Can you apply the conclusions you reached regarding the protests in Egypt to the Afghan context?

C. The Right to Elected Government & Political Participation

The Constitution of Afghanistan

Article 33

- (1) The citizens of Afghanistan shall have the right to elect and be elected.
- (2) The conditions of exercising this right shall be regulated by law.

Article 33 grants the citizens of Afghanistan the right to participate in their political system by voting and running for office. Because of the principle of nondiscrimination outlined in Article 22, citizens must be permitted to vote and be elected without discrimination. The right to political participation is essential to the functioning of a democratic society. Article 33, however, leaves all of the details of the right to vote and run for office to subsequent legislation. Why do you think the drafters did this? Do you think this was the best way to approach the right to political participation? Why or why not?

D. Freedom of Information

The Constitution of Afghanistan

Article 50

- (3) The citizens of Afghanistan shall have the right of access to information from state departments in accordance with the provisions of the law. This right shall have no limit except when harming rights of others as well as public security.

Freedom of information is important in a democratic society because it allows citizens to know how their government is functioning and what it is doing. Article 50 grants this right. Note, however, that Article 50 contains three separate limitations. First, it states that access to

⁶⁷ Emma Graham Harrison, *Afghanistan Qur'an Burning Protests Leave Seven Dead*, The Guardian (London), Feb. 22, 2012, available at <http://www.guardian.co.uk/world/2012/feb/22/afghanistan-quran-burning-protesters-dead>.

information will be “in accordance with the provisions of the law.” This means that the right of access to information will be subject to legislation that was not yet written at the time the Constitution was drafted. Second, the right to access information is limited if it would harm the rights of others. Third, the right to access information could be limited if it would harm public security. This provision might protect the government from releasing sensitive information that could harm the national security if released. Do you think that these limits are appropriate and reasonable? Why or why not?

IV. ECONOMIC, SOCIAL, & CULTURAL RIGHTS

Implementing ESC Rights: Progressive Realization

ICESCR Art. 2(1) provides that a state party “undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized.” Effectively, this language creates different legal obligations for different countries, which are determined by each country’s economic and financial ability to fulfill ESC rights. This does not mean that developing countries have no obligations under progressive realization. Developing countries at the very least cannot take retrogressive measures to restrict rights already realized, and as they develop they are required to allocate funding for the realization of more rights.

A. Right to Education

General Right to Education

The Constitution of Afghanistan

Article 43

(1) Education is the right of all citizens of Afghanistan, which shall be offered up to the B.A. level in the State educational institutes free of charge by the state.

(2) To expand balanced education as well as to provide mandatory intermediate education throughout Afghanistan, the State shall design and implement effective programs and prepare the ground for teaching mother tongues in areas where they are spoken.

Article 44

The State shall devise and implement effective programs to create and foster balanced education for women, improve education for nomads, as well as eliminate illiteracy in the country.

Article 45

The State shall devise and implement a unified educational curricula based on the tenets of the sacred religion of Islam, national culture as well as academic principles, and develop religious subjects curricula for schools on the basis of existing Islamic sects in Afghanistan.

Article 43 of the Constitution guarantees every citizen of Afghanistan a free education through the university level. By providing the citizens of Afghanistan with a right to education, the government is demonstrating its belief in the importance of education. There are many benefits to making education a right rather than a privilege. Promoting an educated population enables people to work in a wide variety of fields and supports economic growth. Augmenting the number of college-educated students leads to an increase in the number of people in highly specialized fields that can be beneficial for economic development. Fostering education and increasing literacy is also a way to fight poverty and raise the quality of life for the people of Afghanistan. But there are a number of difficulties with actually ensuring that people can exercise their right to education. There are many areas in rural Afghanistan with a limited number of schools and teachers to educate children. Continued violence in some regions also makes it significantly more difficult for children to regularly attend school. Additionally, the government of Afghanistan struggles with limited resources, and ensuring that all children have access to schools with well-trained teachers and sufficient resources may not be possible in the short term.⁶⁸ However, there has been some success in increasing the number of children attending school in Afghanistan. Under the Taliban government in 2002, there were less than one million children enrolled in school. By 2009, there were more than six million children enrolled in the formal education system.⁶⁹ It is worth noting that the greatest increase in enrollment was in primary school and the number of children who continued through secondary school dropped off significantly.⁷⁰

Case Study: South Africa

South Africa also includes the right to education in its Constitution. The South African Constitution is worded somewhat differently than the Afghan Constitution, reading “Everyone has the right to a) a basic education . . . and b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”⁷¹ According to the South African Ministry of Education, basic education means through ninth grade and is compulsory. Further education is defined as tenth grade and up and is not compulsory.⁷²

South Africa, like Afghanistan, faces resource constraints on its ability to provide education to all of its citizens. The result is that many neighborhoods, particularly those in poor and rural communities, have substandard schools.⁷³ Because the majority of those living in these poor communities are black South Africans, the lack of access to adequate education plays into long running racial tensions in the country.⁷⁴ However, the South African Constitution does not specify that the education provided must meet a certain quality standard. This has given rise to a debate over whether or not poor quality education is a violation of the constitutional right to education.⁷⁵ The South African Constitutional Court has not heard a case on this issue, but it has

⁶⁸ Human Rights Watch, *available at* http://www.hrw.org/sites/default/files/reports/afghanistan1209web_0.pdf.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ South African Constitution, Chapter 2, § 29(1).

⁷² Eric Berger, *The Right to Education Under the South African Constitution*, 103 Columbia L. Rev. 3 614 (2003).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

refused to rule that the right to health care mandates that the government devote a certain amount of resources to national hospitals, indicating that in a case on the right to education, they would not hold that the government was violating the Constitution because of a lack of resources.⁷⁶

Discussion Questions

1. What do you think of the South African example? Do you think that poor quality schools are a violation of the right to education?
2. Apply this to the situation in Afghanistan. If the government fails to provide sufficient or high quality schools because it lacks resources or because there are active hostilities in some regions, is it violating the constitutional right to education?

Example: ICESCR

Article 13

They [the State Parties] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.⁷⁷

Discussion

This excerpt from ICESCR Article 13 emphasizes the reason for guaranteeing the right to education. The driving force behind this Article is the idea that education promotes a respect for human rights and human dignity and will help bring peace to conflict-plagued societies.

1. Do you think that increased education will lead to greater understanding of and respect for human rights?
2. Do you think that if more people are educated, it would be easier to have sustainable peace in Afghanistan? Or do you think that there is no connection between these ideas?

Discussion Questions

1. Do you think that education is a right that should be protected in the Constitution?
2. What do you think about mandatory education for children? Do you think that the government should require that all children go to school?

⁷⁶ *Id.*

⁷⁷ International Covenant on Economic, Social and Cultural Rights, art. 13 [hereinafter ICESCR].

3. Do you think that the government is effectively implementing and protecting the right to education or do you think that changes are needed?

Education for All

Article 44 of the Constitution says that the state shall provide “balanced education for women” as well as improve education for nomad groups and work to eliminate illiteracy in the country. This Article indicates an intention to improve the level of education for many sectors of the population, including groups with traditionally more limited access to education, like women. The Constitution does not define what “balanced education for women” means, and it could be defined in a number of ways, ranging from equality of education with boys to special education programs for girls to prepare them for the roles they will play. However, in 2009, the Department of Education set a target that 60 percent of girls will be enrolled in primary school (compared to a seventy-five percent target for boys).⁷⁸ In 2009, girls made up 37 percent of children enrolled in primary school and 27 percent of those enrolled in lower secondary school.⁷⁹ There are a number of factors that contribute to a small percentage of girls attending school, including objection to female education, a shortage of female teachers to educate girl students, and increased security concerns.⁸⁰

Example: Education for Afghan Girls

In recent years, Taliban forces have been carrying out an increasing number of attacks on girls’ schools in some areas.⁸¹ This has led to the closure of some schools, a shortage of teachers willing to teach female students, and has resulted in a situation where it is difficult, if not impossible, for girls to go to school and receive an education. The result is that some girls are unable to exercise their constitutional right to education.

Discussion Questions

1. Do you think that a failure to protect schools and ensure that all girls can attend them is a violation of the girls’ constitutional rights?
2. How far do you think that the State’s obligations to protect the right to education extend under the Constitution?

Higher Education

The Constitution of Afghanistan

Article 46

⁷⁸ Human Rights Watch, *available at* http://www.hrw.org/sites/default/files/reports/afghanistan1209web_0.pdf.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Human Rights Watch, *available at* http://www.hrw.org/sites/default/files/reports/afghanistan1209web_0.pdf.

- (1) Establishing and administering higher, general and specialized educational institutions shall be the duty of the State.
- (2) The citizens of Afghanistan shall establish higher, general and specialized educational as well as literacy institutions with permission of the State.
- (3) The State shall permit foreign individuals to establish higher, general and specialized institutions in accordance with the provisions of the law.
- (4) Admission terms to higher educational institutes of the State and other related matters shall be regulated by law.

Article 46 requires that the government create and run universities and other institutions of higher education. This establishes the framework for a network of state universities and schools to provide free education to the people of Afghanistan.⁸² The Ministry of Higher Education oversees and runs national universities across Afghanistan. However, private universities, such as the American University of Afghanistan, can also be created with the permission of the State (with decision-making currently residing in the Ministry of Higher Education).

The Constitution states that the government has control over admission to institutions of higher education. Article 46 says “admission terms to higher educational institutes of the State and other related matters shall be regulated by law.”⁸³ The Afghan Ministry of Higher Education is developing a system of university *accreditation* with the goal of promoting higher standards of education for students.⁸⁴ However, this plan has yet to be finalized and put into effect.

The higher education system in Afghanistan has been damaged significantly by over 30 years of war and occupation. Infrastructure has been destroyed and many professors left the country during the violence to seek safer positions abroad.⁸⁵ By 2001, enrollment in higher education had dropped to under 8,000 students.⁸⁶ By 2009, this number had shot up to over 62,000, 21 percent of whom were women.⁸⁷ Consequently, the Ministry of Higher Education is struggling to keep up with demand and provide education through the B.A. level as required by the Constitution. In 2009, the 22 state universities in Afghanistan had a budget of only \$35 million total, forcing the government to seek other ways to increase available funding.⁸⁸

Discussion Questions

1. What do you think of the provision requiring that anyone who wants to establish a private university must first get permission from the government?

⁸² Constitution of Afghanistan, art. 46.

⁸³ *Id.*

⁸⁴ Afghanistan Ministry of Higher Education, *Strategic Plan*, available at <http://www.mohe.gov.af/?lang=en&p=plan>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

2. Do you think that this is a good way to prevent the creation of low quality schools or does it restrict other forms of education?

B. Cultural Rights

The Constitution of Afghanistan

Article 47

- (1) The state shall devise effective programs for fostering knowledge, culture, literature and arts.
- (2) The state shall guarantee the copyrights of authors, inventors and discoverers, and, shall encourage and protect scientific research in all fields, publicizing their results for effective use in accordance with the provisions of the law.

Article 47 embodies the goal of the government to promote culture, the arts, and innovation as well as its commitment to developing a body of intellectual property law to protect the rights of authors, inventors, and artists. Another impact of Article 47 is to protect artifacts and cultural treasures in Afghanistan, many of which have been lost, stolen, or damaged during decades of unrest and conflict.⁸⁹ As part of the Afghan National Development Strategy (ANDS), the government agreed to work with the United Nations Development Programme (UNDP) to develop a comprehensive inventory of historical artifacts and other works of art.⁹⁰ The government also pledged to maintain the Kabul museum and to establish regional and thematic museums across Afghanistan to ensure that these artifacts are accessible to as many people as possible. Another long-term goal is to establish and preserve historical sites across the country.⁹¹

Protection of intellectual property is especially important given the rapid expansion of media in Afghanistan in recent years. There are now over 130 independent television and radio stations across the country, as well as a great many independent newspapers.⁹² Progress in developing media and intellectual property legislation has been slow, partly due to lack of resources and human capital, and partly because security concerns are currently more pressing.⁹³ In 2006, Afghanistan developed a mass media law to regulate media produced both by Afghans and by foreign nationals within Afghanistan. This law also contains a provision about registering published books and pamphlets with the Ministry of Information and Culture to protect authors' rights to the material, but a more significant body of copyright law has yet to be developed.⁹⁴

Discussion Questions

⁸⁹ Afghanistan National Development Strategy, *available at* http://www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf, (2008).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Mass Media Law of Afghanistan, 2006, *available at* <http://www.unhcr.org/refworld/country,LEGAL,,LEGISLATION,AFG,4562d8cf2,4a5712902,0.html>.

1. Do you think that it is the role of the State to foster Afghan culture? Or do you think that the government should leave cultural issues to the people and allow Afghan culture to develop as it naturally does?

2. What do you think of the government's effort to protect intellectual property?

C. Right to Work

The Constitution of Afghanistan

Article 48

(1) Work is the right of every Afghan.

(2) Working hours, paid holidays, employment and employee rights and related matters shall be regulated by the law. Choice of occupation and craft shall be free within the bounds of law.

Article 48 guarantees every Afghan the right to work and states that the government will develop a body of employment law to regulate working hours and wages, and to ensure that employees have rights to prevent abuse and exploitation by their employers.⁹⁵

The right to work is generally not interpreted to mean that the government is required to provide every citizen with a job. Rather, it means that the government will develop labor laws and policies to remove barriers to employment and to ensure decent working conditions and wages.⁹⁶ It also implies that the government has an obligation to develop policies and programs that will generate employment.⁹⁷

Despite the international resistance to guaranteeing ESC rights discussed above, the right to work gained support rather rapidly, largely because States recognize that they have an interest in adequate employment for their citizens, as a strong workforce spurs economic growth. The right to work was also a major force behind labor movements in the United States and many other countries across the world in the early 1900s.⁹⁸ To advance the right to work and develop international labor standards, the International Labour Organization (ILO) was founded in 1919

⁹⁵ Constitution of Afghanistan, art. 48.

⁹⁶ V.M. Dandekar, *Making the Right to Work Fundamental*, 26 Economic and Political Weekly Mar. 1991, at 697; International Covenant on Economic, Social and Cultural Rights. International Commission of Jurists, *The Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, 2008, available at <http://www.icj.org/dwn/database/ESCR.pdf>.

⁹⁷ V.M. Dandekar, *Making the Right to Work Fundamental*, 26 Economic and Political Weekly Mar. 1991, at 697; International Covenant on Economic, Social and Cultural Rights. International Commission of Jurists, *The Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, 2008, available at <http://www.icj.org/dwn/database/ESCR.pdf>.

⁹⁸ John R. Ellington, *Essential Human Rights: The Right to Work*, 243 Annals of the American Academy of Political and Social Science, Jan. 1946, at 27. V.M. Dandekar, *Making the Right to Work Fundamental*, 26 Economic and Political Weekly, Mar. 1991, at 697; International Covenant on Economic, Social and Cultural Rights. International Commission of Jurists, *The Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, 2008, available at <http://www.icj.org/dwn/database/ESCR.pdf>.

and became the first specialized agency of the United Nations in 1946.⁹⁹ Afghanistan joined the ILO in 1934 and has ratified three of the ILO's eight core conventions: the Convention on Equal Remuneration, the Convention on the Abolition of Forced Labour, and the Convention on Discrimination in Employment and Occupation.¹⁰⁰

Currently, there are high levels of unemployment and underemployment in Afghanistan. It is estimated that in 2008, unemployment was at approximately 35-40 percent.¹⁰¹ To combat this, the government of Afghanistan and the UNDP created the Afghanistan National Development Strategy (ANDS) in 2008, which places a strong emphasis on poverty reduction and job creation. Under the ANDS program, the government pledged to support private sector growth in Afghanistan, with a particular emphasis on the mining and natural gas sectors.¹⁰² The government also pledged to increase the number of public work programs in poor regions of Afghanistan to provide employment for citizens.¹⁰³

Example: ICESCR

Article 6

(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

(2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.¹⁰⁴

Discussion

The ICESCR is much more explicit about the responsibility of the State to promote work and to facilitate and develop employment opportunities for its citizens. The Covenant requires states to develop guidance and training programs to enable people unable to find work to gain more marketable skills. The ICESCR also requires government policies and programs that promote economic growth and development and lead to new employment opportunities. The Constitution of Afghanistan does not specifically require any of these things, but as Afghanistan is a party to the ICESCR, it will be interesting to see whether they come to be considered constitutional requirements.

⁹⁹ About the ILO, *available at* <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

¹⁰⁰ International Labour Organization, *available at* <http://www.ilo.org/asia/countries/afghanistan/lang--en/index.htm>.

¹⁰¹ CIA World Factbook, *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html>.

Afghanistan National Development Strategy, *available at* http://www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf, (2008).

¹⁰² Afghanistan National Development Strategy, *available at* http://www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf, (2008) 34.

¹⁰³ Afghanistan National Development Strategy, *available at* http://www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf, (2008) 34.

¹⁰⁴ ICESCR, art. 6.

1. What do you think about the ICESCR provision on the right to work? Do you think that the additional details that it contains should be incorporated into the right to work in the Afghan Constitution?

2. How should the government be involved in helping people exercise their right to work?

Discussion Questions

1. Do you think that the government of Afghanistan is developing policies and programs that promote employment and job creation across Afghanistan? Do you think that this is enough to protect the right to work?

2. Do you think that the government has effectively introduced regulations to protect workers from harsh or dangerous working conditions?

D. Right to Health Care

The Constitution of Afghanistan

Article 52

(1) The State shall provide free preventative healthcare and treatment of diseases as well as medical facilities to all citizens in accordance with the provisions of the law.

(2) Establishment and expansion of private medical services as well as health centers shall be encouraged and protected by the State in accordance with the provisions of the law.

(3) The State shall adopt necessary measures to foster healthy physical education and development of the national as well as local sports.

Article 53

(1) The state shall adopt necessary measures to regulate medical services as well as financial aid to survivors of martyrs and missing persons, and for reintegration of the disabled and handicapped and their active participation in society, in accordance with provisions of the law.

(2) The state shall guarantee the rights of retirees, and shall render necessary aid to the elderly, women without caretaker, disabled and handicapped as well as poor orphans, in accordance with provisions of the law.

Article 52 provides for a national health service that gives free health care to all Afghan citizens.¹⁰⁵ Article 12 of the ICESCR says that people are entitled to the highest level of physical and mental health they are able to attain.¹⁰⁶

¹⁰⁵ Constitution of Afghanistan, art. 52.

¹⁰⁶ ICESCR, art. 12.

According to the World Health Organization (WHO), every country in the world has ratified at least one treaty that includes health-related rights for its citizens.¹⁰⁷ The WHO constitution was the first international document to call for a human right to the “enjoyment of the highest attainable standard of health.”¹⁰⁸ The WHO defines health as a “complete state of physical, mental and social wellbeing.”¹⁰⁹ This is an extremely broad definition, and could, in theory, be expanded to include the right to food and water, without which physical health is impossible and many other basic elements required for a healthy life. In practical terms, however, the definition is rarely stretched to those limits.

Currently, Afghanistan ranks quite poorly in terms of overall health of the population and access to effective health care. Afghanistan has the highest rate of infant mortality in the world, estimated to be approximately 121 deaths per 1,000 births in 2011.¹¹⁰ Maternal mortality is also the highest in the world, with 1,400 deaths per 100,000 births in 2008.¹¹¹ Doubtless this is largely due to the scarcity of doctors and other medical personnel available to help those who need health care. The WHO estimates that in 2009 there were only two doctors and five nurses or midwives per 10,000 people in Afghanistan.¹¹² Medical facilities are scarce as well, with only four hospital beds for every 10,000 people in 2009.¹¹³ However, the situation has improved significantly in the last decade, with approximately 66 percent of the population living within a two-hour walk of a primary care facility, and the percentage of the population living within a region where the UNDP Basic Package of Health Services is provided jumped from 9 to 82 percent between 2003 and 2006.¹¹⁴ Additionally, between 2004 and 2007, the number of primary care facilities with a female health care worker increased from 26 percent to 81 percent.¹¹⁵ Through the ANDS, the government has pledged to increase the number of hospitals available and to focus on training doctors and other health care providers.

Discussion Questions

1. What do you think of Afghanistan’s national health care system? Do you think that the government is working hard enough to fulfill its pledge to provide access to hospitals and doctors to everyone?

¹⁰⁷ Alicia Ely Yamin, *The Right to Health: Assessing How Far the Discourse Has Evolved Internationally and Within the United States*, in Proceedings of the 104th Annual Meeting: American Society of International Law 14 (2010).

¹⁰⁸ Max Planck Institute, *Access to Medication as a Human Right*, 8 Max Planck YBUN 101 (2004).

¹⁰⁹ *Id.*

¹¹⁰ CIA World Factbook, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html>.

¹¹¹ *Id.*

¹¹² World Health Organization, Country Statistics, available at <http://apps.who.int/ghodata/?vid=3000&theme=country>.

¹¹³ *Id.*

¹¹⁴ Afghanistan National Development Strategy, available at http://www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf.

¹¹⁵ http://www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf.

2. What can be done to improve it and ensure that everyone's constitutional right to health care is protected? Is the provision in the Constitution successful in ensuring that vulnerable groups have access to health care?

E. Family Rights

The Constitution of Afghanistan

Article 54

(1) Family is the fundamental pillar of the society, and shall be protected by the state.

(2) The state shall adopt necessary measures to attain the physical and spiritual health of the family, especially of the child and mother, upbringing of children, as well as the elimination of related traditions contrary to the principles of the sacred religion of Islam.

Article 54 directs the government to provide protections for family units within Afghan society.¹¹⁶ The *International Bill of Rights* also provides for the protection of the family unit. Article 10 of the ICESCR reads, “[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.”¹¹⁷ The ICCPR also addresses the family in Article 23, saying “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”¹¹⁸

Article 54 of the Constitution requires the State to develop a body of law and institutions to protect the family in society.¹¹⁹ Family law regulates marriage, and puts safeguards in place to protect mothers, children, and the family unit as a whole.

Much of the modern body of law and scholarship surrounding human rights was largely developed in Western democracies, like the United States and countries in Western Europe, that focus largely on the *individual* as a rights bearer.¹²⁰ In contrast, many cultures across the world traditionally have focused on families or other groups rather than individuals, necessitating a shift in the human rights discussion to make it particularly relevant to those cultures. The result is special protection for the traditional social unit of the family.¹²¹ In Islamic countries, it is common to emphasize the family as a unit rather than just the individual in the *human rights discourse*. As you will see below, the Cairo Declaration on Human Rights in Islam also contains provisions for the protection of the family unit, as does the Arab Charter on Human Rights.¹²²

¹¹⁶ Constitution of Afghanistan, art. 54.

¹¹⁷ ICESCR, art. 10.

¹¹⁸ ICCPR, art. 23.

¹¹⁹ Constitution of Afghanistan, art. 54.

¹²⁰ Onuma Yasuaki, *Towards an Intercivilizational Approach to Human Rights*, 7 Asian Y.B. Int'l L. 21 (1997).

¹²¹ *Id.*

¹²² See Arab Charter on Human Rights art. 38, available at <http://www.unhcr.org/refworld/docid/3ae6b38540.html>.

Example: The Cairo Declaration on Human Rights in Islam (CDHRI)

CDHRI Article 5

(a) The family is the foundation of society, and marriage is the basis of making a family. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from exercising this right.

(b) The society and the State shall remove all obstacles to marriage and facilitate it, and shall protect the family and safeguard its welfare.¹²³

CDHRI Article 7

(a) As of the moment of birth, every child has rights due from the parents, the society and the state to be accorded proper nursing, education and material, hygienic and moral care. Both the fetus and the mother must be safeguarded and accorded special care.¹²⁴

Discussion

The CDHRI contains a provision protecting the family unit that is similar to the provision in the Constitution of Afghanistan. However, it is a bit more explicit and forbids barriers to any man and woman who wish to marry being able to do so. The CDHRI also provides more explicit protections for infants, children, and their mothers.

1. Compare the provisions of the CDHRI and the Afghan Constitution. Do you think that there are benefits to more explicitly spelling out the rights and protections guaranteed to the family?
2. Consider the issue of same-sex partners. Do you think that the CDHRI would extend the same protections of the family unit to them?

F. Duties of Citizens

The duties of citizens play an important role in the human rights discussion in some parts of the world, including Afghanistan, as evidenced by the title of the second chapter of the Constitution: the Fundamental Rights and Duties of Citizens. In Latin America, for example, the Organization of American States (OAS) signed the Declaration of the Rights and Duties of Man. The Preamble of the Declaration states, “[t]he fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.”¹²⁵ Chapter 1 of the Declaration on the Rights and Duties of Man guarantees the rights contained in all of the other major international human rights conventions, such as the right to education, the right to work, the right to a fair trial, and the right to leisure time.¹²⁶

¹²³ Cairo Declaration on Human Rights in Islam, art. 5.

¹²⁴ Cairo Declaration on Human Rights in Islam, art. 7.

¹²⁵ OAS Declaration of the Rights and Duties of Man, Preamble, *available at* http://www.hrcr.org/docs/OAS_Declaration/oasrights2.html.

¹²⁶ OAS Declaration of the Rights and Duties of Man, Chap. 1, *available at* http://www.hrcr.org/docs/OAS_Declaration/oasrights2.html.

However, Chapter 2 of the Declaration details a number of duties that people owe to the government and to their fellow members of society. These duties are directly related to many of the rights guaranteed in Chapter 1 of the Declaration. For example, the Declaration provides a right to education, and a corresponding duty of each citizen to acquire at least an elementary education.¹²⁷ Additionally, just as there is a right to work, there is a corresponding duty for each person to work “as far as his capacity and possibilities permit.”¹²⁸ The Declaration includes general duties to society and to family. It also includes a number of duties toward the State: the duty to vote, the duty to pay taxes, the duty to serve the community and the nation, the duty to obey the law, and the duty to refrain from political activity in a foreign country.¹²⁹ The duty to serve the community and the nation is a duty to fulfill any military service required by national governments.¹³⁰

As the Preamble to the Declaration on the Rights and Duties of Man asserts, rights provide individual liberty, and duties bring dignity and responsibility to that liberty. The idea is that with rights come certain responsibilities that the citizen is obligated to fulfill. In other words, if the government provides the right for every citizen to go to school, citizens have the obligation to exercise that right for their own benefit and the benefit of society and the State as a whole. Similarly, because citizens are provided with the right to vote and to participate in government, they have the obligation to exercise that right in a responsible manner.¹³¹

Discussion Questions

1. Do you think that if a citizen has certain human rights, those rights should create duties and obligations for the citizen?
2. Do you agree with the idea that rights create responsibilities to society and government?

Military Service

The Constitution of Afghanistan

Article 55

Defending the country shall be the duty of all citizens of Afghanistan. Conditions for compulsory military service shall be regulated by law.

¹²⁷ OAS Declaration of the Rights and Duties of Man, Chap. 2, Art. XXXI, *available at* http://www.hrcr.org/docs/OAS_Declaration/oasrights2.html.

¹²⁸ OAS Declaration of the Rights and Duties of Man, Chap. 2, Art. XXXVIII, *available at* http://www.hrcr.org/docs/OAS_Declaration/oasrights2.html.

¹²⁹ OAS Declaration of the Rights and Duties of Man, Chap. 2, *available at* http://www.hrcr.org/docs/OAS_Declaration/oasrights2.html.

¹³⁰ OAS Declaration of the Rights and Duties of Man, *available at* http://www.hrcr.org/docs/OAS_Declaration/oasrights2.html.

¹³¹ OAS Declaration of the Rights and Duties of Man, Preamble, *available at* http://www.hrcr.org/docs/OAS_Declaration/oasrights2.html.

Citizens of Afghanistan do not just receive rights and privileges from the Constitution; they also owe certain duties as citizens, including defending Afghanistan in times of need. Although Afghanistan does not currently have a draft or require a term of compulsory military service, Article 55's second sentence gives the government authority to implement such measures.

Military service is a particularly relevant issue at the present time, given the planned American withdrawal in 2014 that requires the Afghan National Security Forces (ANSF) to take over security operations within Afghanistan. As of February 2012, the ANSF is composed of 176,350 members of the Afghan National Army (ANA) and over 143,000 members of the Afghan National Police (ANP).¹³² The ANSF is working to reach 352,000 members by the end of 2012, and, according to NATO, is on schedule to reach this target before the deadline.¹³³ By the end of January 2012, the ANSF had primary responsibility for the security of over 50 percent of the Afghan population and led nearly 40 percent of conventional and special forces operations within the country.¹³⁴ The ANSF is also actively recruiting women, with approximately 1,500 women in uniformed positions, including five pilots.¹³⁵ According to NATO, women make up approximately three percent of recruits, a number that is increasing steadily.¹³⁶

At the present time, the ANSF is an all-volunteer force, and each recruit must go through an eight-step process to join the armed forces, including an endorsement by local elders, biometric data checking, and a medical and drug test.¹³⁷ Considering that the ANSF has had no difficulties recruiting enough Afghans to meet its goals to date, it seems unnecessary from a numbers standpoint to revisit the issue of compulsory military service, but that could change in the future and there are other, non-numeric, values often attributed to compulsory service.

Discussion Questions

1. Do you think that Afghanistan should have compulsory military service for all citizens?
2. What are some advantages and disadvantages to an all-volunteer army? Do you think that some of the problems with the current system would be improved or undermined by compulsory service?
3. What do you think about women serving in the ANSF?

Upholding and Abiding by the Law

The Constitution of Afghanistan

Article 56

¹³² North Atlantic Treaty Organization, *Afghan National Security Forces: Training and Development*, Feb. 2012, available at http://www.nato.int/nato_static/assets/pdf/pdf_topics/20120202_120202-Backgrounder_ANSF.pdf.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

(1) Observance of the provisions of the constitution, obedience of laws and respect of public order and security shall be the duty of all citizens of Afghanistan.

(2) Ignorance of the laws shall not be considered an excuse.

All citizens of Afghanistan are obligated to obey the laws of the country. If Afghan citizens do not respect the law and commit a violation of a law, then the State has the power to enforce the laws through the police and court system.

When the police arrest an individual for violating the laws of Afghanistan and he is tried in the courts, under Article 56(2), *pleading* ignorance of the law is not a defense. If citizens were allowed to plead ignorance of the law and walk away without penalty, a number of difficulties would arise and inevitably many people would use ignorance as a defense.

The duty to uphold and abide by the law stems from the idea that citizens have a moral obligation to follow the law and uphold law and order within their country.¹³⁸ Some scholars even argue that there is a natural duty to obey, a duty which results from a person's membership in society and exists regardless of any specific provision creating such an obligation.¹³⁹ A natural duty is owed not just to the government, but to all of society. The alternative view of the duty to uphold the law is that because States have a duty to protect the security and safety of their nationals, those citizens have a corresponding duty to refrain from violating the law and the security and safety of their fellow citizens.¹⁴⁰

Discussion Questions

1. Do you think that ignorance should be a defense to the law?
2. Are there any laws that you can think of that should require specific knowledge of wrongdoing before a person can be found guilty?
3. Do you think that people have a moral obligation to uphold the laws of their country?

V. INTERNATIONAL HUMAN RIGHTS COMMITMENTS

The Constitution of Afghanistan

Article 7

The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights.

¹³⁸ Kent Greenawalt, *The Natural Duty to Obey the Law*, 84(1) Mich. L. Rev. 1 (1985).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Article 7 provides that Afghanistan will incorporate international legal instruments on human rights into its domestic law. This means that, in addition to upholding the specific rights mentioned in the Constitution of Afghanistan, the government commits to uphold and respect the human rights contained in various international legal instruments. Afghanistan has ratified many of the world's most important and far reaching human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the Convention Against Torture and Other Cruel or Degrading Treatment; the International Convention on Elimination of all Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and the Convention on the Rights of the Child (CRC). By ratifying these treaties, Afghanistan has agreed to recognize and uphold a broad range of human rights.

This chapter will provide a short discussion of three of these international instruments: the Universal Declaration of Human Rights (UDHR), the ICCPR, and the ICESCR.¹⁴¹ These three treaties, plus two optional protocols to the ICCPR, make up what is known as the International Bill of Rights.¹⁴² The International Bill of Rights places binding legal obligations on State Parties to implement and uphold the provisions of the treaties and protect the human rights of their citizens.¹⁴³ States are required to develop legislation and institutional mechanisms to ensure that the provisions of the treaties are enforced.¹⁴⁴ For a more detailed discussion of international human rights instruments, read Chapter 4: International Human Rights Law in *An Introduction to International Law for Afghanistan* by the Afghanistan Legal Education Project.¹⁴⁵

The Tension between Article 7 & Islamic Law An Ongoing Debate

Some provisions of international instruments that Afghanistan has ratified arguably conflict with principles of Islamic law to which Article 3 of the Constitution gives primacy. For example, Article 18 of the ICCPR grants individuals “freedom to have or to adopt a religion or belief of [their] choice.” The clause arguably includes the right to change one’s religion. As shown above in the discussion on apostasy, traditional Islamic legal theory seems to take an uncompromising approach toward individuals who wish to convert away from Islam. Which law governs when a provision in an international agreement that Afghanistan has ratified conflicts with a principle of Islamic law?

Many Afghan legal scholars argue that Afghanistan abides by provisions of international agreements only when they are consistent with Hanafi fiqh. Professor Nasrullah Stanikzai,

¹⁴¹ Each of these summaries is taken from Chapter 4: International Human Rights Law in *An Introduction to International Law for Afghanistan* by the Afghanistan Legal Education Project, available at http://alep.stanford.edu/?page_id=813.

¹⁴² Henry J. Steiner, *International Protection of Human Rights*, in *International Law* (Malcolm D. Evans ed., 2d ed. 2006); Geoffrey Robertson, *Crimes Against Humanity* (Penguin Books, 3d ed. 2006); Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell Univ. Press 2002) 9-27.

¹⁴³ See Universal Declaration of Human Rights; See also International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights.

¹⁴⁴ Henry J. Steiner, *International Protection of Human Rights*, in *International Law* (Malcolm D. Evans ed., 2d ed. 2006); Geoffrey Robertson, *Crimes Against Humanity* (Penguin Books, 3d ed. 2006).

¹⁴⁵ Available at http://alep.stanford.edu/?page_id=813.

professor of the Department of Law at Kabul University, asserts that the answer to this contradiction is found in the Dari language version of the Constitution. According to him, the English translation of the Constitution, which provides that “The state shall *abide by* [international agreements],” is not an accurate translation. Rather, the Dari version of Article 7 uses the word *reyayat*, which in the legal context translates to “preservation of law, or preservation of respect towards something or someone.”¹⁴⁶ Thus, according to Stanikzai, Article 7 requires Afghanistan to *respect* international agreements rather than *abide by* them. This, he argues, means that Afghanistan does not have to strictly follow every provision of international agreements, but that the state must generally respect the agreements. The word *reyayat*, he says, was intentionally used to preserve the right of reservation to parts of international instruments that do not comply with Shari’a. Accordingly, Afghanistan can follow Islamic principles if they conflict with provisions of international agreements.¹⁴⁷

The Constitution of Afghanistan contains these potentially contradictory clauses because of the historical context in which it was drafted and ratified. During the drafting process, the drafting committee was under pressure from the conservative religious clerics on the one side and the international community from another side. To keep both sides happy, they inserted both clauses promoting liberal human rights norms and Islamic legal principles. While there is no easy answer to many of these points of tension, the fact that there is an active legal debate going on over this issue is an achievement in itself, particularly given Afghanistan’s recent history and the strong influence that religious clerics have in the country. A public and open discourse on issues such as the tension between Islam and international human rights shows how far Afghanistan has come. In fact, Afghanistan ranked 128th in the 2013 World Press Freedom Index, putting it ahead of India, Pakistan, Turkey, Bangladesh, Russia, and many other countries.¹⁴⁸

Discussion Question

When talking about the tension between Article 7 and Islamic law, what interpretation of Islamic law is at issue? As noted above in the discussion of apostasy and blasphemy under Islamic law, various scholars and clerics have very different interpretations of Islamic law, both within Afghanistan and outside of the country. Whose interpretation is to be followed? What if one interpretation of Hanafi fiqh conflicts with an international agreement that Afghanistan has ratified but another interpretation does not conflict?

A. The Universal Declaration of Human Rights (UDHR)

The UN General Assembly adopted the Universal Declaration of Human Rights in 1948, by a vote of forty-eight states to zero, with eight countries abstaining. (Saudi Arabia, South Africa and the Communist countries abstained). The document opens with the words, “All human beings are born free and equal in dignity and rights.”¹⁴⁹ The UDHR enshrines numerous civil and political rights. These rights prohibit slavery, inhuman treatment, arbitrary arrest and arbitrary

¹⁴⁶ Hasan Ameen, *Farhange Ameen* at 654 (Sephehr Press, Tehran, 30 ed., 1383 (2004)).

¹⁴⁷ Professor Stanikzai has made this argument in his classes at Kabul University. Fahim Barmaki, a student in his civil procedure class in 2008, has provided this account of Professor Stanikzai’s thoughts.

¹⁴⁸ Reporters Without Borders, Press Freedom Index, <http://en.rsf.org/press-freedom-index-2013,1054.html>.

¹⁴⁹ UDHR, art. 1.

interference with privacy; these rights also forbid distinctions based on race, color, gender, language, religion, political or other opinion, national or social origin, property, birth or status. The UDHR also protects the right to a fair trial, equal protection before the law, and due process in criminal proceedings; freedom of movement and residence; the rights to seek political asylum, possess and change nationality, to marry and own property, freedom of belief and worship, opinion and expression, freedom of peaceful assembly and association, and free elections and equal opportunities for access to public positions.¹⁵⁰ The UDHR also contains economic, social, and cultural rights.

Article 29 of the UDHR leaves considerable discretion to states regarding how they choose to implement its principles. Rather than binding states in hard law, the UDHR was intended to be a normative force that motivates states to improve their behavior. The UDHR leaves some wiggle room for states to achieve its goals at their own pace; the UDHR's rights may be subjected to "such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

B. The International Covenant on Civil & Political Rights

If the UDHR articulated a "common standard" for countries to work towards, two treaties that the UN drafted in 1966 helped transform that standard into a binding legal obligation. The International Covenant on Civil and Political Rights¹⁵¹ (ICCPR) and International Covenant on Economic, Social and Cultural Rights¹⁵² (ICESCR), together with the UDHR, make up what is known as the "International Bill of Human Rights." These covenants, which came into force in 1976, reflect many of the same principles contained in the UDHR, but with greater binding force. Afghanistan has acceded to both conventions.

The ICCPR is perhaps the most significant international human rights treaty because it is legally binding. That is, states that ratify the treaty must also implement domestic legislation to give effect to the treaty's provisions (Article 2(2)), as well as provide an effective remedy for violations of those rights (Article 2(3)).¹⁵³ Today, more than 165 countries are party to the treaty, including Afghanistan. The treaty itself contains numerous guarantees of rights. Articles 1 of both the ICCPR and ICESCR are identically worded, guaranteeing a people's right to self-determination and to dispose freely of their natural resources. Article 2 of the ICCPR echoes the Declaration's commitment to non-discrimination by mandating that the treaty's provisions be guaranteed to all peoples, without distinction to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Article 3 pledges states to ensure that both men and women fully enjoy all of the civil and political rights guaranteed under the treaty.

The ICCPR also contains numerous guarantees of specific, substantive rights. For example, affirming a right to life, Article 6 prohibits states from imposing the death penalty in all but the

¹⁵⁰ Universal Declaration of Human Rights, Dec. 10, 1948, GA res. 217(A) III.

¹⁵¹ ICCPR, Dec. 16, 1966, 999 U.N.T.S. 171.

¹⁵² ICESCR, Dec. 16, 1966, 993 U.N.T.S. 3

¹⁵³ ICCPR, art. 2.

most serious cases, and never in the case of minors under the age of 18 or pregnant women. Articles 7 and 8 ban cruel, inhuman and degrading treatment and slavery, while Article 9 guarantees the right of liberty and security in one's person. This means that states are required to avoid arbitrary detentions, and must allow prisoners a timely opportunity to contest their detentions in front of an impartial judge in a trial, or be released. Freedom of movement within a state is another right guaranteed in Article 12. Similar to the UDHR, the ICCPR also guarantees the rights to freedom of thought, conscience and religion,¹⁵⁴ as well as the freedom to hold any opinion without interference.¹⁵⁵ Articles 21 and 22 mirror the UDHR's grants of freedom of association and freedom of expression. Finally, Article 25 includes some protections for political democracy; its language states that, "every citizen shall have the right...to take part in the conduct of public affairs, directly or through freely chosen representatives" and "to vote and be elected at genuine periodic elections."

Just as the Constitution of Afghanistan allows for some limitations on constitutionally guaranteed rights under Article 59 and the State of Emergency (Articles 143 through 148), certain of the rights proclaimed by the ICCPR are subject to derogation. These rights include the freedom from detention, freedom of movement, and certain political rights. Article 4 allows states to derogate these rights:

In time of public emergency which threatens the life of the nation...to the extent strictly required by the exigency of the situation, provided such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, religion or national origin.¹⁵⁶

Additional rights, such as the freedom of religion found in Article 18, may also be subject to "limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedom of others."¹⁵⁷ Note, however that certain rights protected by the ICCPR can *never* be derogated. These include the right to life and the right not to be tortured or enslaved. The general presumption of the ICCPR is that state parties "undertake to respect and ensure" all of the rights contained in the document. States also are prohibited from withdrawing from the ICCPR.

C. The International Covenant on Economic, Social, & Cultural Rights

The International Covenant for Economic, Social and Cultural Rights (ICESCR) is the second major international treaty, along with the ICCPR, that underlies much of today's human rights law. It was adopted by the UN General Assembly on December 16, 1966, and went into effect on January 3, 1976.¹⁵⁸ As of February 2012, the ICESCR had 160 parties and 70 signatories.¹⁵⁹ Because ESC rights are more controversial and complex than civil and political rights, the treaty

¹⁵⁴ *Id.* art. 18.

¹⁵⁵ *Id.* art. 19.

¹⁵⁶ *Id.* art. 4.

¹⁵⁷ *Id.* art. 18.

¹⁵⁸ ICESCR, *available at* <http://www2.ohchr.org/english/law/cescr.htm>.

¹⁵⁹ United Nations Treaty Collection, ICESCR Status, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.

was split off into a separate document from the ICCPR.¹⁶⁰ The ICESCR includes things such as the right to education and health care, the right to work, and the right to a certain basic standard of living.¹⁶¹

Perhaps one of the most controversial provisions of the ICESCR is in Article 1, which states: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁶² Self-determination is the idea that people have the right to choose their own government and to determine how they will be governed.¹⁶³ The right to self-determination is strongly advocated by separatist groups seeking independence, such as the Chechens, Kosovars, and the Kurds in Iraq and Turkey, among many others. Consequently, many States, particularly those containing separatist groups and breakaway provinces within their territory, are harshly critical of self-determination and argue that it should not be considered a human right. This is one of the reasons that the ICESCR has gained support more slowly than the other conventions that make up the International Bill of Rights.¹⁶⁴

The ICESCR allows less developed States to implement the provisions of the treaty more slowly and gives them more time to develop the necessary legislation, but they are required to submit regular reports to the Committee on Economic, Social and Cultural Rights. The Committee is composed of 18 human rights experts who are elected to four-year terms. Additionally, even the least developed signatory States must begin taking some steps immediately.¹⁶⁵ Afghanistan ratified the ICSECR in 1983.¹⁶⁶

The ICESCR has identified certain duties under the Convention as having “immediate effect.”¹⁶⁷ This means that the State has the duty to adopt provisions or take steps to work towards the full realization of the rights contained in the Convention. At the very least, parties to the ICESCR are

¹⁶⁰ R.J. Vincent, *Human Rights and International Relations* (Cambridge Univ. Press 1986) 37-57; Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cambridge Univ. Press 2002) 9-27.

¹⁶¹ ICESCR, available at <http://www2.ohchr.org/english/law/cescr.htm>.

¹⁶² *Id.* art. 1.

¹⁶³ Thomas M. Franck, *Individuals, Groups and States as Rights Holders in International Law*, Proceedings of the American Branch of the Law Association, 1999-2000; Martti Koskenniemi, *The Politics of International Law*, 1 EJIL 4 1990; International Commission of Jurists, *The Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, 2008, available at <http://www.icj.org/dwn/database/ESCR.pdf>.

¹⁶⁴ Thomas M. Franck, *Individuals, Groups and States as Rights Holders in International Law*, Proceedings of the American Branch of the Law Association, 1999-2000; Martti Koskenniemi, *The Politics of International Law*, 1 EJIL 4 1990; International Commission of Jurists, *The Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, 2008, available at <http://www.icj.org/dwn/database/ESCR.pdf>; International Commission of Jurists, *The Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, 2008, available at <http://www.icj.org/dwn/database/ESCR.pdf>.

¹⁶⁵ Office of the United Nations High Commissioner for Human Rights, *Economic, Social and Cultural Rights Fact Sheet 33*, available at <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>.

¹⁶⁶ See ICESCR; International Commission of Jurists, *The Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, 2008, available at <http://www.icj.org/dwn/database/ESCR.pdf>.

¹⁶⁷ Office of the United Nations High Commissioner for Human Rights, *Economic, Social and Cultural Rights Fact Sheet 33*, available at <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>; ICESCR. International Commission of Jurists, *The Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, 2008, available at <http://www.icj.org/dwn/database/ESCR.pdf>.

required to adopt a detailed plan of action for how they will implement and protect all of the rights enumerated in the Convention.¹⁶⁸ This plan is also submitted to the oversight Committee.

Another reason for the relatively slow implementation of ESC rights and the adoption of the ICESCR is the prevailing view that they are difficult to enforce and court systems are ill-equipped to adjudicate cases and enforce the protection of these rights.¹⁶⁹ Critics of the ICESCR in countries that have not yet adopted the Convention fear that national courts would be inundated with claims that the government was violating the human rights of its citizens who were living in poverty, unable to find a job, or without access to adequate health care or education. Proponents of the ICESCR and ESC rights in general argue that litigation should be seen as the last resort in ESC rights disputes, and that government programs and policies to strengthen access to ESC rights should be central.¹⁷⁰ They believe that if the emphasis is placed on improving access to human rights and steady progress is made by governments, a rush to the courts will be avoided. However, these supporters also do believe that courts can adjudicate and provide guidance in cases involving violations of ESC rights by governments.

There are also important differences between the ICCPR and the ICESCR. Whereas both covenants are binding on States Parties, the ICESCR allows states a wide degree of discretion over how quickly they will achieve its goals. According to Article Two, a state party “undertakes to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized.”¹⁷¹ There is no requirement under the ICESCR, for example, that states must implement domestic legislation to realize its goals. This has led some commentators to observe that the ICESCR “lacks teeth.” Even given this, many countries have ratified the ICESCR. As of 2009, the ICESCR had 160 parties, including Afghanistan.

Discussion Questions

1. How do the rights of Afghan citizens under the Constitution of Afghanistan differ from the rights of Afghan citizens under international treaties that Afghanistan has joined? How are they the same?
2. What if a right granted under the Constitution of Afghanistan conflicts with or is in tension with a right granted in the ICCPR or ICESCR? What right would prevail? How would we determine this?
3. The Human Rights Committee, which is an independent body responsible for monitoring the implementation of the ICCPR, issued the following statement in its General Comment No. 31: “Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law

¹⁶⁸ ICESCR; International Commission of Jurists, *The Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, 2008, available at <http://www.icj.org/dwn/database/ESCR.pdf>.

¹⁶⁹ International Commission of Jurists, *The Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, 2008, available at <http://www.icj.org/dwn/database/ESCR.pdf>.

¹⁷⁰ *Id.*

¹⁷¹ ICESCR, art. 2(1).

to justify a failure to perform or give effect to obligations under the treaty.” At the same time, some states have signed the ICCPR, and other international legal instruments, on the condition that they are exempted from certain provisions such as this. How does this information change your answer to question number 2 above?

VI. IMPLEMENTATION OF CONSTITUTIONALLY GUARANTEED RIGHTS

The rights granted in a constitution will not be meaningful unless there are provisions for *enforcing* those rights. Remember that the government is the actor with a *duty to uphold* constitutional rights. The government is therefore the actor capable of *violating* those rights, and it follows that constitutional rights must be enforced *against* the government. At the same time, the government is the only actor capable of enforcing constitutional rights. In any enforcement provision, therefore, the government is charged with enforcing constitutional rights *against itself*. This is like asking a wolf to guard a flock of sheep! Constitutions attempt to solve this problem by creating *independent* bodies within the government that have the authority to monitor human rights and enforce those rights against the government.

The International Covenant on Civil & Political Rights (ICCPR)

Article 2

(3) Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.¹⁷²

The ICCPR requires all Member States to develop domestic enforcement mechanisms to ensure that citizens who suffer human rights violations have methods of recourse within the State. The Covenant requires members to provide remedies, including judicial remedies, to its citizens to ensure that their human rights are protected. Not only must Afghanistan provide a remedy for its citizens, this remedy must be effective. It cannot be set up solely to fulfill the requirements of the Convention. There must be mechanisms for providing redress for wrongs that have been committed against Afghan citizens. The general rule is that before an individual may appeal to an international human rights mechanism, she must exhaust all domestic remedies. However, if these remedies are ineffective or illegitimate, then an individual may appeal to an international body without exhausting all domestic remedies first.

A. The Role of the Executive

¹⁷² ICCPR, art. 2.

The Constitution of Afghanistan creates a general duty for the state to implement the provisions of the Constitution, protect human rights, and “perform its duties with complete neutrality.” But, these clauses don’t create any specific enforcement mechanisms.

The Constitution of Afghanistan

Article 5

Implementation of the provisions of this constitution and other laws, defending independence, national sovereignty, territorial integrity, and ensuring the security and defense capability of the country, are the basic duties of the state.

Article 6

The state is obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes and to provide for balanced development in all areas of the country.

Article 50

(1) The state shall adopt necessary measures to create a healthy administration and realize reforms in the administrative system of the country.

(2) The administration shall perform its duties with complete neutrality and in compliance with the provisions of the laws.

B. Judicial Oversight

In many countries, constitutional rights are enforced primarily through the judiciary, which functions independently from the rest of the government. The Constitution of Afghanistan provides for this. Article 116 establishes the judiciary as “an independent organ of the state.” And, Article 51 establishes a private right of action wherein any individual suffering harm by the government without “due cause” may bring a case against the government for compensation.

Article 51 also provides in the second clause that the State shall not “claim its rights” without an authoritative court order. Clause 2 shows that just like individuals, the government also must use the court system to claim its rights. This means that not even the government is above the law. Rather, the government must submit to the court system just as individuals do. For example, if the government wishes to sue an individual, it must seek a judgment against that individual through an authoritative court.

The Constitution of Afghanistan

Article 51

(1) Any individual suffering damage without due cause from the administration shall deserve compensation, and shall appeal to a court for acquisition.

(2) Except in conditions stipulated by law, the state shall not, without the order of an

authoritative court, claim its rights.

The judicial enforcement mechanism contemplated by the Constitution of Afghanistan is similar to that of the United States, with one important difference. In the United States, individuals routinely bring cases against the government to courts when they believe that the government has violated their constitutional rights. If the court finds for the plaintiff who brought the case, then the government must either change its behavior or provide compensation, depending on the situation. Below is one example of this type of case. Another is the case *Kelo v. City of New London* that you read in Part II.H of this chapter. While reading this American case, think about what the important difference between judicial enforcement in Afghanistan and the United States is.

Brown v. Board of Education of Topeka¹⁷³

Oliver Brown brought a case alleging that the fact that his daughter Linda was required to attend a school for African-American children that was far away from their home, when there was a school for white children very close to their home that she was not allowed to attend on account of her race. Mr. Brown alleged that the exclusion of his daughter from the school violated the right to “equal protection of the laws” in the U.S. Constitution. At that time in the United States (1954), the local state government required that African-American children and white children attend different schools. The court upheld Mr. Brown’s claim that the separate schools violated the constitutional right to equal protection. After this case, the government was not allowed to establish separate schools for African-American and white children.

Could you figure out what the important difference is between the judicial enforcement in the United States and Afghanistan? In the United States, if individuals lose their cases in lower courts, they can petition the Supreme Court to hear their case. In *Brown v. Board*, Mr. Brown could appeal his case to the U.S. Supreme Court if lower courts ruled against him. In Afghanistan, however, pursuant to Article 121, the Afghan Supreme Court may only review legislation “upon request of the Government or the Courts.” This means that under Afghan law Mr. Brown would not have been able to appeal his case to the Supreme Court if he lost in lower courts. Rather, only the Government or a lower court could have referred his case to the Supreme Court for review.

As you learned in Chapter 6: The Judiciary, the formal court system in Afghanistan suffers from problems of resource constraints, corruption, inconsistent application of justice across the country, and lack of trust. Given these challenges, do you think that the people of Afghanistan can realistically rely on the formal court system to enforce their constitutional rights as contemplated by Article 51? Could Afghanistan aspire to a system of judicial enforcement of constitutional rights similar to the system employed in the United States and other countries? Perhaps realizing that building a strong formal court system takes time, the drafters of the Constitution of Afghanistan wrote another mechanism for independent enforcement of human rights into the Constitution—the Afghan Independent Human Rights Commission.

¹⁷³ 347 U.S. 483 (1954).

C. The Independent Human Rights Commission

The Constitution of Afghanistan

Article Fifty-Eight

(1) The State, for the purpose of monitoring the observation of human rights in Afghanistan, to promote their advancement (*behubud*) and protection, shall establish the Independent Human Rights Commission of Afghanistan.

(2) Any person whose fundamental rights have been violated can file complaint to the Commission.

(3) The Commission can refer cases of violation of human rights to the legal authorities, and assist in defending the rights of the complainant.

(4) The structure and functions of this Commission shall be regulated by law.

As you can see above, the Constitution of Afghanistan empowers an Independent Commission for Human Rights in Afghanistan (AIHRC) to monitor and protect human rights.¹⁷⁴ Originally contemplated by UN Resolution 134/48 in 1993, as well as by the Bonn Agreement in 2002, the 2005 Law on Structure, Duties, and Mandate of the Afghanistan Independent Human Rights Commission established the structure and mandate of the AIHRC (hereinafter AIHRC Law).¹⁷⁵ The AIHRC Law provides that the “Commission shall have the following objectives: (1) Monitoring the situation of human rights in the country; (2) Promoting and protecting human rights; (3) Monitoring the situation of and people’s access to their fundamental rights and freedoms; (4) Investigating and verifying cases of human rights violations; and (5) Taking measures for the improvement and promotion of the human rights situation in the country.”

When the Constitution was implemented in 2004, it extended the mandate of the AIHRC to provide oversight and to protect and promote human rights in Afghanistan.¹⁷⁶ Any individual with a claim of human rights violations can bring that claim to the AIHRC. The Commission then evaluates the claim and can refer it to judicial authorities. The AIHRC can also support and assist the person in submitting his or her claim to the judiciary.¹⁷⁷ There are six program units within the AIHRC: the Human Rights Education Unit, the Women’s Rights Protection Unit, the Children’s Rights Protection Unit, the Monitoring and Investigation Unit, the Transitional Justice Unit, and the Unit Protecting the Rights of Persons with Disabilities.¹⁷⁸

The Commission, appointed by the president of Afghanistan, is composed of nine members (“commissioners”), male and female, each with academic backgrounds and practical experience

¹⁷⁴ Constitution of Afghanistan, art. 58.

¹⁷⁵ Law on Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission [hereinafter AIHRC Law], Decree No. 16 (May 14, 2005).

¹⁷⁶ Annual Report of the Afghanistan Independent Human Rights Commission, 2010-2011, *available at* <http://www.aihrc.org.af/media/files/Reports/Annual%20Reports/inside.pdf>.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

in the field of human rights.¹⁷⁹ Importantly, while the president has the authority to appoint commissioners for five-year terms, he does not have plenary power to remove them. Rather, a commissioner may only be removed for failure to competently perform duties or violation of the law. Two-thirds of the Commission must propose to remove a Commissioner, followed by the president's approval, for a Commissioner to be removed.¹⁸⁰ This design is important because it should allow the AIHRC to function independently and to impartially assess the government's human rights record. The Commission currently openly criticizes the government, writing that: "the government's lack of interest and political will in promotion of human rights, rampant and widespread corruption, especially in judicial organs, and abuse of power lack of rule of law and continuation of culture of impunity remained as major obstacles the AIHRC had to face." It is possible that the president could bring the AIHRC under his control by appointing commissioners loyal to him who would be willing to help him remove commissioners who criticized the government. The AIHRC has largely appeared to be fulfilling its role as an independent organ. As you will read below, however, in 2011, President Karzai chose not to reappoint Commissioner Nader Nadery from the Commission in a controversial decision.

The Commission also has eight regional offices and six provincial offices that employ approximately 600 additional staff members.¹⁸¹ The AIHRC is responsible for monitoring human rights in Afghanistan, including monitoring the government's human rights record and the implementation of laws to ensure respect for human rights standards, visiting detention facilities, human rights education, providing human rights advice to the National Assembly and other government actors, working with the UN, and publishing reports on human rights issues.¹⁸² In addition, the AIHRC has a mandate to hear complaints from individuals, collect evidence, investigate and refer cases to the legal authorities of Afghanistan for redress.¹⁸³ The AIHRC also has a duty to provide recommendations on improving protections for the rights of children, women, disabled and other vulnerable populations.¹⁸⁴

Notably, while the AIHRC has the power to refer cases to legal authorities, it does not have the authority to file cases on behalf of victims in Afghan courts. As a result, the victims must file cases themselves and follow them through the courts. In many cases, victims of human rights abuses lack both the resources and the capacity to ensure a fair trial. Victims of human rights violations frequently have low education levels and low incomes. This means that paying a lawyer to represent them in court may not be financially possible. In addition, victims may not have enough knowledge of the legal system to ensure that their case is addressed in a fair and legitimate manner, without corruption. Recent interviews with AIHRC provincial staff indicate that the number of petitions filed with the AIHRC's regional offices has significantly declined in recent years because of this limitation the Commission faces in providing the necessary support that would allow victims to bring their claims before legal authorities.¹⁸⁵

¹⁷⁹ AIHRC Law, art. 7.

¹⁸⁰ *Id.* art. 14.

¹⁸¹ AIHRC 2010/2011 Annual Report 11.

¹⁸² AIHRC Law, art. 21.

¹⁸³ *Id.* art. 23.

¹⁸⁴ *Id.* art. 26.

¹⁸⁵ Based on interviews conducted by Professor Mohammad Isaqzadeh, Assistant Professor, Department of Political Science and Law, American University in Afghanistan.

In 2010, the AIHRC received 2,551 complaints about 900 human rights violations. 961 of those who brought complaints were women.¹⁸⁶ The AIHRC investigated 761 of the 900 incidents and states in its annual report that it resolved 355 of them. An additional 95 cases were closed, while 344 are ongoing.¹⁸⁷ The AIHRC reports that 168 cases involved the right to personal security, 388 claimed violations of the right to a fair trial, 74 cases involved property rights violations, and 54 cases alleged violations of the right to marry.¹⁸⁸ There has been an increase in allegations of violence against women, which the AIHRC attributes to increased knowledge among women of their rights and protections that the law provides.¹⁸⁹ 50 percent of the cases of violence against women went to mediation and only 20 percent of cases resulted in perpetrators being sentenced.¹⁹⁰

The AIHRC's assessment of the human rights situation in Afghanistan is that there is a great deal of uncertainty and insecurity, and that a number of problems present challenges to effectively protecting human rights. One of the biggest challenges is the security situation, which has deteriorated since 2009, making it increasingly difficult for the AIHRC to carry out its programs effectively.¹⁹¹ Additionally, the AIHRC has had a budget deficit, forcing it to cut programs. The Commission is highly critical of the government of Afghanistan in its 2010-2011 Annual Report, stating that "the government's lack of interest and political will in the promotion of human rights, rampant and wide spread [sic] corruption, especially in judicial organs, and abuse of power, lack of rule of law and continuation of a culture of impunity" were major obstacles to AIHRC activities.¹⁹² The Commission found that human rights violations, particularly violence against women and children, increased as the security situation deteriorated and that political crises, like the disputed election in the Wolesi Jirga, distracted from the protection and promotion of human rights.¹⁹³ As a result, the AIHRC believes that the human rights situation in Afghanistan has deteriorated and that Afghans are at greater risk of suffering violations of their constitutionally protected human rights.

Challenges to the AIHRC: The Failure to Reappoint Commissioner Nadery¹⁹⁴

In December, 2011, President Karzai appeared to effectively force Commissioner Nader Nadery, a prominent human rights activist, out of his position on the AIHRC. The details of Mr. Nadery's removal remain unclear. Mr. Nadery was appointed to the Commission when it was created in 2004 and formally began his first term in 2006. His first five-year term was set to expire in December 2011, at which point he was ousted. Mr. Nadery gained a reputation for being

¹⁸⁶ Annual Report of the Afghanistan Independent Human Rights Commission, 2010-2011, p. 67, *available at* <http://www.aihrc.org.af/media/files/Reports/Annual%20Reports/inside.pdf>.

¹⁸⁷ *Id.* at 68.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 69.

¹⁹¹ Annual Report of the Afghanistan Independent Human Rights Commission, 2010-2011, *available at* <http://www.aihrc.org.af/media/files/Reports/Annual%20Reports/inside.pdf>.

¹⁹² *Id.* at 74.

¹⁹³ *Id.*

¹⁹⁴ Information in this box from Matthew Rosenberg, *Afghan Rights Activist Nadery Ousted from Panel*, The New York Times (Dec. 22, 2011), *available at* <http://www.nytimes.com/2011/12/23/world/asia/afghan-rights-activist-nadery-ousted-from-panel.html>.

outspoken, speaking out on election fraud, land grabs by the rich, and civilian casualties of both NATO and Taliban strikes. While Mr. Nadery had long been critical of the government, but an extended report on mass atrocities committed in Afghanistan since the 1980s appears to have been what prompted the Karzai administration to remove him. Individuals named as offenders in the report include senior politicians and government officials, many of whom led the Mujahedeen resistance to Soviet occupation and were active in the civil war in the 1990s. In an interview, Mr. Nadery said that the report details, “more than 180 mass graves, some with large numbers.” The report had not yet been released at the time of Mr. Nadery’s dismissal.

The Law on the Structure, Duties, and Mandate of the AIHRC provides the following:

Article 14: Conditions for Removal of the Members

1. Members of the Commission shall, based on sufficient documents available and clear reasons, be removed from the membership of the Commission for any of the following reasons:

- a. Lack of competency in performing assigned duties;
- b. Violating the confidentiality of the commission;
- c. Violating the provisions of this law;

2. Removal of a member of the Commission, as set out in the paragraph 1 of the present Article, shall happen based on the existence of clear, documented reasons and upon the proposal of two thirds of the members of the Commission and the approval of the President.

Discussion Question: Do you think that Commissioner Nadery’s removal was consistent with the requirements laid out in Article 14 of the AIHRC Implementation Law?

Discussion Questions

1. Do you think that the AIHRC is sufficiently independent from the government to impartially assess the government’s human rights record? How could the Commission be made more independent? Note that according to Article 29 of the AIHRC Law, the Cabinet Ministers must approve the AIHRC budget as part of the national budget. Do you think that this affects the Commission’s independence?

2. A significant portion of the AIHRC’s work consists of publishing reports that document the human rights situation in Afghanistan. Do you think that this is an important and effective method of enforcing human rights? Why or why not?

3. According to Article 23 of the AIHRC Law, the Commission may refer cases “to the relevant judicial and non-judicial authorities.” This provision presupposes that the judicial authorities will be able to effectively enforce human rights provisions. As discussed above, judicial capacity and willingness has been a challenge to AIHRC’s work. As a result, the AIHRC sometimes has to deal with cases outside of the formal judicial system, by seeking pardons or by secretly moving people out of the country. Can you think of a different or better way for the AIHRC to resolve complaints given the current status of Afghanistan’s judicial system?

4. Consider the AIHRC’s assessment of the human rights situation in Afghanistan and how the

Afghan government has contributed to that situation. Do you think the AIHRC is correct in stating that a lack of political will, a culture of impunity, and corruption all have contributed to an increase in human rights violations across Afghanistan?

VII. LIMITS ON CONSTITUTIONALLY GUARANTEED RIGHTS

Many of the rights outlined in this chapter are not absolute. There are instances in which the State may permissibly limit certain constitutional rights under some circumstances. Generally, States should prescribe clear and narrow limits on constitutional rights. If States add broad or vague limitations on the rights of citizens, then there is a risk for the State to exercise those limitations in an arbitrary or abusive fashion. You have read about many limitations on specific rights already in this chapter. For example, you read about how the State may limit an individual's right to liberty if that person has used his right to liberty to affect the rights of others or the public interest. You also read about how the State may in some cases take an individual's private property if doing so is in the public interest and if the State pays that person prior and just compensation. You will now learn about two overall limitations on the exercise of rights that apply to the entire Constitution: Article 59 and the State of Emergency.

A. Article 59

The Constitution of Afghanistan

Article 59

No individual shall be allowed to manipulate the rights and liberties enshrined in this Constitution and act against independence, territorial integrity, sovereignty as well as national unity.

States are defined by *sovereignty*, or the *exclusive* right to make and *execute* laws and operate the justice system in a given territory. Constitutional and human rights restrict State power and sovereignty to a degree, in order to prevent tyranny and to allow citizens to participate in their government. Article 59 allows the State to balance its powers of sovereignty against constitutional and human rights by stating that no one can use his rights to infringe on the State's independence, territorial integrity, sovereignty, and national unity. Do you think a provision such as Article 59 is necessary? Do you think that it could give the State too much power to limit rights? Or do you think that the State should have more power to maintain its sovereignty? Can you think of any other ways that Article 59 could be drafted?

B. The State of Emergency

You read about the State of Emergency in Chapter 2 from a separation of powers perspective. The State of Emergency also has important implications for the exercise of rights. As a reminder, the state of emergency clauses state the following:

The Constitution of Afghanistan

Article 145

During the state of emergency, the President can, after approval by the presidents of the National Assembly as well as the Chief Justice of the Supreme Court, suspend the enforcement of the following provisions or place restrictions on them:

1. Clause 2 of Article 27;
2. Article 36;
3. Clause 2 of Article 37;
4. Clause 2 of Article 38.

Article 27, Clause 2

No one shall be pursued, arrested, or detained without due process of law.

Article 36

The people of Afghanistan shall have the right to gather and hold unarmed demonstrations, in accordance with the law, for attaining legitimate and peaceful purposes.

Article 37, Clause 2

The state shall not have the right to inspect personal correspondence and communications, unless authorized by provisions of the law.

Article 38, Clause 2

No one, including the state, shall have the right to enter a personal residence or search it without the owner's permission or by order of an authoritative court, except in situations and methods delineated by law.

International law, in particular the ICCPR (which Afghanistan is a party to), provides detailed guidelines on conditions in which emergency suspension is permitted. Examining Afghanistan's emergency suspension provisions in relation to the ICCPR emergency suspension guidelines will be a useful analytical exercise to examine the state of emergency in the Constitution of Afghanistan.

The International Covenant on Civil & Political Rights

Article 4

(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

(2) No derogation from Articles 6 [the right to life], 7 [prohibition on torture], 8 (paragraphs 1 and 2) [prohibition on slavery], 11 [prohibition on imprisonment for failure to fulfill a contractual obligation], 15 [prohibition on retroactive laws], 16 [right to recognition as person before the law] and 18 [freedom of thought, conscience, and religion] may be made under this provision.

ICCPR Article 4(1) places the following requirements on the suspension of rights under the state of emergency: (1) a state of emergency may only be declared in the case of war or public emergency, (2) the State must officially proclaim a state of emergency and give notice that it is doing so, (3) the State may only suspend rights “to the extent strictly required by the exigencies of the situation,” (4) the suspension must not conflict with any other international legal obligations, and (5) suspension must be nondiscriminatory.¹⁹⁵

The ICCPR distinguishes between derogable rights (rights that may be derogated in times of emergency) and non-derogable rights (rights that may not be derogated under any circumstance). In addition to the rights listed in ICCPR Article 4(2), the Human Rights Committee has stated that procedural safeguards for criminal defendants, along with some other customary international law rights, are also non-derogable.¹⁹⁶ As you can see above, Article 145 of the Constitution of Afghanistan does not specifically provide for the suspension of rights deemed to be non-derogable by the ICCPR.

In addition, international law commonly requires that four principles be satisfied in the event of a limitation or suspension of rights: (1) the doctrine of margin of appreciation, (2) the requirement that limitations be “prescribed by law,” (3) the principles of necessity and proportionality, and (4) the principle of nondiscrimination.¹⁹⁷

The doctrine of *margin of appreciation* means that states can be given some latitude in determining how to apply substantive rights and in declaring a state of emergency.¹⁹⁸ This means that the government of Afghanistan has some latitude to determine the best way to apply and enforce constitutional rights in Afghanistan and some latitude in determining when it is necessary to declare a state of emergency.

The requirement of *limitations prescribed by law* means that any limitation the State places on rights must be prescribed by a legitimate law.¹⁹⁹ In other words, the State cannot place limits on rights that are not already established in a valid law. For example, the government of Afghanistan could not decide that it wanted to suspend other articles, in addition to those listed in Article 145, during a state of emergency. The State may only suspend rights as permitted by law.

The principle of *necessity* allows states to derogate from rights only “to the extent strictly required by the exigencies of the situation.”²⁰⁰ This means, for example, that under the state of emergency, the government of Afghanistan can only prevent demonstrations to the degree that doing so is necessary to regain peace and order in the country. The principle of *proportionality* means that once it has been established that derogation is necessary, the State may only derogate from that right by employing the least restrictive means “required to achieve the purpose of the

¹⁹⁵ Alex Conte, *Limitations to and Derogation from Covenant Rights*, in *Defining Civil & Political Rights: The Jurisprudence of the United Nations Human Rights Committee* 58-64 (Alex Conte & Richard Burchill, eds. 2009).

¹⁹⁶ *Id.* at 40-41.

¹⁹⁷ Alex Conte, *Limitations to and Derogation from Covenant Rights*, in *Defining Civil & Political Rights: The Jurisprudence of the United Nations Human Rights Committee* 42 (Alex Conte & Richard Burchill, eds. 2009).

¹⁹⁸ *Id.* at 43-46.

¹⁹⁹ *Id.* at 46-47.

²⁰⁰ *Id.* at 47.

limitation.”²⁰¹ Building on the example above, the government may only take measures to prevent demonstrations using the *least restrictive means possible*. This means that if using rubber bullets would adequately control the crowd, the government would not be permitted to use real bullets on the crowd.

The principle of *nondiscrimination* means that the State may not limit or suspend rights in a discriminatory fashion.²⁰² Under the state of emergency, for example, the government of Afghanistan could not forbid demonstrations by women, but permit demonstrations by men.

As a reminder, Article 145 of the Constitution of Afghanistan provides that the following clauses of the Constitution to be suspended in the state of emergency.

Constitution of Afghanistan

Article 27, Clause 2

No one shall be pursued, arrested, or detained without due process of law.

Article 36

The people of Afghanistan shall have the right to gather and hold unarmed demonstrations, in accordance with the law, for attaining legitimate and peaceful purposes.

Article 37, Clause 2

The state shall not have the right to inspect personal correspondence and communications, unless authorized by provisions of the law.

Article 38, Clause 2

No one, including the state, shall have the right to enter a personal residence or search it without the owner’s permission or by order of an authoritative court, except in situations and methods delineated by law.

Discussion Questions

1. Do you think that the emergency suspension clauses in the Constitution of Afghanistan comply with the requirements of the ICCPR and the general principles of international law discussed above? Why or why not?
2. Why do you think that the drafters of the Constitution selected the specific provisions that are subject to suspension in Article 145? Do you think these are the most relevant rights to suspend in the case of an emergency? Why or why not? Should any of the rights listed not be suspended? Should any other rights not listed in Article 145 be suspended?

VIII. CONCLUSION

²⁰¹ *Id.* at 48-49.

²⁰² *Id.* at 50-51.

In the following case study, try to use everything that you've learned throughout this chapter to think through the example and answer the questions that follow.

Case Study: Afghanistan's Ban on Expensive Weddings²⁰³

In 2011, the Afghan Ministry of Justice proposed The Law on Prevention of Extravagance in Wedding Ceremonies, which would limit the number of wedding guests at any wedding in Afghanistan to 300 and the amount spent per guest to around \$7. It would also prevent grooms' families from spending excessively on gifts for the brides' families. In addition, the law would limit brides to receiving only two dresses: one for the wedding and one for an engagement party. Both couples and wedding hall owners who violate the law would be subject to fines or even imprisonment. The proposed law also prevents women from wearing dresses contrary to Islamic law. "Monitoring committees" composed of politicians and bureaucrats would be charged with deciding whether or not dresses were too revealing.

Deputy Minister of Justice Muhammad Hashimzai explained the proposed law by stating: "The parties have gotten out of control. People spend money they don't have and go into debt for many years. It's not good for the society." He continued, "People are returning to Afghanistan from outside, and they're introducing a new culture. Our purpose is to bring some discipline back to the society." Minister of Justice Habibullah Ghaleb also spoke in support of the proposed law: "Wedding ceremonies among people are like a competition, no one wants to come last, people like to show off their wealth by feeding hundreds of guests in costly wedding halls. . . . Families are the victim of such a wrong tradition and have to accept these heavy burdens."

Others are critical of the law. "Why should the government tell people how to spend their money?" said Mohammed Salam Baraki, the owner of a Kabul wedding hall. "If they pass this law, it will only facilitate corruption. I'll have to pay off the inspector to allow more guests in."

Some tribal elders and officials in the provinces have made similar attempts to regulate the expense of weddings. Earlier in 2011, elders from several villages in northern Jawzjan province banned expensive weddings and dowries in an attempt to encourage young people to marry instead of postponing their nuptials because they could not afford it. Under the rules, the cost of a wedding must be proportional the economic status of the groom. If an individual violates the ban, he cannot be invited to other weddings in the village. "Marriage is everyone's right and it must not be presented as a huge burden for the bride and groom," said Azaad Khwa, an elder from Jawzjan. "Making the groom's family pay for everything and feed hundreds is a big sin."

The tribal elder from Jawzjan mentioned that marriage is everyone's right. While some domestic constitutions and international human rights instruments do include the right to marry,²⁰⁴ the Constitution of Afghanistan does not. Given this, do you agree with the statement that marriage

²⁰³ Information in text box taken from: Michelle Nichols & Hamid Shalizi, *Afghan Government Plans Expensive Wedding Ban*, Reuters (Jan. 15, 2011), available at <http://in.reuters.com/article/2011/01/05/idINIndia-53934320110105>; Kevin Sieff, *Afghan Government Seeks to Ban Costly Weddings*, Washington Post (July 15, 2011), available at http://www.washingtonpost.com/world/afghan-government-seeks-to-ban-costly-weddings/2011/07/11/gIQAufnGI_story.html. Some text is directly quoted from the newspaper articles.

²⁰⁴ See, e.g., ICCPR, art. 23.

is everyone's right? If it is, where does this right come from?

If marriage is a right of the citizens of Afghanistan, does this law help to uphold it by making marriage possible for people regardless of their wealth, as the tribal elder stated? Or, does the law infringe on the right to marry by limiting the manner in which people can get married?

Do you think that this law might infringe on any other rights? What about the right to liberty? What about the rights to freedom of expression and freedom of association? Is having a big wedding a form of expression; is having an expensive wedding a way to communicate a certain message to people? By limiting the number of people that can attend a wedding, is the government limiting the freedom of association? What about the right to own and acquire property? Does preventing brides from buying as many wedding dresses as they want infringe on the right to own and acquire property?

Should the government be permitted to tell people how to spend their money? What if the government forces people to spend their money in a way that will benefit people in the long run? Some countries withhold a certain percentage of citizens' paychecks each month, then the government uses that money to help support people who are retired and thus don't have income. Do you think that this violates any rights? Or does it help to uphold rights?

On the other side of this argument, Articles 43 and 54, require the government to implement effective programs for balanced education throughout the country and to ensure the wellbeing of the family, respectively. One might argue that, as part of the duty to fulfill, the ban on expensive weddings is necessary for the government to fulfill its obligations under Articles 43 and 54. If families spend all of their money on weddings, they may not be able to afford education for their children. By limiting the amount of money that families can spend on weddings, is it helping to ensure children will be educated? Or, is the limit on wedding costs part of the government's affirmative duty to ensure the wellbeing of the family?

If you couldn't answer all of these questions, then you're thinking like a lawyer! These are difficult questions, and there are no easy answers. Very frequently, by taking an action to help uphold one right (here, the right to marry or have a family), it could be argued that at the same time, the government is infringing on other rights with that same action (here, possibly the rights to liberty, expression, association, or property). Different rights are constantly *in tension* with each other. With a legal degree, it will be your job to think through all the possible implications of any government action what rights would be upheld and/or infringed, and to ultimately determine whether a given government action is constitutional.

As you have read in this chapter, the Constitution of Afghanistan grants strong civil and political rights protections, incorporates rights granted through international law into domestic law, and provides for monitoring and implementation of these rights. As you have also seen in this chapter, translating the rights granted in the Constitution to real life protections is not easy. First, determining what result will properly uphold people's rights is challenging. Frequently, upholding one right may infringe on another right. This tension is even more complicated when you must consider not only constitutional and international human rights, but also religious values, as in Afghanistan. Second, the Constitution leaves many aspects of rights, particularly

limitations on rights, to legislation. This means that many more laws can be passed that will affect constitutional rights. Third, the Constitution states that individuals can enforce their rights in court and that the AIHRC is responsible for protecting human rights. But, ensuring that these implementation and monitoring mechanisms actually function to protect the rights embodied in the Constitution is a very difficult and slow process. As a future lawyer and leader in Afghanistan, you will hopefully work to help move this process along.

CHAPTER 8: FUNDAMENTAL RIGHTS OF CITIZENS RIGHTS OF CRIMINAL DEFENDANTS

I. INTRODUCTION

“A nation’s greatness is measured by how it treats its weakest members.” – Mahatma Gandhi

Mahatma Gandhi’s quote, “A nation’s greatness is measured by how it treats its weakest members,” applies as much to criminal defendants as to other vulnerable members of society. Criminal cases make up the majority of court cases in Afghanistan. Unlike civil cases, which usually involve a dispute over money between private parties, criminal cases are brought by the government on behalf of “the people” to punish someone for a criminal transgression against society.

Because the Constitution and laws empower the government to punish an individual with imprisonment or even death, these cases are subject to heightened procedural safeguards. Once arrested, the government has physical control over the criminal defendant. Precisely because governments often abuse this power, one of the primary purposes of a Constitution is to give individuals corresponding rights to protect them from the government. This is especially true in criminal law regarding the rights of criminal defendants. Protecting the rights of criminal defendants ensures that decisions of guilt are founded on credible evidence, thereby avoiding mistakes. Protections for criminal defendants also ensure that the public can have confidence that the legal system functions with fairness and integrity.

The Constitution provides the minimum level of protection for criminal defendants. As this chapter will discuss, the constitutional rights for criminal defendants include the presumption of innocence (Article 25); the principle of legality and prohibitions on unlawful detention (Article 27); the prohibition on torture (Articles 29 & 30); the right to an attorney (Article 31); and the open and public nature of trials (Article 128). The Interim Criminal Code for Courts (ICCC) and the International Covenant on Civil and Political Rights (ICCPR) grant some additional rights to criminal defendants.

Part II begins with the background principles of constitutional protections for criminal defendants. Part III discusses the limits on punishment; that is, what the government *cannot* do to punish convicted criminals. Part IV explains the constitutional rights held by criminal defendants who face trial. Finally, Part V looks into the difference between what is written in the constitution and what actually happens in practice.

Discussion Questions

Think about what makes criminal defendants a particularly vulnerable group of citizens. What are prison conditions like? Do convicted criminals have the *exact* same rights as everyone else in society once they are released? Why might it be important to ensure that the government does not overstep its constitutional obligations to criminal defendants?

II. FOUNDATIONS OF DEFENDANTS' RIGHTS

A. Liberty

The end of the law is, not to abolish or restrain, but to preserve and enlarge freedom. . . . For liberty is to be free from restraint and violence from others; which cannot be where there is no law: and is not, as we are told, a liberty for every man to do what he wishes. – John Locke

If the very purpose of law is to protect liberty, the discussion of constitutional rights of criminal defendants must begin with a discussion of liberty. The Constitution safeguards each citizen's right to liberty in Article 24. Liberty means "freedom" or "the power to do as one pleases."¹ Each citizen exercises this liberty through his daily choices, including what food he chooses to eat, where he works, and whom he considers a friend. Liberty also means "freedom from physical restraint" and "freedom from arbitrary or despotic control."² This freedom from restraint is particularly relevant in the context of defendants' rights. Article 24 of the Constitution safeguards each person's "liberty":

Constitution of Afghanistan

Article 24

- (1) Liberty is the natural right of human beings. This right has no limits unless affecting others freedoms as well as the public interest, which shall be regulated by law.
- (2) Liberty and human dignity are inviolable.
- (3) The state shall respect and protect liberty as well as human dignity.

What does it mean for the Constitution to command: "The state shall respect and protect liberty as well as human dignity"? As the Chapter 7 on Human Rights explains, the government has a duty to not torture or otherwise offend the dignity of Afghan citizens (as well as foreigners and noncitizens). This provision could also be read to go a step further. Since liberty is a "natural right of human beings" and is "inviolable," the state can only put people in prison, taking away their liberty, in a limited set of circumstances. The Constitution limits *why* and *how* the government may take away someone's liberty in Article 24(1). The *why* is only if it "affect[s] others freedoms as well as the public interest" and the *how* is "regulated by law."

What crimes or other behavior justify taking away someone's freedom? The Constitution does not specify because this decision is left to the people. In a democratic society, the people decide through their representatives what should be considered a crime and what the range of punishment for that crime should be.

Discussion Questions

¹ Merriam-Webster's Dictionary, <http://www.merriam-webster.com/dictionary/liberty>.

² Merriam-Webster's Dictionary, <http://www.merriam-webster.com/dictionary/liberty>.

1. Of the following, which do you think should be crimes punishable with detention and how long of a sentence would you prescribe?
 - Throwing trash into the street?
 - Driving at 160 kilometers per hour?
 - Insulting someone?
 - Hurting someone?
 - Running away from home?
 - Skateboarding through a crowd of people?
 - Stealing a loaf of bread?
2. Is there any crime currently punishable with detention in Afghanistan that you think should not be a crime? Is there any crime for which the punishment is too harsh?

While discussed in more detail in Part III.3 below, the right to liberty also protects the right to not have one's house searched without warning or have one's property taken by the government because it is "evidence" of a crime. Other laws, such as the law governing police and the ICCC, regulate in substantial detail what the police and prosecutors can and cannot do when investigating a crime.³

B. The Presumption of Innocence

In the same manner that liberty is the "natural right of human beings," the Constitution also proclaims: "innocence is the original state." This is also known as the *presumption of innocence*. This means that no one should be treated as guilty until guilt is proven at trial. Hence, the constitution draws a distinction between a *suspect* (someone accused of a crime, but not yet convicted by a court) and a *convict* (someone proven guilty of a crime by a court).

Constitution of Afghanistan

Article 25

- (1) Innocence is the original state.
- (2) The accused shall be innocent until proven guilty by the order of an authoritative court.

The presumption of innocence serves two functions. First, it is a "rule of proof" that puts the burden of proving the defendant's guilt on the prosecution rather than making the criminal defendant prove his own innocence. Second, it is a shield from punishment before conviction. If the defendant is innocent until proven guilty, he cannot be punished before all the evidence has been presented and a judge issues a criminal verdict.⁴

The first function of the presumption of innocence mandates that the government must bear the *burden of proof* at trial. If the prosecutor does not convince the judge that the person is guilty, the

³ For example, Article 38(3) of the ICCC mandates that the investigation of a crime should be carried out in the presence of the suspect and his lawyer.

⁴ Francois Quintard-Morenas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 American Journal of Comparative Law 107, 149 (2010).

judge must let him go free. Ultimately if the evidence is equal, the tie goes to the defendant. Additionally, police, prosecutors, and judges must treat a suspect as innocent and refrain from asserting his guilt until after trial.⁵

Example 1: Harassment and the Presumption of Innocence

The chief of police has always hated Ahmed Kaseem. They grew up in the same neighborhood and fought at school when they were young. To harass Mr. Kaseem, the chief of police decides to arrest him and *falsely* charge him with burglarizing the mayor's home, even though Mr. Kaseem has never committed a crime. Mr. Kaseem goes to trial.

Without the presumption of innocence, Mr. Kaseem might have to prove his own innocence. Of course, since he did not burglarize the house, he could get an alibi from a friend attesting to where he was on the night and time in question. But the burden would be on him to gather the evidence and convince the judge that he was telling the truth.

The presumption of innocence, however, requires that the chief of police and the prosecutor prove Mr. Kaseem actually committed the burglary. Therefore, the prosecution would have to gather evidence. Since Mr. Kaseem did not actually rob the house, this might be difficult. Of course, they could lie, but the judge would have to let Mr. Kaseem go free unless they could gather real evidence and witnesses that would prove Mr. Kaseem committed the robbery.

Thus, the presumption of innocence makes it more difficult for the prosecution and police to bring criminal charges to harass an individual, since the burden lies on the prosecution and police to prove the case.

The second function of the presumption of innocence prevents the government from punishing the defendant until after he has been convicted. He cannot be forced to pay a fine or serve jail time or receive any physical punishment until after the trial court finds him guilty. Likewise, the media should not report that the defendant is guilty until after he is convicted. The media could *speculate* that the defendant is guilty, but the presumption of innocence establishes the legal fact that he is innocent until *after* the completion of trial. Of course, the bad publicity may leave a lasting mark on the individual's reputation even if he is proclaimed innocent at trial.

Discussion Question

From your experience, is the principle of "innocent until proven guilty" respected in practice? For example, how do the newspapers treat someone accused of a crime? (Remember, the Constitution does not restrain the press, only the government. Newspapers have no legal obligation to abide by Article 25.)

⁵ Alexandra H. Guhr, Ramin Moschtaghi, Mandana Knust Rassekh Afshar, Max Planck Manual on Fair Trial Standards in the Afghan Constitution, the Afghan Interim Criminal Code for Courts, the Afghan Penal Code and other Afghan Laws as well as in the International Covenant on Civil and Political Rights 19 (2009).

Part V, below, further discusses the differences between constitutional principles and what actually happens in practice.

The government often detains criminal defendants before trial to keep them from fleeing. The government also needs to detain suspects during the investigative phase of trial to ask them questions. In certain circumstances the government detains people for the safety of themselves and others. Are these detentions punishment?

Although this form of detention is not intended to punish, it is not functionally different from serving a sentence in jail – the government has still restricted the liberty of the criminal defendant. The Constitution does not explicitly state when such detention is permissible, but it states that it must be regulated by law. Consider the following example:

Example 2: Detention and the Presumption of Innocence⁶

The Counter Narcotics Law (CNL) establishes a Central Counter Narcotics Court in Kabul for the whole of Afghanistan.⁷ A suspect arrested outside of the Province of Kabul and carrying a quantity of narcotic substances that violates the CNL must be transferred to the Primary Saranwal of the district where the arrest took place within 72 hours. The Counter Narcotic Police do not need to begin investigation before the end of that 72-hour period, but they must transport the suspect to Kabul together with the evidence within 15 days of the arrest. If the authorities need more time to investigate, they must inform the Counter Narcotic Tribunal within that 15-day period, or release the suspect.

From one perspective, this law authorizes detention of the suspect for up to 15 days based only on suspicion and without the approval of a judge. Depending on whether you think 15 days is an excessive or reasonable period of time to detain a suspect, this could be considered a violation of the constitutional presumption of innocence. If you think 15 days is too long to detain someone without the approval of a judge, you can argue it is punishment and therefore a violation of Article 25. If you think the 15-day time period is a reasonable amount of time, given the exigencies of locating and verifying evidence, this would not be punishment and would not violate Article 25. Which perspective would you adopt in light of the presumption of innocence?

Article 4 of the Interim Criminal Code for Courts specifies, by law, what pretrial detention is permissible:

Interim Criminal Code for Courts

Article 4

⁶ Alexandra H. Guhr, Ramin Moschtaghi, Mandana Knust Rassekh Afshar, Max Planck Manual on Fair Trial Standards in the Afghan Constitution, the Afghan Interim Criminal Code for Courts, the Afghan Penal Code and other Afghan Laws as well as in the International Covenant on Civil and Political Rights 34-35 (2009).

⁷ Counter Narcotics Law Article 37(9).

From the moment of the introduction of the penal action until when the criminal responsibility has been assessed by a final decision the person is presumed innocent. Therefore decisions involving deprivations or limitations of human rights must be strictly confined to the need of collecting evidence and establishing the truth.

Is this law sufficiently limited in scope (for the collection of evidence and establishing truth) to comply with the presumption of innocence, or do you think even these deprivations of liberty violate the Constitution? Should there be a time limit as well?

Compare Article 4 of the ICCC to the parallel constitutional provision in Pakistan:

Constitution of Pakistan

Article 10 [Preventative Detention]

(4) No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defense of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services, and no such law shall authorize the detention of a person for a period exceeding [three months] unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of [three months], unless the appropriate Review Board has reviewed his case and reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention. When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, [within fifteen days] from such detention, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order: Provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose. The authority making the order shall furnish to the appropriate Review Board all documents relevant to the case unless a certificate, signed by a Secretary to the Government concerned, to the effect that it is not in the public interest to furnish any documents, is produced.

(7) Within a period of twenty-four months commencing on the day of his first detention in pursuance of an order made under a law providing for preventive detention, no person shall be detained in pursuance of any such order for more than a total period of eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case . . .

Pakistan's Constitution limits the exact amount of time and the exact reasons a suspect may be detained under "preventative detention" before seeing a judge. The rigidity of this provision has benefits and drawbacks. The benefits are (1) clarity – defendants know exactly when they will see a judge and what rights they have; (2) consistency – the government should not be able to treat people differently when the limits are so narrowly circumscribed. On the other hand, the drawback of such a rigid provision is that it does not account for the particular exigencies of a situation. What if the government needs more time? Must they release the detainee? The

Afghanistan Constitution is just the opposite. It does not give exact time periods and thus can be stretched to meet the government's needs, but it does not provide the same clear outline of criminal defendants' rights.

Author Hossein Gholami has suggested that the constitutional presumption of innocence requires the government to comply with the following requirements:

- the investigation office is obliged to collect and provide evidence against the accused (barring cases where the law denies him/her such an obligation);
- it is prohibited to force an accused to prove his/her innocence or present testimony or make a confession against himself/herself;
- sufficient time and opportunity should be given to the accused to contest the accusation;
- appropriate legislation and regulations should be drawn up to ensure a fair trial;
- any doubt should be exercised in favour of the accused;
- the temporary arrest of the accused can be ordered, but only in exceptional circumstances;
- the judicial authority should intervene in cases where the accused is deprived of his/her liberty at any stage of the prosecution, particularly at the preliminary investigation stage;
- precise and unequivocal regulations should be drawn up supporting the right of the accused to complain against the issuance of a temporary arrest order and to redress such a complaint;
- the accused should be immediately released following the court's decision finding him/her not guilty;
- the state should compensate anyone arrested without sufficient justification.⁸

Discussion Question

Do you agree that the constitutional presumption of innocence requires each of the requirements mentioned above?

C. Due Process of Law

Due process of law represents one of the most fundamental *structural* rights that protect criminal defendants. Due process guarantees that each individual has a right to the same procedure – the same action taken by the government – before they are punished. Afghanistan's criminal procedure system is divided into four stages: (1) crime detection, whereby the persons report crime or the police detect criminal activity and make an arrest; (2) investigation, whereby the police or detectives investigate those responsible for the crime and collect evidence; (3) trial, whereby a neutral judge determines responsibility for the crime after evaluating all the evidence; (4) court decision and its execution, whereby the criminal defendant receives his or her punishment.⁹ Criminal procedure law, such as the ICC, regulates each of the four stages that the police, prosecutors, judges, and prison officials must follow. When the police, prosecutor,

⁸ Hossein Gholami, *Basics of Afghan Law and Criminal Justice*, pg. 157 (2006).

⁹ Hossein Gholami, *Basics of Afghan Law and Criminal Justice*, pg. 163 (2006).

judge, or prison official does not follow the criminal procedure law or denied the defendant one of the four stages, we say that individual has violated the criminal defendants' *right to due process*.

Due process of law applies to everyone – making everyone equal before the law. Every criminal defendant, no matter how clearly guilty or how horrible a crime they committed, has the same procedural rights. Everyone has the right to be investigated free from corruption, the right to a trial and a lawyer, and the right to be presumed innocent by a judge who evaluates all the evidence. The Constitution intends for these rules to be absolute, and not discretionary. Any discretion as to the right to due process places too much power in the hands of judges and prosecutors to decide who can have a trial and what procedural rights they can have. The absolute prohibition “No one shall be pursued, arrested, or detained without due process of law”¹⁰ and the bar on “punishment without the decision of an authoritative court”¹¹ treats everyone equally and therefore protects everyone from the danger of arbitrary or corrupt decisions of police and prosecutors.

Constitution of Afghanistan

Article 27

...

(2) No one shall be pursued, arrested, or detained without due process of law.

(3) No one shall be punished without the decision of an authoritative court taken in accordance with the provisions of the law, promulgated prior to commitment of the offense.

When the government denies a criminal defendant his right to due process (for example, his right to have a lawyer) the government has violated the law, specifically Article 27 of the Constitution. In practice, the government frequently violates criminal defendants' rights to due process, however, this does not change the fact that it is illegal to do so. Even if the violation brings about the proper conviction of a guilty criminal, by law it must be declared null and void because the government cannot violate the Constitution with impunity.¹² The criminal procedure laws provide for specific remedies when laws are not followed. For example, Article 7 of the ICCC provides that “evidence which has been collected without respect of the legal requirements indicated in the law is considered invalid and the court cannot base its judgment on it.” This rule is also known as the *exclusionary rule*, whereby tainted evidence is excluded from proceedings. If the exclusionary rule is applied, that particular criminal defendant may benefit from having evidence excluded from his or her trial. The goal of this rule, however, is larger than the particular case. The goal of the exclusionary rule is to deter police from acting illegally when collecting evidence.

One manner by which the Constitution seeks to structurally secure due process of law is by separating the prosecutor's office from the police and from other branches of government. Not only do the prosecutors have a duty to be faithful to their role in protecting society and prosecuting those crimes against Afghan law, they are entrusted with independence from the

¹⁰ Constitution of Afghanistan, Article 27(2).

¹¹ Constitution of Afghanistan, Article 27(3).

¹² Hossein Gholami, *Basics of Afghan Law and Criminal Justice*, pg. 155 (2006).

Executive to prevent the President and other officials from influencing the prosecution of crime. The Constitution provides:

Constitution of Afghanistan

Article 134

(1) Discovery of crimes shall be the duty of police, and investigation and filing the case against the accused in the court shall be the responsibility of the Attorney's Office, in accordance with the provisions of the law. The Attorney's Office shall be part of the Executive organ and shall be independent in its performance.

(2) The organization, authority as well as method of work of the Attorney's Office shall be regulated by law.

(3) Special law shall regulate discovery and investigation of crimes of duty by the armed forces, police and officials of national security.

These constitutional provisions govern the Attorney's Office, keeping it separate and independent from the other branches of government. The Constitution also separates the prosecutor's office from the police to create a structural incentive for the prosecutor to oversee that the police work honestly. Even now, the police and prosecutors surely face temptations to be corrupt and collude to convict certain persons. If the offices were joined, the incentives to collaborate and tamper with evidence might be even stronger.

Previous chapters discussed the role that independence plays in preserving individual rights and the importance of separation of powers to avoid corruption and influence. The same is true for the prosecutor's office. Separated from the judiciary, and having a distinct role from the police, the design of the government intends for prosecutorial decisions to be made independently on the facts, not based on corruption. This independence is important because the prosecutor's office has *discretion* as to whether or not it will prosecute, investigate, or even initiate a case.¹³ Many governments give prosecutor's discretion to use their best judgments as to which cases are meritorious and which are frivolous. If a prosecutor finds exonerating circumstances, he or she can drop the case. However, such discretion also opens the door to corruption because prosecutors can decide to prosecute or drop a case for illegitimate reasons rather than legitimate ones.

Exercise in Constitutional Argument

What follows are the arguments for and against prosecutorial discretion. Prosecutorial discretion describes a system that allows prosecutors to choose which cases and which penalties to pursue.

For Prosecutorial Discretion: Proponents of prosecutorial discretion argue that it leads to a more efficient allocation of prosecutors' resources, because they only pursue those meritorious cases that are supported by substantial evidence.

¹³ Hossein Gholami, *Basics of Afghan Law and Criminal Justice*, pg. 168 (2006).

Against Prosecutorial Discretion: Critics of prosecutorial discretion argue that discretion leads to discrimination and corruption at the hands of prosecutors.

Using this chapter, make an argument either for or against prosecutorial discretion as enhancing or detracting from the rights of criminal defendants. For example, is “due process of law” furthered by giving prosecutors discretion over which cases they will pursue? Arguments for might say that prosecutorial discretion enhances due process of law because the results of police misconduct can be checked by prosecutors, releasing innocent persons who should have never been arrested in the first place. Arguments against might say that prosecutorial discretion reduces due process of law because prosecutors use factors such as bribes and family connections and even ethnicity to decide who to prosecute.

Share your argument with a partner who has chosen to argue the other side. Can you convince him or her?

D. No Punishment without Law

The legal concept, “no punishment without law,” is found in almost every modern constitution. That is, no one can be punished for an action unless a law specifically bars that action when it was committed. This concept is also sometimes known as “ex-post facto laws” or retroactive laws if a law is passed and the action is made illegal after it has been committed. Article 27(1) of the Constitution bars such laws.

Constitution of Afghanistan

Article 27

(1) No deed shall be considered a crime unless ruled by a law promulgated prior to commitment of the offense.

...

For example, someone may commit an act today that is not illegal or prescribed by any law. However, if tomorrow, the legislature decides that this action should be made illegal and passes a law making the action a crime, the individual who committed the action yesterday cannot be punished for committing that crime. It was not an illegal action when he or she did it. Similarly, a judge cannot punish someone for a crime not prohibited by law. The judge cannot make new laws; only the legislature can make new laws (if the judge made laws it would violate separation of powers). Finally, prosecutors and the police cannot use their power of investigation to investigate or seek punishment for actions that are not crimes under Afghanistan’s laws. To investigate an action that is not a criminal offense would also violate the principle of “no punishment without law.”

Remember that Article 130(2) of the Constitution states: “When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts’ decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible manner.” Now, read the following provision from the Afghan Penal Code:

Afghan Penal Code

Article 1

- (1) This law regulates the “Ta’zeeri” crime and penalties.
- (2) Those committing crimes of “Hudud”, “Qisas” and “Diyat” shall be punished in accordance with the provisions of Islamic religious law (the Hanafi religious jurisprudence).

In Afghanistan, Islamic Law serves as a background principle of law. But does this mean that a judge may punish someone for a violation of Islamic Law that is not also a violation of Afghan statutory law? In practice, the answer seems to be yes. But such practice seems to conflict with Article 27(3) of the Constitution which bars punishment for crimes not codified in law. The Penal Code only codifies the ta’zir crimes, it leaves hudud and qisas crimes to religious law.¹⁴ Is there an argument from the Constitution that all Shari’a should be considered Afghan law as well? How would this apply to non-Muslims?

Example 3: Crimes That Are Not Crimes

In practice, instances of violating the principle of “no punishment without law” do take place. For example, reports have come to the attention of the Legal Systems Observation Project (LSOP) regarding runaway girls and women being prosecuted for leaving home despite the fact that such family or social issues are not criminal offenses.¹⁵

The same is true for trial and punishment for Shari’a crimes, such as apostasy. In 2007 the journalist Ahamd Gaws Zalmay published a translation of the Koran into Dari. Religious leaders and scholars condemned the publication as blasphemous and sought to have him tried in criminal court. The prosecutor charged him with blasphemy and asked for the death penalty. The primary court, affirmed by the appeals court, sentenced him to 20 years.¹⁶

1. Discuss the examples above in a small group. What is the relationship between these examples and the constitutional law, which protects individuals from being punished without due process and from being punished for an action that is not a statutory crime?
2. If these actions cannot constitutionally be punished in the courts of Afghanistan, can they be punished elsewhere? Does the informal system of justice operate in accordance with the principle of “no punishment without law”?

One of the driving reasons behind the bar on ex-post facto laws and retroactive laws is the concept of notice. Notice means having prior knowledge that certain actions are illegal. It would

¹⁴ Alexandra H. Guhr, Ramin Moschtaghi, Mandana Knust Rassekh Afshar, Max Planck Manual on Fair Trial Standards in the Afghan Constitution, the Afghan Interim Criminal Code for Courts, the Afghan Penal Code and other Afghan Laws as well as in the International Covenant on Civil and Political Rights 115 (2009).

¹⁵ Tilmann Roder, *Human Rights Standards in Afghan Courtrooms: The Theory and Reality of the Right to a Fair Trial*, Islam and Human Rights 338-39 (2010).

¹⁶ Tilmann Roder, *Human Rights Standards in Afghan Courtrooms: The Theory and Reality of the Right to a Fair Trial*, Islam and Human Rights 340 (2010).

be unfair to punish someone for a crime that they never knew was illegal. Since most Muslims (and therefore most people in Afghanistan) know not to commit hudud and qisas crimes, do they have sufficient notice?

Further Reading

For more information on the intersection of due process rights and punishment for crimes against Islam, see *The Case of an Afghan Apostate – The Right to a Fair Trial Between Islamic Law and Human Rights in the Afghan Constitution*, Mandana Knust Rassekh Afghar, Max Planck Institution for Comparative Public Law and International Law (2006).

The Constitution of Afghanistan also bars punishing someone for a crime that someone else committed and incriminating others during investigation, arrest, and detention of an accused.¹⁷ These provisions were likely designed to prevent the police and prosecutors from threatening to prosecute or punish a suspect's family in order to coerce a confession from him or her. Because police may be tempted to use such coercive tactics, the constitutional drafters simply prohibited them as unconstitutional.

Constitution of Afghanistan

Article 26

- (1) Crime is a personal act.
- (2) Investigation, arrest and detention of an accused as well as penalty execution shall not incriminate another person.

Simple as it seems, in practice, this may prove more complicated. What happens in conspiracy situations when a group of people commits a joint crime? Take, for example, a drug distribution ring. If one person makes the drugs and then gives them to another person to transport and then to a third person to sell, how should they be held liable? Are they all guilty of the same crime, or are there multiple crimes and each is guilty for one piece of the larger production? Each person may be prosecuted for what they did and may be prosecuted as an accomplice if they assisted another person in committing a crime.

III. PROHIBITIONS ON PUNISHMENT

Certain punishments and means of interrogation are absolutely prohibited by the Constitution and international law. Article 28 prevents extradition of Afghan citizens where not authorized by international law. This protects Afghan citizens from punishment abroad where the safeguards of the international agreements and the Constitution might not apply.

Constitution of Afghanistan

Article 28

¹⁷ Constitution of Afghanistan, Article 26.

No citizen of Afghanistan accused of a crime shall be extradited to a foreign state without reciprocal arrangements as well as international treaties to which Afghanistan has joined. No Afghan shall be deprived of citizenship or sentenced to domestic or foreign exile.

Article 28 also prohibits the government from denying anyone citizenship or exiling anyone for a crime they have committed, no matter how horrible. Statelessness is a particularly harsh punishment, denying the individual all rights granted by the Constitution and the government. Therefore, the Constitution places an absolute ban on this form of punishment.

Constitution of Afghanistan

Article 29

- (1) Persecution of human beings shall be forbidden.
- (2) No one shall be allowed to or order torture, even for discovering the truth from another individual who is under investigation, arrest, detention or has been convicted to be punished. Punishment contrary to human dignity shall be prohibited.

Other prohibitions in the Constitution are not as clear. Article 29(2) prohibits “torture,” but what does that mean? The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁸

Based on this definition, does torture necessarily have to include physical violence? What about psychological abuse, which includes sensory deprivation, hallucinogenic drugs, and some forms of extreme emotional distress? According to the Convention Against Torture, do these meet the standard for torture? What about under the Constitution of Afghanistan? Article 29(2) also prohibits “punishment contrary to human dignity.” Does including this provision expand the prohibited techniques beyond torture? If so, why does the Article also ban torture? Does Article 29 prohibit public humiliation?

A. Prohibition on Unlawful Searches

The Constitution prohibits “trespassing” even when committed by the state. The state, however, (which in this context usually means the police, but could also mean military or other

¹⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by Afghanistan on February 4, 1985 and entered into force on June 26, 1987.

government officials) may later seek court approval to justify a search of someone's private home.

Constitution of Afghanistan

Article 38

- (1) Personal residences shall be immune from trespassing.
- (2) No one, including the state, shall have the right to enter a personal residence or search it without the owner's permission or by order of an authoritative court, except in situations and methods delineated by law.
- (3) In case of an evident crime, the responsible official shall enter or search a personal residence without prior court order. The aforementioned official, shall, after entrance or completion of search, obtain a court order within the time limit set by law.

Recall the discussion of “no punishment without law” (ex-post facto laws) in section II.4 above. If the police can obtain permission from the court to search someone's home after they have already searched it, is this a violation of the principle of “no punishment without law”? Article 38 gives the police power to search before a judge approves their actions, though only in situations where a crime is “evident”. Do you think this is a sufficient limitation on the ability of police to conduct searches without judicial permission?

In practice, searches are often conducted illegally. This is especially true outside the context of the home. The police do not need judicial authority to search a person's car if they think they have committed a crime, such as possession of drugs or weapons.¹⁹ Why is this? Re-read Article 38. The Constitution only protects residences, not cars or public space.

B. Prohibition on Coerced Confessions

Article 29 also specifically states the government cannot torture “even with the intention of discovering the truth.” The drafters of the Constitution clearly intended that confessions be free from torture and other forms of compulsion.

Constitution of Afghanistan

Article 30

- (1) A statement, confession or testimony obtained from an accused or of another individual by means of compulsion shall be invalid.
- (2) Confession to a crime is a voluntary admission before an authorized court by an accused in a sound state of mind.

Article 30 complements the prohibition on torture by making all “statement[s], confession[s] or testimony” obtained through coercive techniques “invalid.”²⁰ This eliminates the government's incentive to use torture because they cannot prosecute anyone based on the evidence obtained.

¹⁹ Hossein Gholami, *Basics of Afghan Law and Criminal Justice*, pg. 272-83 (2006).

²⁰ This provision is similar to Article 38 of the Constitution of Iran:

The provision further defines a “confession” as a “voluntary admission before an authorized court by an accused in a sound state of mind.”²¹ This definition can be broken into four component parts: (1) voluntary admission; (2) before an authorized court; (3) by an accused; (4) in a sound state of mind. First, a confession must be a “voluntary admission,” that is not coerced by torture, threats, or a bribe. Second, a confession must be “before an authorized court,” this is, in a courtroom as opposed to in a police station or on the street. If a defendant confesses at the police station, he or she must restate that confession during trial. Third, “by an accused,” requires that no one but the defendant himself may confess to the crime. An accomplice can *implicate* another person in a crime, but cannot tell the court that the defendant confessed to him. When another person tells the court what he heard the defendant say, we call that *hearsay*. Hearsay is less reliable evidence because the judge cannot evaluate the credibility of the original speaker. Hearsay cannot form the basis of a confession because Article 30(2) requires the defendant himself to state the confession. Fourth and finally, the defendant must be in “a sound state of mind”; that is, he must not be insane or mentally incompetent, nor may he be under the influence mind-altering drugs.

Discussion Questions

1. Defendant Khalil is convicted of drug smuggling and is awaiting trial in the Counter Narcotics Tribunal in Kabul. The prison guards learn that he smokes cigarettes and has not been able to smoke since he entered prison. Can the police and prosecutor exchange cigarettes for testimony from the defendant regarding the other people involved in the drug smuggling ring?
2. Defendant Abdul has been accused of murder. While they police are holding him at the stationhouse, they ask him if he has anything to tell them and he confesses to the crime. Is this confession valid under the Constitution?

C. The Death Penalty

Constitution of Afghanistan

Article 129

(2) All specific decisions of the courts are enforceable, except for capital punishment, which is conditional upon approval of the President.

There is no international consensus about whether the death penalty is a legitimate form of punishment. Although most countries do not apply the death penalty, some do (including the United States and China). Nevertheless, the international community does agree that the death

All forms of torture for the purpose of extracting confession or acquiring information are forbidden. Compulsion of individuals to testify, confess, or take an oath is not permissible; and any testimony, confession, or oath obtained under duress is devoid of value and credence.

Violation of this article is liable to punishment in accordance with the law.

²¹ Afghanistan Constitution, Article 30(2).

penalty should not be imposed on juveniles, pregnant women, or mentally incompetent individuals. (ICCPR Art. 6). Afghanistan has the death penalty for serious crimes. As the death penalty is irreversible, it remains that much more important that criminal defendants' rights are protected at all stages of the criminal justice process, including throughout the trial leading up to the decision to impose the death penalty.

Certain forms of the death penalty might violate the prohibition on torture either under Afghan law or international law. Death by stoning, for example, has been widely criticized as a violation of international prohibitions on torture. Since Article 129(2) gives the President authority to approve or disapprove of death sentences, he therefore is in a position to withhold his approval in all those cases where the means of execution violates the prohibition of torture.²²

IV. POSITIVE RIGHTS GRANTED TO CRIMINAL DEFENDANTS

The Constitution of Afghanistan preserves certain procedural guarantees. As discussed above, due process requires that everyone be treated in accordance with these procedures.

Constitution of Afghanistan

Article 31

Upon arrest, or to prove truth, every individual can appoint a defense attorney. Immediately upon arrest, the accused shall have the right to be informed of the nature of the accusation, and appear before the court within the time limit specified by law. In criminal cases, the state shall appoint a defense attorney for the indigent. Confidentiality of conversations, correspondence, and communications between the accused and their attorney shall be secure from any kind of violation. The duties and powers of defense attorneys shall be regulated by law.

Article 31 guarantees several of these rights, including (1) the right to counsel ("every individual can appoint a defense attorney") and to have conversations with that attorney kept confidential; (2) the right to a prompt hearing ("right to be informed of the nature of the accusation, and appear before the court within the time limit specified by law").

A. The Right to Counsel

Every person has the right to an appointed lawyer. Ideally, this means that everyone has a right to an advocate who understands the law and the facts and presents the best case on behalf of the criminal defendant. But in a nation where there are too few defense lawyers and very little public money to pay them, this may not always be the case. Nonetheless, the Constitution and ICCC give criminal defendants who otherwise cannot afford to hire a private lawyer a free lawyer, paid for by the state.²³ The right to counsel includes the right to have counsel present whenever being questioned by police and at every judicial hearing.²⁴ It also requires that the defense lawyer be

²² Alexandra H. Guhr, Ramin Moshtaghi, Mandana Knust Rassek Afshar, Max Planck Manual on Fair Trial Standards in the Afghan Constitution, the Afghan Interim Criminal Code for Courts, the Afghan Penal Code and other Afghan Laws as well as in the International Covenant on Civil and Political Rights 118 (2009).

²³ ICCC Article 19.

²⁴ ICCC Article 38.

given access to legal documents and witnesses that might be useful for the case.²⁵ The lawyer must be permitted to present a full defense, to cross-examine witnesses and to call witnesses.²⁶

Afghan law allows for a trial to be held in absentia if the criminal defendant cannot be found. If the criminal defendant is not present for his trial, his lawyer must be there on his behalf. To allow for a trial without anyone representing the defendant's interests would be unfair to the defendant and contrary to the presumption of innocence. Thus, the preferred method of trial is with the defendant present. The Interim Criminal Code for Courts gives the criminal defendant a right to be present during his trial – and further provides that if he cannot be found, the prosecutor must leave notice at his last known address.²⁷

The right to counsel benefits all of society. If criminal defendants have good legal representation, society can be assured that only those guilty are actually being punished for crimes. Not only does this protect the innocent from undue punishment, it encourages the police and prosecutors to be more accurate when they investigate crimes. The police and prosecutors know that they will face a competent and well-prepared defense attorney, so they must be thorough and complete in their investigation and preparation of the case. Also, if both the prosecution and the defense work hard to present the facts most favorable to their case, the judge can decide the case based on *all* the facts. A well-prepared defense attorney will find the weaknesses in the prosecution's case and ensure that only those truly guilty defendants suffer punishment.

B. Right to a Prompt Trial

To prevent the abuse of prolonged detention without trial, Article 31 guarantees a criminal defendant the right to be informed of the charges against him and the right to be presented to a judge “within the time limit specified by law.” The Interim Criminal Code for Courts specifies that this time limit is 15 days.

Interim Criminal Code for Courts

Article 36

When the arrest performed by the Judicial Police is sanctioned or when the arrest has been ordered by the Saranwal and it remains in force, the arrested person shall be released if the Saranwal has not presented the indictment to the Court within fifteen days from the moment of the arrest except when the Court, at the timely request of the Saranwal, has authorised the extension of the term for not more than fifteen additional days.

Article 42

The Court immediately after having received the act of indictment orders the notification of the deed indicating the day and hour fixed for the commencement of the trial.

The Constitution does not outline a remedy if the government fails to comply with these mandates, but according to the Interim Criminal Code for Courts, the arrested person would have

²⁵ ICCC Article 43.

²⁶ ICCC Article 53.

²⁷ ICCC Articles 17, 41, and 53(2).

to be released if he was not told of the charges against him or presented to a judge in a reasonable time. In practice, though, nothing guarantees that this happens. One study found that detainees are often held for several months before being brought in front of a judge for a hearing, even if the crime is small.²⁸

Still, the right to a prompt trial must be weighed against the government's need for time to investigate crime and the criminal defendant's need to gather witnesses and prepare a proper defense. The exact amount of time necessary will vary with the case. The "reasonableness" of any time delay shall be gauged based on the complexity of the case, the amount of evidence available, the cooperation of the criminal defendant and other witnesses, the seriousness of the crime and any other extenuating circumstances.

Habeas Corpus

In some societies prolonged detention can be solved through the procedural mechanism of *habeas corpus*. This is a Latin phrase that means "release the body." Legally, it means that a criminal who is detained may challenge the lawfulness of his or her detention and the government must justify the detention. If the criminal defendant can convince the court that detention has violated the 15-day rule or another law, the government would have to release him or her. However, the Afghan Constitution does not include the right to this procedural safeguard, so no process protects the rights of unlawfully detained individuals.

C. The Right to a Public Hearing

The Constitution of Afghanistan guarantees an open trial so the public can serve as an additional check on the government. The public can watch trials for evidence of corruption, unfairness, and infidelity to the Constitution. The media can also serve as an important watchdog to make sure that trials are fair by reporting to the public when they are not. Although judges are not elected and therefore the public cannot vote them out of office, public pressure can still reach judges through the effect of bad publicity on their reputation and respect for them in the community.

Constitution of Afghanistan

Article 128

- (1) In the courts of Afghanistan, trials are open and everyone is entitled to attend trials within the bounds of law.
- (2) The court, in situations which are stated in the law or in situations in which the secrecy of the trial is deemed necessary, can conduct the trial behind closed doors, but the announcement of the court decision should be open in all instances.

The Constitution does allow for trials to be closed in certain situations, as Article 128(2) provides. The constitution of Iran includes a similar provision:

²⁸ *Afghanistan: Re-Establishing the Rule of Law*, 14 August 2003, AI Index: AA 11/021/2003, p. 25 (cited in Alexandra H. Guhr, Ramin Moschtaghi, Mandana Knust Rassekh Afshar, Max Planck Manual on Fair Trial Standards in the Afghan Constitution, the Afghan Interim Criminal Code for Courts, the Afghan Penal Code and other Afghan Laws as well as in the International Covenant on Civil and Political Rights 75 (2009)).

Constitution of Iran

Article 165

Trials are to be held openly and members of the public may attend without any restriction unless the court determines that an open trial would be detrimental to public morality or discipline, or if in case of private disputes, both the parties request not to hold open hearing.

How are these two provisions different and which is more protective of public trials?

- In Afghanistan, trials may be closed when “secrecy is deemed necessary.”
- In Iran, trials may only be closed when (1) “detrimental to public morality or discipline” or (2) two private parties request it.

Who determines when “secrecy is deemed necessary” in Afghanistan, the judge or the parties?

Other laws provide more guidance: Article 52(2) of the Interim Criminal Code for Courts grants a “public order” exception, that is when allowing the public into the courtroom would prevent the efficient administration of justice. Another exception would permit a closed trial when necessary for “national security” interests. This exception would pertain to the trial of terrorists or, potentially, government officials with secret information. Finally, the “morality” exception allows for closed trials when minors (Art. 33 of the Juvenile Code) are concerned or if the trial includes sexual offenses.²⁹ Do you think this flexibility permits the judge to close a courtroom when necessary, regardless of the reason, or is this discretion too broad and subject to abuse?

D. The Right to Interpreters and Translation

The Constitution guarantees that an accused person has the right to full information of the charges against him or her. Of course, Dari and Pashto will most often be spoken in court, but what if someone speaks only Uzbek or Turkmen and they face trial in Kabul? This information and the entire trial must be translated into a language he or she speaks so that he can fully comprehend the case and defend him or herself.

Constitution of Afghanistan

Article 135

If parties involved in a case do not know the language in which the trial is conducted, they have the right to understand the material and documents related to the case through an interpreter and the right to speak in their mother language in the court.

E. The Right to a Reasoned Decision

²⁹ Alexandra H. Guhr, Ramin Moschtaghi, Mandana Knust Rassekh Afshar, Max Planck Manual on Fair Trial Standards in the Afghan Constitution, the Afghan Interim Criminal Code for Courts, the Afghan Penal Code and other Afghan Laws as well as in the International Covenant on Civil and Political Rights 81 (2009).

The presumption of innocence sets the burden of proof on the prosecution to convince the judge that the criminal defendant is guilty of the crime charged. If the judge is not convinced, he must let the criminal defendant go. If he is convinced that the individual is guilty, he must clearly state his reasons in the decision so that the defendant, the public, and higher courts know the basis for his reasoning.

Constitution of Afghanistan

Article 129

- (1) The court is obliged to state the reasons for the decision it issues.
- (2) All specific decisions of the courts are enforceable, except for capital punishment, which is conditional upon approval of the President.

This reasoned decision should also be in writing. A written decision allows the defendant, the prosecutor who will execute the judgment, and the appellate court to understand what exactly the judge decided and why. A verdict should be “clear, simple and unambiguous, but must be based on law.”³⁰

Building on the right to a reasoned decision, each criminal defendant has a right to appeal and seek relief from a higher court in the case of judicial mistake. No judicial system is perfect and any judge can wrongly convict an innocent person. For this reason, the judiciary is set up in a hierarchy wherein the appellate courts and Supreme Court supervise the decisions of the lower courts.³¹ This structure reduces wrongful convictions in two ways: first, lower courts are more likely to be careful if they know someone will review their decisions for error; and second, higher courts may catch intentional or unintentional errors made by the lower court. The higher courts are authorized to remedy wrongful convictions below by overturning a conviction and releasing the individual and/or providing monetary relief.³²

V. PRINCIPLES VS. PRACTICE – CORRUPTION & BRIBERY

The principles and standards outlined in the Constitution are not always followed in practice. Scholar Tilmann Roder observed a murder trial in the provincial court of Herat.³³ He met the two criminal defendants who told him that they had been assaulted and then shot back in self-defense. They also told him that no witnesses had been called to help prove the defendants’ claim of self-defense because such “friends” would not be credible. The defendants were not given an attorney and they had not been informed of their right to counsel or right to remain silent. An armed policeman excluded the public from the courtroom. Finally, the judges sentenced the two men to death. The defendants had no idea of their right to appeal until the observer made them aware of it.

³⁰ Hossein Gholami, *Basics of Afghan Law and Criminal Justice*, pg. 201 (2006).

³¹ Afghanistan Constitution, Article 116.

³² For a very thorough explanation of appellate jurisdiction over criminal proceedings, the process of objecting to a lower court decision and the remedies available, see Hossein Gholami, *Basics of Afghan Law and Criminal Justice*, pg. 179-198 (2006).

³³ Tilmann Roder, *Human Rights Standards in Afghan Courtrooms: The Theory and Reality of the Right to a Fair Trial*, Islam and Human Rights 329-30 (2010).

Why did this happen? As the Chapter 6 on the Judiciary explained, the problems with judicial independence, corruption, and competence exist at every level of the Afghan judiciary. Judges are not well paid, with young district judges typically making about 10,000 Afghanis (\$200 USD) a month.³⁴ This particularly affects criminal defendants' right to a fair trial because underpaid judges and prosecutors are more vulnerable to corruption. The corruption can come from the victims family if they want to see a heavier punishment imposed on the defendant or from the defendant if he or she has enough money to "buy" his or her innocence.

Discussion Questions

Review the two forms of judicial independence discussed in Chapter 6 on the Judiciary, institutional independence and decisional independence.

1. Which of the two forms is more important for the protection of rights of the criminal defendant?
2. Do you think prosecutors and defense attorneys need the same level of independence?

Reports of violence and threats of violence shed light on one major problem in judicial independence in the criminal justice system. One report detailed an attempt to kill a judge for not releasing a local police commander's son who was being held as a murder suspect.³⁵ In a culture of corruption and power, those who have the power to do physical harm can wield that power over those who have judicial power.

Bribery, corruption and meddling by the politically powerful also erode the criminal justice system by injecting bias into the system and creating inequalities across defendants. The same action can lead to very different results depending on whether the criminal defendant has the resources and ability to bribe the judge and other officials in the courthouse. Bribery exists at all levels, from a bribe to the clerk of court to start, delay, or appeal a case, to a much larger bribe for the release of a defendant from prison.³⁶

Example 4: Bribery³⁷

In Herat Province a military commander shot an innocent man and then claimed afterwards that he had been a drug smuggler. The military commander was arrested and put in detention. But the family of the innocent deceased man bribed the prison officers to turn him over to the family.

³⁴ Tilmann Roder, *Human Rights Standards in Afghan Courtrooms: The Theory and Reality of the Right to a Fair Trial*, Islam and Human Rights 336 (2010).

³⁵ Tilmann Roder, *Human Rights Standards in Afghan Courtrooms: The Theory and Reality of the Right to a Fair Trial*, Islam and Human Rights 335-36 (2010).

³⁶ Tilmann Roder, *Human Rights Standards in Afghan Courtrooms: The Theory and Reality of the Right to a Fair Trial*, Islam and Human Rights 336-37 (2010).

³⁷ Tilmann Roder, *Human Rights Standards in Afghan Courtrooms: The Theory and Reality of the Right to a Fair Trial*, Islam and Human Rights 337 (2010).

The prison officers accepted the bribe and handed him over. The family then took the military commander to the grave of the deceased man and shot him there.

Do you think any process or additional procedural safeguards could have prevented the tragedy described above? What should the remedy for the family be? Can they sue the government in addition to the killers?

GLOSSARY

Abstract Review: The right to bring the case before the constitutional court is reserved for the highest state bodies and officials (the president, of the republic, the cabinet), groups of members of parliament (i.e. parliamentary opposition), and similar bodies. The constitutionality of a statute is examined abstractly, not in the context of any particular case.

Accountable: Subject to giving an account; answerable. In the context of government, the different branches are often said to be **mutually accountable** to each other, meaning that each branch is expected to give an account and be answerable to the other branches.

Accreditation: To give official authorization to or approval of.

Administrative Law: The procedures created by administrative agencies (governmental bodies of the city, county, state or federal government) involving rules, regulations, applications, licenses, permits, available information, hearings, appeals and decision-making.

Afghan National Assembly: The legislature of Afghanistan, which is composed of both the upper and lower houses.

Alleged: Asserted to be true; accused but not proven or convicted.

Apostasy: Renunciation of a religious faith.

Arbitrary: (a) Not restrained or limited in the exercise of power: ruling by absolute authority (“an *arbitrary* government”); (b) Marked by or resulting from the unrestrained and often tyrannical exercise of power (“protection from *arbitrary* arrest and detention”).

Aspirational: Expressing a hope or intention but not creating a legally binding obligation.

Balance of Power: The distribution of power among parts of government so that no one part can seriously threaten the fundamental interests of another.

Bicameral: Having two parts—used to describe a government in which the people who make laws are divided into two groups.

Binding: Having legal force; requiring obedience.

Blasphemy: The act of insulting or showing contempt or lack of reverence for God.

Blueprint: A detailed plan or program of action.

Branch: A division of an organization. In the context of a central government, the executive, the legislature, and the judiciary are each branches of the government.

Bright-Line Rule: A legal rule of decision that tends to resolve issues, especially ambiguities, simply and straightforwardly, sometimes sacrificing equity for certainty.

Budget: The amount of money allocated to the government and its various institutions to be spent each year.

Burden of Proof: The requirement that the prosecution show by a certain standard that all the facts necessary to win a judgment are presented and are probably true.

Bureaucracy: A large group of people who are involved in running a government but who are not elected.

Cabinet: A body of advisors of a head of state.

Censorship: The practice of examining materials for objectionable matter.

Centralize: To concentrate by placing power and authority in a center or central organization.

Chamber: A legislative or judicial body; *especially* either of the houses of a bicameral legislature.

Checks and Balances: A system that allows each branch of a government to amend or veto acts of another branch so as to prevent any one branch from exerting too much power.

Civil Law System: In a civil law system, judges decide cases based on what the relevant code specifies. Only rarely do these long, detailed codes not cover any given case. In those instances the judge applies the principles of the code to the case at hand.

Co-Equal: Equal with one another.

Commander-in-Chief: A head of state or officer in supreme command of a country's armed forces.

Common Law System: In a common law system, judges play a central role in interpreting laws and rely on past judicial rulings rather than a code for guidance. When a case presents a new issue, the judge reasons by comparing it and contrasting it to other cases to make new law.

Competence (Judicial Competence): The power and authority of law, at the time of acting, to do the particular act. That is, the type of case a court is authorized by law to hear, see also *Jurisdiction*.

Concrete or Incidental Review: The constitutional or supreme court reviews cases based on referrals of constitutional questions by lower courts. In most systems, if an ordinary court finds that a statutory provision that it has to apply in a concrete way is constitutional, it must refer the question of constitutionality.

Conflict of Interest: (a) A conflict between the private interests and the official responsibilities of a person in a position of trust. (b) A situation in which a person has a duty to more than one person or organization, but cannot do justice to the actual or potentially adverse interests of both parties. This includes when an individual's personal interests or concerns are inconsistent with the best for a customer, or when a public official's personal interests are contrary to his/her loyalty to public business. An attorney, an accountant, a business adviser or realtor cannot represent two parties in a dispute and must avoid even the appearance of conflict.

Constituency: A body of citizens entitled to elect a representative (as to a legislative or executive position).

Constitutionalism: Does not necessarily refer to having a constitution, but to structural and substantive limitations on government.¹

Constitutional Complaint: This procedure gives individuals access to a constitutional court. A person who already has lost his or her case before the ordinary courts can complain before the constitutional court that their constitutional rights have been violated.

Convict (or Convicted Criminal): A person who has been convicted of a crime and punished.

De Facto: Used to describe something that exists but that is not officially accepted or recognized.

De Jure: Based on or according to the law.

De Novo: To review and decide a case anew (or for a second time), taking into account all the facts, rather than simply looking at whether the lower court correctly applied the law.

Decentralize: The dispersion or distribution of functions and powers; *specifically* the delegation of power from a central authority to regional and local authorities.

Decisional Independence: Judicial rulings free from corruption or external influence based solely on the facts of the case and applicable law.

Delineate: To describe, portray, or set forth with accuracy or in detail.

Deprivation: The state of not having something that people need.

Derogation: An exemption from or relaxation of a rule or law.

Direct: To follow a straight course.

Discretion: The power of a judge or prosecutor to make decisions on various matters based on his/her opinion within general legal guidelines. Examples: a) a judge may have discretion as to

¹ Gerhard Casper, Occasional Papers from The Law School Number 22: Constitutionalism 16 (The University of Chicago Apr. 6, 1987).

the amount of a fine or whether to grant a continuance of a trial; or, b) a prosecutor may have discretion to charge a crime as a misdemeanor or felony.

Disparate Impact: An adverse effect of a practice that is neutral in its intention but nonetheless disproportionately affects certain individuals.

Distinction: A difference that sets something apart.

Drafter: One who creates the document in question.

Due Process (of Law): (a) The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case. (b) All legal procedures set by statute and court practice, including notice of rights, must be followed for each individual so that no prejudicial or unequal treatment will result.

Duty: A moral or legal obligation.

Endorse: To publicly or officially say that you support or approve of (someone or something).

Enforcement: To carry out effectively.

Entitled: Having a legitimate claim on something.

Exclusionary Rule: The rule that evidence secured by illegal means and in bad faith cannot be introduced in a criminal trial.

Exclusive: Limited to a single individual or group.

Execute: To carry out fully; to put completely into effect.

Ex Post Facto: Latin for "after the fact," which refers to laws adopted after an act is committed making it illegal although it was legal when done, or increasing the penalty for a crime after it is committed. Therefore, new laws do not apply to crimes committed before the new laws were adopted.

Federal: Of or constituting a form of government in which power is distributed between a central authority and a number of constituent territorial units.

Fiduciary Duty: The legal duty of a fiduciary to act in the best interest of the beneficiary.

Formal System of Justice: Also known as the judiciary, this describes state-run courts.

Foundling: An abandoned infant whose parents are not known.

Gubernatorial: Of or relating to a governor.

Habeas Corpus: Petition to a judge in the location where the prisoner is incarcerated, and the judge sets a hearing on whether there is a legal basis for holding the prisoner. Habeas corpus is a protection against illegal confinement, such as holding a person without charges or when due process is denied.

Hearsay: Second-hand evidence in which the witness is not telling what he/she knows personally, but what others have said to him/her.

Horizontal Effects: The relationship between private citizens.

Horizontal Separation of Powers: The separation of powers between the different branches of the federal government.

Human Rights: Fundamental and inalienable rights that a person is entitled to, simply because he or she is a human being.

Human Rights Discourse: The debate and discussion of international human rights by the political, academic, and activist communities.

Immunity: Special protection from what is required of most people by law.

Implement: To give practical effect to and ensure of actual fulfillment by concrete measures.

Incorporeal Persons: “Incorporeal” means having no body or substance; intangible; without physical existence. This term often refers to organizations and businesses that have “person” status for legal purposes.

Indirect: Deviating from a straight path; not direct.

Informal System of Justice: Although even asking parents to resolve a dispute among siblings can be a form of informal justice, this term traditionally refers to shuras and jirgas as well as other traditional and tribal methods of resolving disputes.

Infrastructure: The underlying foundation or basic framework, particularly for public works, for example, roads and bridges.

Infringe: To encroach upon in a way that violates law or the rights of another.

Instrument: A formal legal document.

Insulate: To prevent (someone or something) from dealing with or experiencing something. Example: The company has tried to insulate itself from the region's political turmoil.

International Bill of Rights: The major international human rights treaties: the UDHR, ICCPR, and the ICESCR. Collectively they are known as the international bill of rights.

International Covenant on Civil and Political Rights (ICCPR): The major international treaty that addresses civil and political rights. It entered into force in 1976.

International Covenant on Economic, Social and Cultural Rights (ICESCR): The major international treaty on ESC rights. It entered into force in 1976.

Interpellation: To question (as a foreign minister) formally concerning an official action or policy or personal conduct.

Interpret: To establish or explain the meaning or significance of something.

Interval: A period of time between events.

Judicial Independence: The idea that individual judges and the judicial branch as a whole should do their work free of external influence. This term also refers to those constitutional guarantees like appointments, impeachment, and tenure that safeguard against external influence.

Jurisdiction: A term used in two senses as it applies to a court: (1) In a general sense, the abstract right of a court to exercise its powers in causes of a certain class; (2) in a particular sense, the right of a tribunal to exercise its power with respect to a particular matter. In other words, the power of the court over the subject matter, over the property in contest, and for the rendition of the judgment or decree the court assumes to make.

Justified: Proven to be just, right, or reasonable.

Legislation: A law or set of laws made by the legislature.

Liability: Legal responsibility for something.

Liberalism: A political and economic doctrine that emphasizes the rights and freedoms of the individual and the need to limit the powers of government.

Litigation: A legal contest by judicial process or trial.

Loya Jirga: A special body composed of the members of the National Assembly, and provincial and district leaders. It has the power to address key issues and to amend the Constitution.

Mandate: The power to act that voters give to their elected leaders.

Mechanism: A process or system that is used to produce a particular result. Examples: (a) Scientists are studying the body's mechanisms for controlling weight, (b) There is no mechanism in place for enforcing the new law, (c) A legal mechanism to prevent lobbyists from exerting unfair influence.

Meshrano Jirga: The upper house of the National Assembly of Afghanistan.

Negative Rights: State obligations to refrain from interfering with a person's attempt to do something.

Non-Derogable Rights: Rights deemed to be so important that they cannot be restricted in times of war or public emergency. Rights considered to be non-derogable are: (a) the right to life, (b) the right to be free from torture and other inhumane or degrading treatment or punishment, (c) the right to be free from slavery or servitude, and (d) the right to be free from retroactive application of penal laws.

Norms: Generally accepted standards of conduct, action, or policy.

Pleading: One of the formal allegations and counter allegations made alternately by the parties in a legal action or proceeding. Pleadings are usually written.

Plenary: Fully attended or constituted by all entitled to be present.

Plurality: A number of votes cast for a candidate in a contest of more than two candidates that is greater than the number cast for any other candidate but not more than half the total votes cast.

Polity: A political organization, or a politically organized unit.

Popular Sovereignty: A doctrine in political theory that government is created by and subject to the will of the people.

Positive Rights: State obligations to do something for someone.

Precedent: Something done or said that may serve as an example or rule to authorize or justify a subsequent act of the same or an analogous kind. In the legal context, a decided case that furnishes a basis for determining later cases involving similar facts or issues.

Prescribe: To lay down as a guide, direction, or rule of action.

Presumption of Innocence: A fundamental protection for a person accused of a crime, which requires the prosecution to prove its case against the defendant beyond a reasonable doubt.

Progressive Realization: Requirement that governments move as expeditiously and effectively as possible toward the goal of realizing economic, social and cultural rights, and to ensure there are no regressive developments.

Proportionate: A number corresponding to the group's share of the total. A proportional share of the total.

Proscribe: To prohibit something considered harmful or unlawful.

Protection: The state of being covered or shielded from exposure, injury, damage, or destruction.

Province: A subject or area of interest that a person knows about or is involved in—usually singular: (a) It's a legal question that falls outside my province (meaning that it does not relate to the area that I know about), (b) Study in that area had once been the exclusive province of academics.

Provision: A clause in a legal instrument or law, providing for a particular matter.

Quorum: The number of members of a body required to be present or in attendance to allow that body to legally conduct its business. The minimum number of members of parliament required to be present or in attendance to allow the National Assembly to pass legislation.

Quota: A minimum number required by law.

Ratify: To approve and sanction formally; confirm.

Referenda: The principle or practice of submitting to popular vote a measure passed on or proposed by a legislative body or by popular initiative.

Regulations: Rules and administrative codes issued by governmental agencies at all levels, national and subnational. Although they are not laws, regulations have the force of law, since they are adopted under authority granted by statutes, and often include penalties for violations.

Repugnant: Inconsistent or irreconcilable with; contrary or contradictory to. (“The court's interpretation was repugnant to the express wording of the statute.”)

Restorative Justice: Resolving a dispute in a manner that aims to rebuild the relationship between the wrongdoer and the victim as well as between the wrongdoer and the community.

Restraint: Any means of restricting or preventing something.

Run-Off: A final race, contest, or election to decide an earlier one that has not resulted in a decision in favor of any one competitor.

Safeguard: A precautionary measure to protect people or their rights.

Scope: The space or opportunity for unhampered activity; the extent of influence; the range of operation.

Self-dealing: Financial dealing that is not at arm's length; especially borrowing from or lending to a company by a controlling individual primarily to the individual's own advantage.

Self-enrichment: The act or process of increasing one's resources.

Sovereignty: Supreme power over an area.

Specialize: To concentrate one's efforts in a special activity, field, or practice.

Staggered: Arranged so that things are positioned at different places or happen at different times.

State Parties: States that have ratified and become parties to an international treaty or convention.

Subjective: Affected by personal views, experience, or background.

Subvert: (1) To secretly try to ruin or destroy a government, political system, etc. ("They conspired to subvert the government"); (2) To make (something) weaker or less effective.

Superfluous: Not needed; exceeding what is sufficient or necessary.

Suspect: One charged with a crime or offense.

Suspension: To stop temporarily; the temporary abrogation of a law or rule.

Ticket: A list of candidates for nomination or election.

Touchstone: A fundamental part or feature.

Tyranny: Oppressive power exerted by government.

Unicameral: A legislature or parliament composed of a single house.

Unilateral: Done or undertaken by one person or party.

Universal Declaration of Human Rights (UDHR): The first international declaration of human rights, adopted in 1948.

Vertical Effects: The relationship between private citizens and the state.

Vertical Separation of Powers: The separation of powers between the federal and local governments.

Veto: A power of one department or branch of a government to forbid or prohibit finally or provisionally the carrying out of projects attempted by another department; *especially* a power vested in a chief executive to prevent permanently or temporarily the enactment of measures passed by a legislature.

Wolesi Jirga: The lower house of the National Assembly of Afghanistan.