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Constitutional Interpretation and the Continuing Crisis in Afghanistan

Summary

- The recent controversy in Afghanistan over the outcome of the 2010 parliamentary elections ultimately resolved the question of who sits in Parliament, but left a more fundamental question unanswered: “Who has the power to interpret the Afghan Constitution?”
- Ambiguities in the language of the Constitution make it difficult to determine who has the legal authority to interpret it. The Supreme Court maintains that the Constitution gives it the power of judicial review, but the Constitution also calls for the Independent Commission on the Supervision of Implementation of the Constitution (ICSIC), which the Parliament has mandated to decide constitutional issues instead.
- Without political and legal consensus over who has final authority to decide different types of constitutional claims, Afghanistan cannot achieve a rule of law where government activities are subject to consistent and transparent rules.
- Afghanistan must establish clear and unambiguous rules for constitutional interpretation to avoid damaging crises about political leadership and the separation of powers as the security transition and Presidential election approach in 2014.

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Introduction

In July 2011, more than six months after a new Afghan Parliament was sworn into office, a Special Elections Tribunal created by President Hamid Karzai ordered the replacement of 62 of the 249 sitting members of Parliament elected in the 2010 vote. The tribunal claimed a mandate to identify perpetrators of election fraud that was denounced by candidates and the international community alike as more of a political ploy than a legal process.

The debate over the tribunal’s mandate, and the validity of the election results more generally, prompted a series of legal challenges that ultimately called into question the legitimacy of all three branches of government. The Supreme Court ruled that Parliament could not pass laws until those accused of fraud were replaced. Parliament retaliated by threatening to impeach six of nine Supreme Court justices and declared the Special Tribunal to be illegal. Meanwhile, President Karzai refused to work with Parliament and through his attorney general, Mohammad Ishaq Aloko, pressured the Independent Election Commission (IEC) to retract its final election results. This prompted Parliament’s no-confidence vote on Aloko.

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the most fundamental questions of Afghan governance: Who has the authority to interpret the Constitution?

A Constitution itself should, ideally, provide an unequivocal answer to this question. It should also delineate the separation of government powers. But ambiguities in the 2004 Constitution have created a legal fog around these questions. As difficult as the discussion may be, the Afghan government must find a way to debate and decide who has the ultimate power to decide constitutional questions.

The Struggle for Power to Interpret the Constitution

The current constitutional crisis reflects a quiet but longstanding tension over rights of Constitutional interpretation. During the 2003 Constitutional Loya Jirga, the draft provisions of the Constitution relating to the Judiciary called for an independent, unitary judiciary led by a Supreme Court. Article 121 of the current Constitution (ratified in 2004) specifically states the Supreme Court may “upon request of the courts or the government review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law.” Such language appears to give the Supreme Court the power of judicial review.

A new provision was also inserted in the Constitution creating a constitutional oversight role to counterweight a Supreme Court allied to the presidency. Article 157 designates an “Independent Commission for the Supervision of the Implementation of the Constitution” (ICSIC), to be “established by law” and whose members would be “appointed by the President.” However, the Constitution remains silent about both the ICSIC’s specific duties and its relationship to the Supreme Court. It dedicates 20 separate articles to matters related to the Judiciary and the Supreme Court, and one article—Article 121—specifically addresses the Supreme Court’s relationship to the Constitution.

It was four years before the law on the duties and functions of the ICSIC was finally passed in November 2008. In the meantime, the Supreme Court handled all questions regarding Constitutional interpretation, including an advisory opinion declaring that, in the absence of district council elections, the one-third of the membership of the upper house of Parliament left vacant by local elections could still be formed with two-thirds of its members chosen by Provincial Councils. This decision was accepted and appeared to demonstrate the Supreme Court possessed final authority to interpret the Constitution.

This tacit understanding was challenged in May 2007, when the lower house voted to strip then-Foreign Minister Rangin Dadfar Spanta of his ministerial post. President Karzai refused to recognize the legitimacy of Parliament’s vote and questioned Parliament’s removal powers before the Supreme Court. Although the Constitution states in Article 71 that the Parliament’s lower house must confirm ministerial appointments, it is silent on removal of a sitting minister by Parliament. The Supreme Court ruled that Parliament does have an implied constitutional right to remove a minister but in Minister Spanta’s case, it did not follow appropriate voting procedures. Parliament flatly rejected the Supreme Court’s decision, arguing that Article 121 gave the Supreme Court the power to interpret laws, but not legislative actions such as appointment powers.

ICSIC’s Ambiguous Legal Mandate

The controversy over ministerial appointments spurred the Parliament to finally enact legislation formally establishing the ICSIC called for by Article 157 (Law Nr. 986, Aug. 31, 2008). The ICSIC Law requires seven members to be nominated by the President and approved by the lower house for

four-year terms with the same privileges as ministers.¹ Only five of the seven have been appointed thus far, although in October, President Karzai finally proposed two additional names that were rejected by Parliament. The Commission members reflect a range of legal qualifications, having served as judges, professors and judicial officials in past Afghan governments.

The law defines the ICSIC's primary mandate to inform the public about the provisions of the Constitution and to monitor the extent to which the people and the government abide by it. However, Article 8 of the law conveys powers of interpretation of the Constitution "at the request of the President, Parliament, and the Supreme Court."² Initially, President Karzai vetoed this legislation, arguing that the ICSIC was meant only to supervise the implementation of the Constitution. Parliament overrode Karzai's veto by a two-thirds majority. The ICSIC law was passed, but it includes footnotes noting the Supreme Court's objections to articles relating to constitutional interpretation.³

During the June 2010 confirmation hearings before Parliament, Commission nominees openly declared they would exercise the ICSIC's authority to interpret the Constitution, so long as the ICSIC maintained the Parliament's support. This sets up the fundamental contradiction in Constitutional powers between the Supreme Court and the ICSIC and raises questions about the binding effect of an ICSIC opinion over the President or the Parliament if the Supreme Court disagrees with an ICSIC opinion.

Thus far, the ICSIC has been engaged with the executive branch to review and vet proposed laws or policies for constitutional validity. Responding to a request by the ICSIC for constitutional review of draft legislation, Presidential Decree No. 11371, dated November 14, 2010, "instructed that draft of laws after decision of the cabinet and prior of sending to National Assembly shall be sent to the [ICSIC]." However, the ICSIC faces a conflict of interest if either the Courts or the Parliament ask it to rule on the constitutionality of legislation it helped to write.

Despite the passage of the ICSIC law, the approach to solving constitutional questions has been increasingly *ad hoc* and politicized. During the most recent parliamentary elections, Parliament sent letters to both the Supreme Court and the ICSIC asking their interpretation of the electoral law concerning how fraudulent votes might be disqualified. The IEC also reportedly requested both bodies to opine on the validity of the President Karzai's Special Electoral Tribunal. The Supreme Court and ICSIC were also consulted on how the Speaker of Parliament should be elected. It is clear that simultaneous requests are being submitted to both the Supreme Court and ICSIC as a means of hedging bets in case one institution offers a more favorable opinion or ultimately emerges with superior authority.

An Uncertain Constitutional Future

Having two legal institutions with overlapping mandates in a highly politicized environment is a recipe for instability and fundamentally undermines the rule of law. The recent election dispute was ultimately resolved through politics, without either the Supreme Court or the ICSIC: President Karzai disbanded his Special Election Tribunal and simultaneously defended its legality and ceded authority to the IEC to issue the final decisions about the Parliamentary election results. (The IEC agreed to remove only nine of the 62 members the Special Election Tribunal said were wrongly seated in Parliament.) Therefore, it remains an open question as to who has the ultimate authority to interpret Afghan laws affecting political power and succession. That uncertainty will engender costly political crises every time an election or appointment of senior government officials occurs.

Moreover, the crisis over constitutional interpretation continues to escalate and deadlock the government in subtle ways. Parliament increasingly uses constitutional arguments to oppose

ABOUT THIS BRIEF

This PeaceBrief reports on controversies surrounding interpretation of the 2004 Afghanistan Constitution, which have created a crisis of confidence in the rule of law that the authors argue must be resolved for national reconciliation to occur. The research in this report reflects USIP's ongoing work from its office in Kabul on Afghan constitutional law and rule of law reform. Scott Worden is a senior rule of law adviser for USIP in Washington, DC with responsibility for the Institute's rule of law programs. Sylvana Sinha is a rule of law advisor in USIP's Kabul Office.



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President Karzai's actions. In June, Parliament's nearly unanimous vote of no confidence against Attorney General Aloko reprised the question of Parliament's authority to remove Presidential appointees. Throughout the summer, the last item on the Parliament's agenda was a "silent session" protesting the President's failure to appoint new cabinet members. In July, the Parliament voted to impeach the Chief Justice and five members of the Supreme Court over their support for the Special Elections Tribunal; and in October, the Parliament maintained that it had already dismissed the Supreme Court justices and Aloko.

The three branches of government must work together to address the issue of the separation of powers and agree to principles of constitutional interpretation that are legally consistent and unambiguous. In particular, the following fundamental questions require resolution to avoid escalating political confrontations:

- Can the Constitution be amended by a Loya Jirga without the delegates required by the Constitution from the district councils, which have yet to be formed? If not, district council elections must be held before any amendments that may be required for a political reconciliation process can be adopted.
- Does the Supreme Court have the sole power of judicial review of the Constitution? If so, the ICSIC statute should be revised to remove its interpretive powers under Article 8, and the respective roles of the Supreme Court and ICSIC should be made clear.
- Does Afghanistan want an independent Constitutional Court where all matters of constitutional interpretation are ultimately decided? If so, the ICSIC law must be redrafted to clarify lines of jurisdiction in accordance with international standards on the duties and rules for similar courts established in continental jurisdictions.

Differences of opinion on the interpretation of the Constitution threaten a political and legal crisis every time a constitutional challenge is made, particularly as political transition and reconciliation increase the pressure on the outcome of legal disputes. The current impasse demands a political solution if the 2004 Constitution is to remain relevant. Clarifying the role of the ICSIC and the Supreme Court is a good place to start.

Endnotes

1. The first five members, who were not approved until June 2010, include Chairman Gul Rahman Qazi, Deputy Chairman Abdul Qadir Adalatkhwah, and members Sayyed Omar Munib, Muhammad Amin Ahmadi, and Mahbuba Huquqmal—the only woman. Despite calls for the President to nominate the two remaining members, those positions remain vacant.
2. Article 8(1) and Article 9.
3. See http://www.mpil.de/shared/data/pdf/law_on_art_157_commission_english.pdf for the unofficial Max Planck English translation.