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### **Resolving the Crisis over Constitutional Interpretation in Afghanistan**

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The current political crisis over elections in Afghanistan stems, in part, from a fundamental gap in Afghanistan's legal and political system: *lack of agreement on what entity(s) has the power to resolve constitutional disputes, and how that power is accessed*. Without a clear path to settling constitutional disagreements, the system becomes deadlocked as disputes arise, exacerbating tensions between Afghanistan's fragile institutions and factionalized political elite.

Filling this gap in Afghanistan's constitutional system is of paramount importance to stabilizing the political system. The executive, legislative, and judicial branches should begin intensive discussions to hammer out a compromise.

#### Background

The debate over where to locate the power to issue constitutional interpretations that would bind the branches of the government began during the constitutional drafting process in 2003. Initially, the draft constitution submitted to President Karzai by the Constitutional Drafting Commission contained provisions for a Constitutional Court, distinct from the Supreme Court. It stated as follows:

#### ***Draft Article 146***

*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.*

Like many modern Constitutional Courts, this entity would have had clear jurisdiction to issue binding decisions that interpret the constitution. Its limitations would have been in its independence and in enforcement of decisions against powerful actors, but its jurisdiction to resolve disagreements over the meaning of the constitution would have been relatively clear. However, the plans for a Constitutional Court were removed from the draft constitution prior to the Loya Jirga, in part due to concerns that the Constitutional Court would become like Iran's Council of Guardians, using the provisions of the constitution, especially those having to do with Islam, to trump the political system. Instead, some of the basic competencies of the Constitutional Court were folded into the Supreme Court:

***Article 121 (2004 Constitution)***

*The Supreme Court on the request of the Government or the Courts shall review the laws, legislative decrees, international treaties and international covenants for their compliance with the Constitution and provide their interpretation in accordance with the law.*

The inclusion of Article 121 marked a historic shift for the judiciary in Afghanistan, as prior to 2004, the Afghan Supreme Court never explicitly had the power, as an independent branch of the government, to interpret the constitution. In order to fulfill its obligations under Article 121, the Supreme Court would need to interpret the language of the constitution in order to determine whether laws, legislative decrees, international treaties and international covenants comply with the meaning of the constitution.

However, the language of Article 121 does not include the broad grant of power to interpret the constitution contained in the draft Constitutional Court articles, including instead only that language allowing the Court to judge the compatibility of laws, decrees and international agreements with the constitution.

During the Constitutional Loya Jirga, the language of Article 157 was placed into the constitution without significant debate by some of the same actors who had argued for the establishment of a Constitutional Court. The jurisdiction of the Article 157 Commission is completely undefined within the constitution itself:

***Article 157 (2004 Constitution)***

*The Independent Commission for the Supervision of the Implementation of the Constitution will be established by the provisions of the law.*

*Members of this Commission shall be appointed by the President with the confirmation of the Wolesi Jirga.*

From 2004 to 2007, it appears as though the Supreme Court and the Executive assumed (or at least acted as if) the Supreme Court had been granted the same broad jurisdiction to interpret the constitution as had been envisioned for the Constitutional Court. For example, in 2005 when it became clear that district elections would not be held as envisioned in Article 140 of the Constitution, there was a question over how to properly constitute the Upper House of the parliament (Meshrano Jirga), as one-third of its members were to be district council members as per Article 84 of the Constitution. President Karzai referred this issue to the Supreme Court, which advised that Provincial Councils could send two members each to the Meshrano Jirga instead of only one member, thereby filling seats in the Meshrano Jirga allocated to the District Councils (until District Councils had been duly elected). Similarly, in 2006, there was a dispute between the executive and the new legislature over the meaning of the word “majority” in a vote to approve government ministers and Supreme Court justices that was referred to the Supreme Court for adjudication.

It was not until the dispute over the case of Foreign Minister Spanta, in 2007, that a strong dispute emerged over the Supreme Court’s constitutional jurisdiction. In taking a vote of no confidence against Minister Spanta, the parliament acted according to powers it possesses under Article 92 of the constitution, which allows the Wolesi Jirga to take a no-confidence vote on a government minister based on well-founded reasons. Following the vote against Foreign Minister Spanta, President Karzai asked the Supreme Court to review whether the act of the Wolesi Jirga was constitutional. The court found that the vote in this case was both unconstitutional, as the basis for the vote was not something within the rational control of the Foreign Minister, and improper, as the vote violated established parliamentary procedure. Angered, several members of parliament stated that the Supreme Court did not have jurisdiction to hear this case, as it was not related to the consistency of a law or other legal document with the constitution as allowed under Article 121, and therefore Parliamentarians stated that they did not recognize the decision.

In response, the executive and the Supreme Court moved to create legislation that would resolve the jurisdictional questions. The Supreme Court attempted to clarify its jurisdiction through a proposed amendment to the Law on the Organization and Jurisdiction of the Courts (2005), revising the previous Article 24 to read:

*The Supreme Court High Council shall have the following jurisdiction within the scope of drafting, organizing, proposing and interpreting laws:*

- 1. Assess the conformity of laws, legislative decrees, international treaties and conventions with the Constitution upon a request from the government or courts and issue the necessary awards.*
- 2. Interpret the Constitution, laws and legislative decrees upon request from the government or courts.*
- ...*
- 4. Resolve disputes stemming from the implementation of law and exercise of legal authority between the National Assembly and the Government.*

At the same time, the executive drafted a law on the Article 157 Commission that would have allowed the Commission to review draft legislation “prior to the endorsement of the President” and express an opinion of the constitutionality of the draft (before it became law). The 157 Commission was also empowered to provide legal advice on “issues arising from the Constitution” and “studying previous laws for their inconsistency” for the President. In this draft, the 157 Commission was empowered to provide advice, not to issue binding decisions on any subject, or to interpret the constitution outside the bounds of the issues prescribed.

The parliament then amended the draft legislation on the 157 Commission to remove the explicit but limited power to provide an opinion on legislation prior to endorsement by the President. Instead, parliament inserted language that gave the 157 Commission the expansive power of “*Interpretation of the Constitution on the request of the President, the National Assembly, the Supreme Court, and the Executive.*”

President Karzai then vetoed this legislation, on the grounds that this language violated articles 121, 122, and 157 of the constitution. The primary argument of the President’s veto message is that 1) Article 121 of the constitution implies broad constitutional interpretation powers for the Supreme Court, which has historically had this power, and 2) the Article 157 Commission was meant to be a supervisory body for the implementation of the constitution, not a body for interpretation.

In September 2008, the Parliament overrode Karzai’s veto of the 157 Commission legislation by a two-thirds majority, making it enforceable law (see Article 94 of the Constitution). However, since this is a “law”, the President could refer it for review to the Supreme Court under its Article 121 powers, which would likely

again result in a decision that the legislation is unconstitutional based on the grounds stated in the President's veto message.

### Commentary on the Article 157 Commission Legislation

The power granted to the Commission in Article 8(1) is the heart of the controversy.

#### ***Article Eight***

*For effective overseeing of the implementation of the provisions of the Constitution, the commission shall have the following authorities and responsibilities:*

- 1. Interpretation of the constitution on the request of President, National Assembly, Supreme Court and the executive.*

This Article appears to be a broad grant of jurisdiction to the Commission to interpret the constitution by the request of any of the three branches. However, it is unclear whether this is exclusive jurisdiction and whether their decisions are binding. If the jurisdiction is exclusive, then there would appear to be contradiction between this article and Article 121 of the constitution, which grants authority to the Supreme Court to interpret the constitution in order to determine the compatibility of laws.<sup>1</sup>

Comparison of the language in Articles 8 and 9 yields a clue that the decisions made under Article 8 are meant to be binding. The language in Article 9 explicitly provides for "legal opinion" (nazar-i-huqooqi) rather than "interpretation" (tafsir):

#### ***Article Nine***

*Following competent authorities can refer the issues arising from implementation of the constitution to commission for the purpose of giving legal opinion:*

- 1. The President*

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<sup>1</sup> But note that many parliamentarians and others (including some of President Karzai's own legal advisors) have rejected the notion that Article 121 grants the Court authority to interpret the Constitution, arguing that Article 121 only grants the authority to review a law's compliance with the Constitution (but not the authority to "interpret" the Constitution's meaning). However, it is unclear how can one determine "compliance with" the Constitution without interpreting what the Constitution means.

2. *Any house of the National Assembly*
3. *Supreme Court*
4. *Independent Human Rights Commission, Independent Election Commission and Administrative Reform and Civil Service Commission.*

Furthermore, the fact that additional bodies can request an opinion under Article 9 rather than under Article 8 suggests that the drafters clearly meant to differentiate between these two powers of the Commission.

It is more difficult to determine whether the jurisdiction granted to the Supreme Court in Article 121 or to the Article 157 Commission in its legislation are exclusive. Interpretation of the constitution is, in certain respects, the job of every branch. For example Article 63 requires the President to take an oath to “respect and supervise the implementation of the Constitution” which would require the President to exercise his own interpretation. There are similar requirements in Art. 74 for Ministers.

### **Commission Membership and Qualifications**

It is important to note that the mechanism for the appointment of Commission members is the same as that for the Supreme Court: appointed by the President and approved by the Lower House. Furthermore, the term of Supreme Court justices is ten years and staggered to prevent one President from packing the court, while the term for the Commission members is only four years, all appointed simultaneously, making the Commission members much more subject to influence or partisanship than the Supreme Court. Therefore, arguments that suggest that the Commission will be more independent than the Supreme Court are not well grounded. It may, of course, be true that in any given configuration, the Commission may be more independent than the Court, but over time, experience suggests that the terms of appointment for the Supreme Court justices will make the Court more independent.

It appears clear that members of the Article 157 Commission cannot be sitting members of parliament. Article 152 of the Constitution states:

*The President, Vice Presidents, ministers, heads and members of the National Assembly, the Supreme Court, Attorney General and judges, cannot undertake other jobs during their terms of office.*

The Article 157 legislation also states in Art. 6(3) that Commission members cannot occupy other jobs while in office, except for higher education.

### Resolving the Crisis

It is essential for political and legal stability in Afghanistan that the current inter-branch stalemate over constitutional dispute resolution be resolved. There are several reasonable solutions. Most importantly, the solution must be achieved through an Afghan-owned process of dialogue and compromise; otherwise the outcome is unlikely to be implemented.

Any solution must include a determination of which entity will have jurisdiction to undertake constitutional interpretation and in which circumstances.

Possible solutions include:

(1) Accepting the power of the Supreme Court to make binding or advisory decisions in cases concerning the constitutionality of a law or treaty, and for the 157 Commission to issue constitutional opinions on other issues, such as inter-branch disputes and the constitutionality of government actions. This would ensure that overlapping jurisdiction is minimized, and that the constitutional authority of the court is neither expanded nor contracted.

(2) The Court could have jurisdiction to issue binding decisions in all constitutional interpretation cases. The role of the Commission, then, could be to issue advisory opinions on constitution questions put to it, as well as carrying out its other responsibilities, such as examining past laws (e.g. pre-2004<sup>2</sup>) to render an opinion on their constitutionality, proposing legislation required by the constitution, and monitoring the implementation of the constitution by the executive branch. These distinctions could be further refined, for example, by stating that the Commission would have the power to issue advisory opinions on pending legislation only before it is passed (pre-promulgation review) while the Supreme Court would only be able to review the constitutionality of laws once they have been adopted, or once a concrete case has emerged. These two types of

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<sup>2</sup> Note that the “National Justice Program” (NJP), which sets forth implementation guidelines for the “National Justice Sector Strategy” (NJSS) adopted in 2008 and incorporated into the Afghanistan National Development Strategy, provides for the Ministry of Justice to review all past laws for constitutional compliance (but does not say that other institutions – like the Article 157 Commission – could not also have this task). The NJSS and NJP also explicitly state that the Supreme Court has the authority to interpret the Constitution. These, however, were executive branch documents that did not require Parliament’s approval.

review are often referred to as “abstract” and “concrete” review, a distinction made in several constitutional systems. This would expand the powers of the Court beyond a plain reading of the constitution, but within the bounds of what is normally expected for a Supreme Court in the absence of a Constitutional Court.<sup>3</sup>

(3) Allow somewhat overlapping jurisdictions for the Court and the Commission, with lower court cases going through the judiciary, and other requests from the government, parliament, or other designated bodies going to the forum of choice for that body. Such an approach will create competing centers of power and is unlikely to lead to a stable system that promotes predictability and finality.

Any of these options could be achieved through an agreement that would be codified in legislation. While constitutional amendment through a Loya Jirga could result in a clearer permanent outcome, it is not necessary to amend the constitution – given the complexity and risk of such an endeavor – to find a workable solution. In the current environment, it is preferable to settle these questions within the framework of the 2004 Constitution.

The Law on the Organization and Jurisdiction of the Courts and the Law on the Commission to Monitor the Implementation of the Constitution could be amended in concert to ensure that jurisdictional line-drawing between the Court and the Commission is coherent.

An agreement could provide a way through the electoral crisis as well as settling the larger question of which body, the Supreme Court or a new Commission on Constitutional Implementation, will have the authority to interpret the Constitution and in what circumstances. Exactly how the power is divided is not the crucial issue. What really matters is that the three branches reach agreement on who has the power to issue binding constitutional decisions and that they accept those decisions.

The ability to channel conflict into the political process, rather than through war, is the test of any constitutional system. In Afghanistan the stakes are especially high, as the stability and legitimacy of the Afghan government is ultimately the greatest weapon against the insurgency.

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<sup>3</sup> Such a decision could potentially include an informal agreement pertaining to upcoming Supreme Court appointments, as three of the current justice’s terms will expire in 2010.