

Constitutional Decision Rules (Who Decides?)

Afghan Peace Process Issues Paper

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Summary: Identifying who has the power to interpret a constitution is one of the most important provisions in any constitution. This will be particularly important in the current Afghan peace process because the Taliban and representatives of the Afghan government are far apart on the issue of how Islamic law should be interpreted and applied, and how to share power between the different branches and levels of government. The issue of constitutional interpretation was contentious even without the Taliban's divergent views. With the Taliban calling for stricter adherence to a particular interpretation of Sunni Islamic jurisprudence, there is a greater need for the peace process to clearly define which bodies have the authority to resolve constitutional disputes in the future, particularly with regard to questions about Islam and the separation of powers between the branches of government.

The Issues

One of the most important aspects of any constitutional or governing framework is the answer to a frequent and fundamental question: who decides? Constitutions are deliberately broad and designed to apply to myriad difficult issues that arise over time. As such, there is always a need to interpret provisions and apply them to new facts and circumstances. If there is a question about who has the power to appoint an official, who decides? If there is disagreement about where the authority lies to issue a regulation, who decides? Most important for the Afghan government's current negotiations with the Taliban, when questions arise about the interpretation of Islam and Sharia, who decides? If there are principles agreed in a peace framework, who decides whether they are met? It will be important, therefore, to outline clear decision rules in both a peace agreement—which could apply to an interim governing arrangement—as well as in any revised constitution. It is also critically important to identify who has the right to request a decision from the body identified to resolve difficult interpretive

questions. For example, can a female citizen, whose rights may be violated, ask for a ruling on the constitution? Or must a president or Parliament agree to ask the question on her behalf? Afghan experience with both peace agreements and constitutions in the last several decades underscores the importance of this issue. The breakdown of peace agreements in the 1990s was due in part to unclear rules on who had the authority to interpret the application of their provisions. More recently, disagreements over electoral outcomes, as well as tensions over qualifications of ministers and powers of appointment and dismissal have provoked constitutional crises about who has the authority to make final decisions and who can enforce penalties if final decisions are not carried out. While clear decision rules will not prevent power struggles, they can help to keep them from getting out of control.

The two issues likely to emerge as the most significant in the current peace talks are about (1) the qualifications and powers of government leaders and (2) the meaning of Islam and Sharia with respect to rights, laws, and the character of the state and its institutions. The 2004 constitution and Taliban practice and their draft 1998 constitution provide different, but flawed, approaches to resolving these questions.

Prior to 2004, the Afghan Supreme Court never explicitly had the power, as an independent branch of government, to interpret the constitution. The 2004 constitution empowered the Supreme Court to review the “compatibility of laws, decrees, inter-state treaties and international covenants with the Constitution.”¹ However, Article 157 called for the establishment of an independent commission for “supervision of the implementation of the Constitution.” These bodies have overlapping mandates, and the locus of powers of constitutional interpretation has been highly contested over the past 15 years. In 2010, the Supreme Court and the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) disagreed over measures to address election fraud during that year’s parliamentary election, prompting a constitutional crisis. Failure to resolve this issue has permitted political rivals to engage in “forum shopping” for legal decisions that advance their own interests, and has undermined confidence that constitutional disputes can be resolved impartially, if at all.

The role of these institutions in judging conformity with Sharia is also not specified. Indeed, this responsibility may rest in multiple places, including the courts, the executive (e.g., in the Ministry of Justice’s Taqin Department, which reviews the legality of statutes and regulations on behalf of the executive branch) and the legislature. The 2004 constitution states that any gaps in law may be resolved by the courts according to Hanafi Islamic jurisprudence (or Shia Islamic jurisprudence in the case of Shia civil disputes). Afghanistan has a National Ulema Council comprised of appointed religious leaders, but it has no direct authorities under the constitution. There are various models in other Muslim countries, such as Egypt’s Supreme Constitutional Court, which includes Islamic jurists who check that legislation passed by the Parliament is consistent with Islamic principles, or the Algerian High Islamic Council, which issues legal rulings when asked by the executive branch to clarify ambiguity or points of contention in the application of Islamic law.

¹ Afghan Const. of 2004, art. 121.

It is worth noting that initially, the draft constitution submitted to then-Afghan President Hamid Karzai by the Constitutional Drafting Commission in 2003 contained provisions for a Constitutional Court, distinct from the Supreme Court. Draft Article 146 stated “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. This article was not adopted, however, because there was the fear that one powerful constitutional decision-making body, if controlled by any one group, would have a stranglehold on the fragile political system, potentially using “adherence to Sharia” as a means to exert control.

The 2004 constitution also carries forward the distinctly Afghan institution of the *loya jirga*. As the “highest manifestation of the will of the people,” the *loya jirga* is called upon for constitutional amendment, impeachment and “to decide on issues related to independence, national sovereignty, territorial integrity as well as supreme national interests.”² This wide berth makes the *loya jirga* the ultimate potential final arbiter in many constitutional decisions. While not fit for decisions about specific legal cases—the violation of an individual right or interpretation of a specific legislative phrase, for example—the *loya jirga* is essentially a supra-constitutional body that makes decisions about major issues or corrects flaws in the constitution. This institution, as described in the 2004 constitution, is highly inclusive and democratic, derived from elections at the national, provincial and district levels. The process for convening a constitutional *loya jirga* is onerous and only questions of sweeping national importance are likely to be addressed. Notably, no constitutional *loya jirgas* have been convened to date.

In contrast to the 2004 constitution, the Taliban’s 1998 draft constitution gives the power to interpret the constitution and laws to the emir in consultation with an Islamic *shura* (Articles 50 and 108). The role of the Supreme Court in constitutional interpretation under the Taliban’s constitution is not clear. The *loya jirga* is absent from the Taliban’s constitution. In the 2004 constitution, as in almost every previous Afghan constitution, a *loya jirga* exists for making decisions of supreme national interest. The lack of a *loya jirga* in the Taliban’s constitution ensures that the power of the emir and the Islamic Council is not diluted; for example, granting the emir the authority to amend the constitution. The contrasting importance the two constitutions place on a *loya jirga* may indicate different approaches to ratifying an eventual peace agreement and maintaining Afghan sovereignty.

A Range of Views on Reform

Judging by recent statements, the Taliban are proposing an Islamic Council to select the leader of the country.³ They have also argued for the use of Hanafi jurisprudence for decision-making in the peace

² Afghan Const. of 2004, art. 110 and 111.

³ DPA. “Taliban Demands ‘Elite Religious Council’ to Select National Leader.” RFE/RL Gandhara, September 21, 2020. <https://gandhara.rferl.org/a/taliban-demands-elite-religious-council-to-select-national-leader/30849519.html>.

talks. Both of these suggestions point to an expectation by the Taliban that primary application and interpretation of the constitution would be done by clerics who follow the Taliban's particular school of thought. This is consistent with their past approach to governing and their draft constitution. It is not clear, outside the existence of an emir, how the Taliban would envision member selection for an Islamic Council, or whether diversity of sect, gender, school and political views would be allowed. Participants in focus group discussions made the point that, while the Taliban would want a significant role for the ulema in interpretation, there is a difference in the skills and knowledge base required for interpreting a constitution and drafting a law than for issuing a *fatwa*. There would also be important questions about who among the ulema is given the authority to decide religious questions and what the relationship of that body or individual would be to the rest of the government. Critical questions exist, then, with respect to how Islam and Sharia are defined (or not defined) in the constitution and who interprets the meaning of Sharia in the context of passing legislation, defining rights—particularly for women and minorities—and resolving disputes in court.

Can a Constitutional Court, as the highest authority to decide questions of Islamic law, be designed to accommodate Taliban and other Afghan jurists? It likely depends on the composition of the body. Clearly such a court would help resolve the current ambiguity between the interpretation authorities of the Supreme Court and the ICOIC. However, if the Taliban were to dominate such a body, it would function less as an independent branch of government with limited judicial powers and more like a *shura* of Islamic clerics, the *Shura-Ahl al-hall wal-aqd*.⁴ There is concern that a "Guardian Council," like that in Iran, would effectively smother democratic systems and the protection of individual rights. This was the concern that motivated the removal of the Constitutional Court from the draft of the constitution in 2003. However, some observers suggested that the Taliban's own diagnosis was that they had failed in the 1990s because they had attempted to impose a Sharia system that was not natural to Afghanistan, and that they did not have the support of Afghans or the wider international community—errors they may seek to correct in the peace process.

Ultimately, there appears to be some combination of five options, discussed in detail below:

- 1) A regular Supreme Court, possibly with a Sharia bench
- 2) An independent Constitutional Court
- 3) An independent advisory body/court with special expertise but nonbinding authority
- 4) A supreme Islamic council, like in Iran
- 5) A muddle that fails to provide clear authority and causes frequent constitutional crises

Options

The start of the peace talks and debate over constitutional principles provide an important opportunity to shape clear rules for constitutional interpretation and adjudication that will aid the stability of the political and legal systems over time. The following options may provide an avenue for positive discussions.

⁴ Literally "those who loosen and bind," i.e., those qualified to elect or depose a caliph on behalf of the Muslim community.

Focus on interests, not positions. Rather than jump quickly to a battle over institutions and who controls them, parties should try and focus on their goals and concerns about constitutional interpretation. For example, concerns about ideology and sufficient levels of expertise to make decisions about constitutional and Islamic law issues may help shape the right outcomes, as would discussion of specific cases, past and potential. This may not result in closer positions—it could, for example, define the gulf between attitudes toward women’s rights—but it will help define what is meant and desired by specific outcomes.

Recognize that all branches of government have a role in constitutional decision-making. Just as a highly centralized presidential system can create a winner-take-all mentality, so, too, can the investment of all constitutional interpretation authority in a single body. The ability to create some give and take in the system is one that allows each branch to play its part in interpretation. For example, if the executive branch is appointing judges that have to adhere to certain educational or clerical criteria, the executive will be the first to define what meets that criteria in practice. If the legislature is passing laws “in accordance with Islam,” it is making the first effort to define the application of that phrase. If the court system is reviewing claims of violation of constitutional rights, it will be the first to interpret their meaning. But in all of these cases another branch will have a check on or input into that decision-making. The legislature will decide to confirm the judges and the executive will have to enforce the legislature’s laws or the judiciary’s decisions about the application of rights.

Create a body to advise on constitutionality. Several constitutional systems have separate bodies for constitutional interpretation: one that reviews “concrete” cases that resulted from the actual implementation of a law or decision and one that reviews “abstract” questions about what the meaning of a proposed law or decision could be. In the case of “abstract review,” such opinions may be advisory, meaning that they give the executive or legislature insight into whether a certain law or act may be constitutional, but the opinions are not binding. The executive or legislature still has the constitutional power to act, and a Supreme Court or Constitutional Court still has the power to make a judgment down the line. But such a body—for example, a special commission or ulema council within the Parliament—would have power to steer the direction of the law and provide a rationale that could be used later if the law or action were to be contested in court. If a law or act is obviously unconstitutional in the opinion of the advisory body, preventing it could in turn prevent serious harm to citizens or a political crisis. This was a proposed function of the Article 157 commission, but the broader conflicts over power and jurisdiction of the commission and the Supreme Court disrupted this approach. Such an approach would allow for valuable input and debate—usually at the request of the executive or legislature—but does not give an extra “veto” to the advisory body. In some systems, the Supreme Court or Constitutional Court can also be asked for advisory (nonbinding) opinions.

Create a single court with jurisdiction over concrete constitutional interpretation. Any constitutional reform process provides a key opportunity to make clear who has the power to undertake constitutional interpretation and under which circumstances. For concrete cases, this could either be a Supreme Court or a separate Constitutional Court. In Afghanistan’s case, creating a separate court that is outside the normal functioning of the justice system with specialized expertise and selection processes may provide the greatest clarity and transparency on what will be a politically contested entity for years to come. What is most important is that there is a clear path for disputes to be taken up and resolved.

Consider a Constitutional Court with an Islamic law bench. In some states where Islamic principles, law or jurisprudence are established in the constitution as a basis or standard of legislation, a judicial or other body empowered to assess the constitutionality of laws may also have the authority to review

legislation for its conformity to Islam. For example, Iraq's constitution provides that, "No law that contradicts the established provisions of Islam may be established" and the Federal Supreme Court has jurisdiction to interpret the constitution and to provide oversight. Pakistan's constitution also tasks a Federal Sharia Court with examining "whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam." If a law is determined to be repugnant to Islam, "such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect."⁵ In Egypt, the Supreme Constitutional Court is the centralized authority that determines whether laws adhere to both the constitution and Sharia.⁶

For Afghanistan, it may make sense to have a separate bench within a Constitutional Court (or Supreme Court) for Sharia cases, but one whose decisions are ultimately reviewable by the whole court. In other words, the Islamic law bench within the court would be the preeminent body for interpreting the Islamic strictures of the constitution, but would not be the final authority.

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⁵ Pakistani Const. art. 203.

⁶ Drawn from Kakar, Palwasha L. Forthcoming. "Comparative Islamic Constitutionalism." Issues Paper. Washington, DC: United States Institute of Peace.