



Afghanistan Rule of Law Project پروژه امور عدلی و قضای

AFGHAN CONSTITUTIONAL LAW JUDICIAL TRAINING COURSE

COURSE SYLLABUS

This course on Constitutional Law is intended for the continuing education of judges and judicial candidates. Therefore, the focus is on the unique responsibilities of the judiciary as a separate and independent organ of the state of the Islamic Republic of Afghanistan. The materials are prepared in a way to encourage interactive teaching and learning, instead of the transfer of information through a pure lecture. Learning objectives are included, as are suggested reading assignments. Questions and hypothetical scenarios are presented to encourage class discussion. Materials are included to permit the delivery of the course in six- to twelve-hour modules, depending on the amount of time available for the subject in a particular training program. If additional hours of training time are available, the course can be supplemented with discussion exercises and outside materials.

A 12-hour course could be organized as follows:

Presentation of the principles and concepts underlying law and constitutional law (Class hours 1 and 2).

Explanation of the political system embraced by the 2004 Constitution of Afghanistan, followed by a discussion of the concept of separation of powers (Class hours 3 – 6).

Review, analysis, and extended discussion of the fundamental rights and duties of citizens under the 2004 Constitution (Class hours 7 and 8).

Examination of the international covenants and conventions applicable in Afghanistan that expand or inform those fundamental rights (Class hours 9 and 10).

Analysis and discussion of the unique role of the judiciary in protecting and enforcing those rights (Class hours 11 and 12).

These materials have been approved by the Supreme Court for use in judicial training programs, are available to any organization that wishes to use them, and may be found at www.afghanistantranslation.com.

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Charter of the United Nations

Universal Declaration of Human Rights

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Convention on the Rights of the Child

Convention on the Elimination of All Forms of Discrimination against Women

International Convention on the Elimination of All Forms of Racial Discrimination

International Covenant on Economic, Social and Cultural Rights

International Covenant on Civil and Political Rights

I. Introduction

Learning Objectives – Class Hours 1 and 2
Describe the basis for government
Describe the purpose of government
State the purpose and role of law
Cite the purposes of a constitution
Define statutory law
Describe other sources of law

(A). Social Contract

What are some of the reasons why people establish countries and form governments?

- Protection and security from neighbors and aggressors (army)
- Security and stability within the community (police)
- Provision of necessary services (government)
- Protection of fundamental rights and freedoms

What are some examples of necessary services?

- Health care
- Education
- Infrastructure
- Criminal justice system
- Method of resolving civil disputes
- Participation in the international community

What, then, is the basic agreement or contract that citizens make with their government?

The people of the community cede their autonomy and, to varying degrees, their personal authority to the government in exchange for protection, security, and services. They also, in this exchange, retain certain fundamental rights and freedoms that are protected by the government.

This can be called a social contract.

What are some examples of these fundamental rights and freedoms?

- Freedom of speech and association
- Right to peacefully assemble and protest
- Right to travel freely
- Prohibition against slavery and forced child labor
- Equal rights and duties under the law
- Presumption of innocence when charged with a crime
- Right to an attorney when arrested or charged with a crime
- Freedom from torture to compel a confession
- Right to sue the government for harm suffered at the hands of the government
- Freedom from imprisonment for debt

How does government maintain security and stability in the community, protect the rights and freedoms of citizens, and deliver services?

What is the common denominator?

The law.

(B). Foundation and Purpose of Law

All organized societies need rules or laws to guide the behavior of the society and of the individual members of the society.

These rules or laws need not necessarily be written down, but they must be understood and accepted by the members of the society.

Otherwise, the result is chaos and anarchy.

Therefore, the foundation of law is the need to organize the society in a way to preserve peace, justice, and public order.

All laws reflect ideas and policies.

Where do these ideas and policies come from?

- Societal norms
- Customs
- Traditions
- Religious and ethical teachings
- Academic and scientific knowledge

What is one fundamental difference between norms, customs, traditions, and ethical teachings on the one hand, and laws on the other?

Norms, customs, traditions, and ethical teachings act as guides to personal behavior.

Laws, on the other hand, are intended to be prescriptive, that is, to be followed regardless of the approval, or lack thereof, of any particular member of the society.

Concomitantly, the state or the government has an obligation to enforce the laws, often through the threat of the imposition of sanctions in case of noncompliance.

What are some examples of sanctions?

- Criminal penalties
- Civil remedies
- Withdrawal of privileges, i.e., licenses to do one thing or another

We have seen that as part of the social contract, the members of a society cede their autonomy to the government in exchange for protection, security, and services, and the guarantee of fundamental rights and freedoms.

We have also seen that this social contract is sealed through the promulgation and enforcement of laws.

(C). Constitutional Law

How are these laws made?

Where do we start in answering this question?

Let's go back to the beginning.

When the members of a society decide to cede their autonomy to a government, what is the first thing that they do?

- Anoint a king
- Select a chief
- Elect a president
- Form a shura or jirga to decide what to do
- Prepare a declaration or constitution

In modern times and in large societies or countries, the first thing that happens is the preparation and adoption of a written constitution

What is the primary purpose of a constitution?

The fundamental purpose of the constitution is to define and establish the relationship between the society or state and the citizens of the state.

What are some of the other purposes of a constitution?

- Establish the basic form of the state
- Define the responsibilities of the organs of the state and their relationship to the citizens and to each other
- Adopt and incorporate by reference certain international treaties and conventions
- Identify the fundamental rights and duties of the citizens
- Establish the mechanism for the preservation and perpetuation of the state
- Establish the procedure for the approval of the constitution by the citizens
- Establish the procedure for the adoption of amendments to the constitution

So, what is the answer to the question: How are laws made?

Laws are made by the legislative branch of government and approved by the president pursuant to and in accordance with the provisions of the constitution. Such laws are referred to as **statutes or statutory laws**.

If statutory laws are not made in accordance with the provisions of the constitution, can they be binding on the citizens? No.

Why not? They cannot be binding because only that authority and power that is expressed and specified in the constitution has been ceded by the citizens to the government.

Simply put, statutory laws that are not adopted pursuant to the constitution or that are contrary to the provisions of the constitution are invalid and not binding.

Can there be other types of legal pronouncements that are binding, that is, that have the force and effect of statutory law?

What are some possible examples?

- International treaties, covenants, and conventions
- Regulations adopted by the executive branch
- Presidential legislative decrees
- Court decisions and regulations
- Local custom

(D). Additional Sources of Law

Let's look at these under the general category "additional sources of law."

International Treaties, Covenants, and Conventions:

International treaties, covenants, and conventions provide rules to govern the relationships among countries and between the citizens of different countries.

To be binding upon a country, and by extension, the citizens of that country, a particular treaty, covenant, or convention must be approved by the country in accordance with the provisions of the country's constitution. This process of approval is often referred to as the ratification process.

Ratification of treaties, covenants, and conventions is a voluntary act, and no country can be forced to ratify a particular treaty, covenant, or convention. However, acceptance into an international organization, for example, the United Nations, may be conditioned upon the acceptance of certain existing treaties, covenants, and conventions.

Once a particular treaty, covenant, or convention is lawfully ratified by a country, it becomes binding on the government and the citizens to the same extent as statutory laws adopted by the country.

Later on in this course, we will examine in detail particular international covenants and conventions applicable in Afghanistan.

Regulations Adopted by the Executive Branch:

What is one of the main duties of the executive branch of government? Implement and enforce the law.

How does the executive branch carry out this duty? Through ministers and ministries.

What are some examples of ministries?

- Ministry of Education
- Ministry of Public Health
- Ministry of Justice
- Ministry of Interior
- Ministry of Defense
- Ministry of Higher Education
- Ministry of Foreign Affairs
- Ministry of Finance
- Ministry of Women's Affairs
- Ministry of Commerce

- Ministry of Public Welfare

The programs that fall under the jurisdiction of a particular ministry can be extensive and complex.

Often, the laws creating those programs do not cover all the details of the programs or answer all questions related to the implementation of the programs.

For this, reason, the law creating a government program may provide authority to the ministry charged with implementing the program to adopt regulations to govern the implementation of the program.

If a law so provides, and if the regulation is adopted in accordance and conformance with the law and the constitution, the regulation will be binding on the ministry and the citizens to the same extent as statutory laws adopted by the legislative branch of government.

Presidential Legislative Decrees:

Sometimes, during periods of transition or emergency, the president is authorized under a country's constitution to issue legislative decrees, that is, to create binding law similar to statutory law. Typically, these "laws" are time-limited and subject to reenactment by the legislative branch.

Court Decisions and Regulations:

Let's assume a constitution with a political system composed of three separate but equal branches of government: executive, legislative, and judicial.

In such a system, the judicial branch, including the lower courts, is typically under the administrative control of a supreme court.

In such a system, would the supreme court be authorized to adopt regulations to implement the judicial functions of the country?

What are examples of such judicial functions?

- Employment of clerks and court administrators
- Assignment of cases to particular courts and judges
- Administration of case filing and reporting systems
- Maintenance of court facilities
- Establishment and enforcement of standards of judicial conduct
- Delivery of continuing judicial education programs

Where would the supreme court's authority to adopt regulations be found?

- Inherent power
- Constitution
- Statutory law

Would such duly-adopted regulations be binding?

- On the judges?
- On the other branches of government?
- On the citizens?

In addition to the administration of the judiciary, what is a primary function of a supreme court? To consider and finally decide particular cases appealed from the lower courts.

Are such final decisions binding on the parties to the particular cases?

Is this true even if one of the parties is a government ministry or office?

Hypothetical scenario:

Let's assume that a case comes for trial before a panel of the primary court that has been described in the local news media and gained great notoriety in the community. Citizens and the media are very interested in the outcome of the trial. Let's assume further that the president of the court panel decides not to conduct the trial in public because he does not think there is room in the courtroom for all the interested people.

The owner of a local newspaper challenges the decision of the president, and the case comes before the supreme court, which must interpret the following provision of statutory law:

Trials in the courts shall happen in open procedure in which everybody may attend, subject to law. The court may convene the trials in close procedure only if they are legally required or that it is deemed necessary.

Do you think that this statute is clear or unclear?

What is unclear about the statute?

What does the phrase, "or that it is deemed necessary," mean?

The policy of the law favors open trials, closed trials being the exception, but yet the statute sets forth no standards other than necessity to guide courts in the application of the exception.

Let's assume that the supreme court decides that the reason given by the president of the panel was not sufficient to justify the closing of the trial to the media and the public, and sets forth some guidelines for applying the law in its decision.

Would the supreme court's interpretation of the law, as announced in its decision, cover future cases?

If so, would the interpretation be binding on the lower courts in future cases?

If you think so, does this mean that the supreme court, in effect, has the power to change the statutory law?

If so, and if the executive and/or legislative branches did not agree with the supreme court's interpretation in a particular case, what options would they have?

- Ignore the supreme court's decision
- Ask the supreme court to reconsider the decision
- Challenge the supreme court in the media
- Call for the dismissal of the justices who rendered the decision
- Seek to amend the statutory law to overrule the supreme court's interpretation

These are challenging and important questions. Please think about them as we review the provisions of the 2004 Constitution of Afghanistan because we will return to them later in the course.

Local Custom:

When can you look to local custom in deciding a case?

Where is local custom found?

This has been a brief introduction to the subject of jurisprudence and constitutional law. We will now move on to a study of the 2004 Constitution of Afghanistan.

[reading assignment for next class – Constitution, preamble, articles 1 – 21, 60 – 80, 134, 136 – 148, and 151 – 157]

II. 2004 Constitution of Afghanistan

Learning objectives- Class Hours 3-6
Describe the political system in Afghanistan
List the duties of the state
Recite the purpose and duties of the executive branch of government
Recite the purpose and powers of the legislative branch of the government
Describe the judicial branch of the government
State the features of an independent judiciary
Demonstrate the importance of a system of checks and balances

(A). Political System

How would you describe the political system in Afghanistan? Islamic Republic.

How do we know that Afghanistan is an Islamic Republic? Stated in the Constitution of 2004.

What does a free republican form of government mean? The government is run by representatives elected by the people, and accountable to the people.

What are some other forms of government?

- Absolute monarchy
- Constitutional monarchy
- Personal Dictatorship
- Military dictatorship
- Communist republic
- Socialist republic

What are some of the attributes of the political system in Afghanistan?

- Free and open elections of the president and representatives
- Three separate but equal branches of government: executive, legislative, and judicial
- Checks and balances
- Guarantee of specified individual rights and personal freedoms
- Guarantee of specified services from the government
- Specific process to amend the Constitution

Let's look in more detail at the 2004 Constitution, starting with the three branches of government.

(B). State

What is the difference between the government and the state?

- State includes all three branches
- Attributes are accorded to the state, and duties are placed upon the state (arts. 1 – 21)
- In essence, the state is the country of Afghanistan

Let's examine some of these attributes and duties of the state:

Afghanistan is an Islamic Republic, an independent, unitary, and indivisible state (art. 1).

The sacred religion of Islam is the official religion of Afghanistan, but followers of other faiths are free, within the bounds of the law, to practice their religions (art. 2).

Because the sacred religion of Islam is the official religion of the country, no law can contravene its tenets and provisions (art. 3).

The national sovereignty of Afghanistan belongs to the nation, manifested directly and through its elected representatives (art. 4).

Afghanistan is comprised of all the tribes of the country, and is composed of all individuals who possess Afghan citizenship, of which they cannot be deprived (art. 4).

The fundamental duties of the state include implementing the provisions of the Constitution and laws, defending the independence, national sovereignty and territorial integrity of the country, and securing and defending the country (art. 5).

The state is 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 and equality between all peoples and tribes, and balance development of all areas of the country (art. 6).

The state must observe the U.N. Charter, the Universal Declaration of Human Rights, and all ratified inter-state agreements and treaties (art. 7).

The state must prevent all terrorist activities, cultivation and smuggling of narcotics, and production and use of intoxicants (art. 7).

The foreign policy of the country must be based on preserving independence, national interests and territorial integrity, as well as on non-interference, good neighborliness, mutual respect and equality of rights (art. 8).

The state must encourage private investment and economic development, promote agriculture, provide housing and distribute public estates to deserving citizens, and protect and improve forests and the living environment (arts. 10 – 15).

The state must adopt measures to foster education at all levels, and develop religious teachings, and improve the conditions of mosques and religious schools and centers (art. 17).

Pashto and Dari are established as the official languages, a calendar is designated, a flag is created, directives are given for the creation of a national anthem, and Kabul is established as the capital (arts. 16, 18 – 21).

(C). Executive Branch of Government

Purpose of Executive Branch:

What is the purpose of the executive branch of government?

- Provide the services specified in the Constitution
- Protect and guarantee the individual rights and personal freedoms specified in the Constitution
- Execute the laws of the country
- Carry out the mandates of the Constitution regarding the relationship to the other branches of government

Organization of Executive Branch:

How is the executive branch organized under the constitution?

- President (arts. 60 - 70)
- First vice president (art. 60)
- Second vice president (art. 60)
- Ministers (arts. 71 – 80)
- Attorney General (art. 134)
- Local administrative units (arts. 136 – 142)

President and Vice Presidents:

Election, qualifications, term of office, resignation, and removal

The president is the head of state with two vice presidents, who a candidate for president declares before the election; the vice presidents, in order, take over for the president in case of absence, resignation, or death (art. 60).

The president (and with him his selected vice presidents) is elected by receiving more than 50% of votes cast by voters through free, general, secret, and direct voting, and the election for president is held 30 to 60 days prior to the end of the current presidential term (1st of Jawza of the fifth year following the election) (art. 61).

If no candidate gets more than 50% of the votes, the two highest vote getters participate in a run-off election to be held within two weeks from the date election results are proclaimed; the result of the death of a candidate during the election is governed by statutory law (art. 61).

To be eligible to stand as a candidate for president or vice president, a person must be a citizen of Afghanistan (and of no other country), be a Muslim, be born of Afghan parents, be not less than 40 years of age on the date of declaring candidacy, and not have been

convicted of crimes against humanity, a criminal act, or deprivation of civil rights by a court (art. 62).

No individual shall be elected for more than two terms as president or vice president (art. 62).

Could a person who served as vice president later serve as president for two terms? Yes – vice presidents can nominate themselves as presidential candidates (art. 67).

In case of the resignation, impeachment, or death of the president, the first vice president shall assume the authorities and duties of the president; in case of resignation or an incurable illness impeding the president's performance of duties, as verified by an authoritative medical team assigned by the Supreme Court, the first vice president shall act as interim president pending an election for president which shall be held within three months in accordance with article 61 (art. 67).

While acting as interim president, the first vice president cannot amend the Constitution, dismiss ministers, or call a referendum (art. 67).

If a vice president resigns or dies, the president can appoint a replacement with the endorsement of the House of People (art. 68).

In case of resignation, death, or inability to serve under article 67, the order of succession is as follows: first vice president, second vice president, president of the House of Elders, president of the House of People, and foreign minister (art. 68).

The president can be accused of a crime against humanity, national treason, or any crime by one-third of the members of the House of People, and if the accusation is approved by two-thirds of the House of People, it shall convene a Loya Jirga within one month. If the Loya Jirga, by two-thirds majority, approves the accusation, the president shall be released from duty and the issue referred to a special court composed of the President of the House of Elders, and three members of the House of People and three justices of the Supreme Court appointed by the Loya Jirga (art. 69).

Article 69 states that “[i]n such a situation the provisions of Article 67 of this Constitution shall be applied.” What does this mean? Is the president considered to be impeached before the special court renders a verdict?

Unless impeached, upon the conclusion of his or her term, the president is entitled to the financial benefits of the presidency for life (art. 70).

Authorities and duties

The authorities and duties of the president are set forth in article 64, and to a lesser degree in the oath of office prescribed in article 63. What are the authorities and duties of the president under article 64?

- Supervise the implementation of the Constitution (para. 1)
- Be commander and chief of the armed forces, declare war and peace with the endorsement of the National Assembly, defend the territorial integrity and preserve the independence of the country, and dispatch armed forces outside of Afghanistan with the endorsement of the National Assembly (paras. 2 – 6)
- Convene the Loya Jirga except in the situation prescribed in article 69 (para. 7), and inaugurate the sessions of the National Assembly and Loya Jirga (para. 9)
- Accept the resignations of vice presidents (para. 10)
- Appoint the ministers, the attorney general, the Head of the Central Bank, the national security director, and the Head of the Red Crescent with the endorsement of the House of People, and accept their resignations and dismiss them (para. 11).
- Appoint the Chief Justice and Justices of the Supreme Court with the endorsement of the House of People (para. 12).
- Appoint, dismiss, and accept the resignation and retirement of judges, officers in the armed forces, police officers, national security officers, and high-ranking officials according to the provisions of law (para. 13).
- Appoint representatives to foreign states and international organizations, accept the credentials of foreign political representatives, and issue the credential letter for conclusion of international treaties in accordance with the provisions of the law (paras. 14, 15, and 17).
- Endorse laws and judicial decrees (para. 16).
- Reduce and pardon penalties in accordance with the provisions of the law (para. 18).
- Bestow medals, insignias, and honorary titles in accordance with the provisions of the law (para. 19).
- Establish commissions to improve the administration of the country in accordance with the provisions of the law (para. 20).
- Perform other authorities and duties enshrined in this Constitution (para. 21).

In addition to these specific authorities and duties, under article 65, the president can call for a referendum of the people on important national, political, social, and economic issues, so long as the referendum is not contrary to the provisions of the Constitution or requires its amendment.

As an overriding principle, under article 66, the president shall take into consideration the supreme interests of the people to enforce the authorities enshrined in the Constitution, and shall not sell or bestow state property without the provision of the law or use the position of the presidency for linguistic, sectarian, tribal, religious, or party considerations.

As you can see, the execution of several authorities and duties specified in article 64 are limited by the requirement that the execution be “in accordance with the provisions of the law.”

What does this mean?

- Not self-executing
- Requires action by the Parliament in the form of the passage of an enabling statute
- Limits the authority and discretion of the president to what is permitted under the statute

What are the other two major limitations on the exercise of presidential or executive authority?

- Every action or activity of the president and the executive branch must arise from some specific authority granted in the Constitution. Accordingly, executive power is limited
- An action or activity of the president and the executive branch cannot be contrary to the provisions of the Constitution

What are the checks on the abuse by the president of executive power?

- Parliament
- Supreme Court
- Impeachment

After we examine the constitutional framework for the legislative and judicial branches of government, we will return to this very important concept of checks and balances. But first, we must look at the ministries.

Ministers:

Article 71 provides that the “Government” shall be comprised of ministers who work under the chairmanship of the president. In other words, ministers are selected by the president to run the day to day affairs of the government and carry out the responsibilities of the executive branch of government. They do this through governmental ministries.

To be appointed as a minister, an individual must be a citizen of Afghanistan, have higher education, work experience, and a good reputation, be not less than 35 years of age, and not have been convicted of crimes against humanity, a criminal act, or deprivation of civil rights; if the individual holds dual citizenship, the House of the People may approve or reject the nomination (art. 72).

If a member of the National Assembly is appointed as a minister, he or she loses that membership (art. 73).

Ministers take an oath of office (art. 74), and their duties, that is, the duties of the government, are set forth in general terms in article 75:

- Execute the provisions of the Constitution, other laws, and the final decisions of the courts (para. 1)
- Preserve the independence, defend the territorial integrity, and safeguard the interests and prestige of Afghanistan in the international community (para. 2)
- Maintain public law and order and eliminate every kind of administrative corruption (para. 3)
- Prepare the budget, regulate the financial conditions of the state, and protect the public wealth (para. 4)
- Devise and implement social, cultural, economic, and technical development programs (para. 5)
- Report to the National Assembly at the end of the fiscal year about tasks achieved and important programs for the new fiscal year (para. 6)
- Perform other duties that, in accordance with the Constitution and other laws, fall within the responsibilities of the government (para. 7)

Article 76 authorizes the government to approve regulations to implement the fundamental lines of the policy of the country and the duties of the government, so long as the regulations are not contrary to the body or spirit of any law.

Under article 77, the ministers are responsible to the president and the House of People for their specified duties, and the performance of those duties must be within the framework of the Constitution and prescribed laws.

Ministers shall not use their positions for linguistic, sectarian, tribal, religious, or partisan purposes, and if a minister is accused of crimes against humanity, national treason, or another crime, in accordance with article 134, the case is submitted to a special court (art. 78).

As previously mentioned, the executive branch has some limited authority to make law. During the recess of the House of People, the government shall, where there is an immediate need, issue legislative decrees, except in matters related to the budget and financial affairs, and such decrees acquire the force and effect of law upon endorsement by the president (art. 79).

Legislative decrees must be presented to the National Assembly within 30 days of convening its first session, and if rejected, they are void (art. 80).

Attorney General:

As we have seen, the attorney general is appointed by the president, and is considered to be a part of the government. The attorney general is not part of the judiciary.

The constitutional authorization for the attorney general is found in article 134, which provides as follows:

Discovery of crimes is the duty of the police, and the investigation and filing of the case against the accused in the court is the responsibility of the attorney general, in accordance with the provisions of the law.

The Office of the Attorney General is part of the executive branch, and shall be independent in its performance.

The organization, authority, and method of work of the Office of the Attorney General shall be regulated by law, and special law will regulate the investigation of crimes of duty by the armed forces, police, and national security officials.

Local Administrative Units:

Local units of government in Afghanistan are provided for in the Constitution, and fall under the general authority of the executive branch of government.

As regulated by law, the central administration of the country is divided into several local administrative units called provinces, each headed by a minister (art. 136). These ministers are called governors, and are appointed by the president.

The government, while preserving the principles of centralism, shall transfer necessary powers in accordance with the law to local administrators in order to accelerate and improve economic, social, and cultural matters, and foster peoples' participation in developing national life (art. 137).

The primary governing body of each province is the provincial council, which has the following attributes and powers:

- Members elected for four years by the residents of the province, proportionate to the population, through free, general, secret, and direct elections; one member elected as president by the council members (art. 138)
- With the cooperation of the provincial administration, participate in the attainment of the development objectives of the state and improvement of the affairs of the province, and advise the provincial administration on related issues in the manner prescribed by law (art. 139)

Local councils, elected for three-year terms through free, general, secret, and direct elections shall be established to organize activities and attain active participation of the people, including nomads, in districts and villages in accordance with the provisions of law (art. 140).

As regulated by law, municipalities shall be established to administer city affairs, with a mayor and municipal councils selected through free, general, secret, and direct elections (art. 141).

Finally, to implement the provisions and attain the values enshrined in the Constitution, the state shall establish necessary offices (art. 142).

State of Emergency:

The executive branch of government is accorded special powers during a state of emergency, although those powers are defined and are limited.

With the endorsement of the National Assembly, the president, by proclamation, will declare a state of emergency in all or part of the country when the protection of independence and national life becomes impossible through constitutional channels due to war, threat of war, serious rebellion, natural disasters or similar conditions (art. 143).

If the state of emergency continues for more than two months, the National Assembly must consent to its extension (art. 143).

During the state of emergency, the president can, in consultation with the presidents of both Houses of the National Assembly and the Chief Justice of the Supreme Court, transfer some powers of the National Assembly to the executive branch of government (art. 144).

In addition, pursuant to article 145, with the approval of the presidents of both Houses and the Chief Justice, the president can suspend the enforcement of, or place restrictions on the following fundamental rights guaranteed in the Constitution:

- Clause 2 of article 27 (no one shall be pursued, arrested, or detained without due process of law)
- Article 36 (fundamental right to gather and hold unarmed demonstrations)
- Clause 2 of article 37 (state does not have the right to inspect personal correspondence and communications, unless authorized by the provisions of law)
- Clause 2 of article 38 (no one shall have the right to enter a personal residence and search it without the owner's permission or a court order)

The Constitution cannot be amended during a state of emergency (art. 146).

If the presidential or legislative term expires during the state of emergency, the new general elections will be postponed, and the terms extended for up to four months, and if the state of emergency continues for more than the four months, the president will call the Loya Jirga; the elections will be held within two months after the termination of the state of emergency (art. 147).

Upon the termination of the state of emergency, measures adopted under articles 144 and 145 are immediately void (art. 148).

[reading assignment for next class – Constitution, articles 81 – 115, and 149, 150]

(D). Legislative Branch of Government

Introduction:

Broadly speaking, the legislative branch of government is composed of the National Assembly (arts. 81 – 109), and the Loya Jirga (arts. 110 – 115), although the role of the Loya Jirga is specific and very limited.

National Assembly:

Composition and qualifications for membership

The National Assembly, often referred to as the Parliament, is the highest legislative organ of the state, and manifests the will of the people and represents the entire nation; every member, when voting, shall make judgments according to the general interests and the supreme benefits of the people (art. 81).

The National Assembly consists of two houses: House of People and House of Elders, and an individual cannot be a member of both houses at the same time (art. 82).

To be qualified to serve in the National Assembly, an individual must be a citizen of Afghanistan, not have been convicted of crimes against humanity, another crime, or deprivation of civil rights, and be 25 years of age (House of People) and 35 years of age (House of Elders) (art. 85).

Election credentials of members of the National Assembly shall be reviewed by the Independent Elections Commission in accordance with the provisions of law (art. 86).

Article 83 governs the election of members of the House of People:

- Members shall be elected by the people through free, general, secret, and direct balloting
- After the disclosure of the election results, the old parliament shall end and the new parliament shall commence on the 1st of Saratan of the 5th year
- The election of members shall be held 30 to 60 days prior to the expiration of the old term
- The number of members shall be proportionate to the population of each constituency, not exceeding 250 members
- The electoral constituencies, as well as other related issues, shall be determined by the elections law, which shall attain, through the electoral system, general and fair representation for all the people of the country, and proportionate to the population of every province, and on average, at least two females shall be elected members from each province

Article 84 governs the section of members to the House of Elders:

- From among members of each provincial council, one member will be elected for a four-year term
- From among the district councils of each province, one individual will be elected for a three-year term
- The remaining one third of the members shall be appointed by the president for a five-year term from among experts and experienced persons, including two impaired and handicapped individuals and two nomads, and 50% must be female
- Council members elected to the House of Elders lose their council positions

In case of death, resignation, dismissal, or disability impeding performance of a member, selection of a replacement for the remaining period of the legislative term shall be in accordance with the provisions of the law (art. 108)

No member of the National Assembly can be legally prosecuted for reasons of voting or views expressed during the performance of duties (art. 101).

If a member is accused of a crime, the responsible official informs the House of the member, and the prosecution proceeds; in case of an evident crime, a member can be arrested without the permission of the House; however, in both cases, if detention is required and requested, the responsible official must obtain the approval of the House (if the Assembly is in recess, the approval is requested from the administrative board of the respective House, and the decision referred to the first session of the House) (art. 102).

Provisions common to both Houses

At the commencement of the legislative term, from among its members, each house will elect an administrative team composed of a president for the legislative term, and first and second deputies, a secretary, and assistant secretary for a period of one year; the duties of the administrative teams shall be determined by the Regulations on Internal Duties of each house (art. 87).

Both houses will form commissions to study issues under discussion in accordance with the Regulations on Internal Duties (art. 88).

Under Article 90, the National Assembly shall have the following duties:

- Ratification, modification, or abrogation of laws or legislative decrees (para. 1)
- Approval of social, cultural, economic, and technological development programs (para. 2)
- Approval of the state budget and permission to obtain or grant loans (para. 3)
- Creation, modification, and or abrogation of administrative units (para. 4)
- Ratification or abrogation of international treaties and agreements (para. 5)

- Other authorities enshrined in the Constitution (para. 6)

As a political check on the exercise of executive authority, any commission of both houses of Parliament can question any minister about special issues, and the minister must provide an oral or written response; also, ministers can participate in the sessions of either House, and either House can demand the participation of a minister (arts. 93 and 103).

Law making is the special domain of the National Assembly:

- A proposal for a law is made by the government or a member of the National Assembly, and in the domain of the judiciary, by the Supreme Court through the government, except that only the government can propose a law affecting the budget or financial affairs (art. 95)
- If a proposal for a law is made by 10 members of either of the two Houses, it will be, after approval of one fifth of the House where it was initiated, included in the work agenda of that House (art. 97)
- If a proposal for a law includes the imposition of new taxes or a reduction of state revenues, it can be included in the work agenda of the National Assembly only if the source of compensation is included in the text of the proposal (art. 96)
- A proposal for a law, but not the state budget and development program, is submitted first to the House of People by the government; within one month of receiving the proposal, the House of People, following a debate, will approve or reject the proposal as a whole; if a proposal is approved, it will be sent to House of Elders, which must decide within 15 days (art. 97)
- In deciding about proposals, the National Assembly must give priority to treaties and development programs of the state that, according to the government, require urgent consideration (art. 97)
- If one House rejects a decision of the other, a joint commission comprised of an equal number of members shall be formed to solve the difference; if the difference is solved, the decision of the commission upon endorsement of the president becomes law; if the difference is not solved by the joint commission, the decision may be considered and re-passed by a two-thirds majority of the House of People at its next session, and become law upon the endorsement of the president without re-submission to the House of Elders (art. 100)

Under article 98, special rules apply regarding the state budget and development program of the government:

- During the fourth quarter of the fiscal year, the government must present to the National Assembly the budget for the next year with a brief account of the budget for the current year; the precise account of the budget for the previous year will be presented to the National Assembly during the next six months according to the provisions of law

- If the budget is not approved before the beginning of the new fiscal year, the budget of the previous year will be applied pending passage of the new budget
- The House of People shall not delay approval of the budget for more than one month after receiving it, and shall not delay giving permission to obtain or grant loans not included in the budget for more than 15 days (if permission is not granted within 15 days, the proposal for obtaining or granting loans shall be considered approved)
- The state budget and development program of the government is submitted to the House of People through the House of Elders, and includes its advisory views
- The decision of the House of People is implemented without presentation to the House of Elders upon endorsement by the president

If the annual budget, development program, or issues related to national security, territorial integrity, or independence of the country are under discussion, the sessions of the National Assembly shall not end pending a decision on the matter (art. 99)

Proposals for amending the elections laws cannot be included in the work agenda during the last year of the legislative term (art. 109)

Sessions of the National Assembly shall be held as follows:

- Both Houses shall convene their sessions concurrently, but separately; joint sessions presided over by the President of the House of People can be held when the legislative term or annual sessions are inaugurated by the president or when deemed necessary by the president (art. 104)
- No one shall enter the National Assembly by force, and sessions shall be open unless otherwise approved by the Assembly at the request of the President of the House of People or at least 10 members (art. 105)
- Unless otherwise stated in the Constitution, a quorum of each House is a majority of the members, and decisions can be taken by a majority vote of the members present (art. 106)
- The National Assembly shall hold two regular sessions annually for a total period of nine months, which can be extended by the Assembly when needed; extraordinary sessions during recess can be convened by order of the president (art. 107)
- Matters relating to the presence and absence of members are regulated by the Internal Duties Statute (art. 108)

Provisions special to the House of People

To provide a check on the exercise of executive power, the House of People has the following authorities:

- 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 (art. 89)
- On the proposal of 20% of its members, to make inquiries from each minister (referred to as an elucidation session under article 91, para. 1); if the explanations given are not satisfactory, the House of People will consider the issue of a no-confidence vote, which shall be explicit, direct, and based on convincing reasons; such a vote must be approved by a majority of all the members (art. 92)

Under article 91, the House of People has the additional authority to decide on the development program and state budget, and approve or reject appointments according to the provisions of the Constitution.

Executive branch check on exercise of legislative authority

How does the constitution define a law in article 94? “Law shall be what both houses of the National Assembly approve and the President endorses, unless this Constitution states otherwise.”

What is the main check that the president has on the activities of the National Assembly?
The main check is the presidential veto provided in article 94:

- If the president elects to reject a proposal approved by the National Assembly, the president must return the proposal to the House of People within 15 days of the date of its receipt, along with a message stating the reasons for the rejection.
- If the president does not act within the 15-day period, the proposal is considered endorsed and enforceable.
- If the president vetoes the proposal, the House of People can override the veto by re-approving the proposal with a two-thirds majority of those present and voting.

Loya Jirga and Amendments to the Constitution:

The Loya Jirga is the highest manifestation of the will of the people, and consists of the members of the National Assembly and the presidents of the provincial and district assemblies (art. 110).

The ministers, Chief Justice and justices of the Supreme Court, and the attorney general shall participate in the sessions of the Loya Jirga without voting rights (art. 110).

The Loya Jirga shall convene to decide on issues related to independence, national sovereignty, territorial integrity, and supreme national interests, to amend the Constitution, and to impeach the president under article 69 (art. 111).

At its first session, the members shall elect from their number a chairperson, deputy-chair, secretary, and assistant secretary (art. 112).

The quorum for voting is a majority of the members, and decisions shall be adopted by a majority of members present, except as otherwise explicitly stated in the Constitution (art. 113).

Sessions shall be open to the public, unless otherwise approved by the Loya Jirga pursuant to the demand of one fourth of its total membership (art. 114).

During the sessions, articles 101 and 102 are applicable to the members (art. 115).

Under article 150, a proposal to amend the Constitution that is submitted to the Loya Jirga must be approved by a majority of two thirds of its members, notwithstanding the provisions of article 113.

The constitutional principles of adherence to the tenets of the Holy Religion of Islam and Islamic Republicanism cannot be amended, and amendments to the fundamental rights of the people are permitted only to improve those rights (art. 149).

A commission comprised of members of the government, National Assembly, and Supreme Court is formed by presidential decree to prepare a proposal for an amendment, and the Loya Jirga is convened by presidential decree to consider the proposal (art. 150).

[reading assignment for next class – Constitution, articles 116 – 135, and 155]

(E). Judicial Branch of Government

Independent Judiciary:

Introduction

A judiciary that is independent of the other branches of government is essential to the success of a republican form of government. This principle is recognized internationally:

United Nations Basic Principles on the Independence of the Judiciary (General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985).

Two of the basic principles are worthy of special mention:

No. 3. “The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”

No. 4. “There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision”

Judicial independence is properly viewed from two standpoints: institutional independence and the independence of the individual judge in the role of decision maker.

Does Afghanistan have a truly independent judiciary?

To answer that question, let’s examine both aspects of judicial independence.

Institutional independence

What does institutional independence mean?

Is the judiciary in Afghanistan truly independent from the other branches of government?

What are the characteristics of institutional independence?

Constitutional recognition: Under article 116, the judiciary is “an independent organ of the state of the Islamic Republic of Afghanistan” comprised of a Supreme Court, courts of appeal, and primary courts whose organization and authority shall be regulated by law, and headed by the Supreme Court, the highest judicial organ.

Separate and independent budget: Further, under article 125, the budget of the judiciary shall be prepared by the Supreme Court in consultation with the government, shall be presented to the National Assembly as part of the national budget, and shall be implemented by the Supreme Court.

Guarantee of adequate salaries: Suitable salaries for justices and judges are guaranteed by article 155.

Control of court administration: Pursuant to article 124, in accordance with laws related to civil servants and administrative staff of the state, the Supreme Court shall regulate the appointment, dismissal, promotion, retirement, rewards, and punishment of the officials and administrative personnel of the judiciary.

Constitutional protection of judicial function: The independence of the judiciary is further protected by article 122: Except for the formation of special courts authorized in articles 69, 78, and 127, and military courts, to be regulated by law, “[n]o 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.”

Independence of the judge as decision maker

The Constitution is silent on the independence of the judge as decision maker.

However, the recently adopted Regulation of Judicial Conduct for the Judges of the Islamic Republic of Afghanistan directly addresses this issue, and in articles 3, 5, and 7 requires judges to ensure that they will not be influenced by any persons, including other judges, who are not participating in a case.

Composition of Supreme Court:

As prescribed in article 118, Supreme Court members, or justices, must have the following qualifications:

- Be a citizen and not less than 40 years of age
- Have higher education in legal studies or Islamic jurisprudence, and expertise and adequate experience in the Afghan judicial system
- Have a good character and reputation
- Not have been convicted for crimes against humanity, another crime, or deprivation of civil rights
- Not be a member of any political party during the term of appointment

The Supreme Court is composed of nine members appointed by the president with the endorsement of the House of People, one of whom is appointed as the chief justice (art. 117).

Justices were initially appointed as follows: three members for a period of four years, three members for seven years, and three members for 10 years. Subsequent appointments will be for a period of 10 years (art. 117).

Justices take an oath of office (art. 119), and will receive lifetime pensions at the end of their term of service provided they do not hold state or political offices (art. 126).

Justices cannot serve for more than one term, and except under circumstances stated in article 127, justices cannot be dismissed until the end of their term (art. 117).

Regarding dismissal under article 127, if more than one third of the members of the House of People demand the trial of a justice accused of a crime related to job performance or committing another crime, and the House approves the demand by two-thirds majority of all the members, the justice shall be dismissed and the issue referred to a special court for trial as regulated by law.

Lower Courts and Judges:

Courts of appeal and primary courts are contemplated by article 116, and are under the direction of the Supreme Court through the Office of General Administration of the

Judiciary established by the Court to better regulate judicial and judicial administrative matters and attain necessary reforms (art. 132).

Judges are proposed for appointment by the Supreme Court, subject to the approval of the president, and the appointment, transfer, promotion, punishment and proposals for retirement of judges, carried out according to the provisions of the law, is within the authority of the Supreme Court (art. 132).

Article 123 provides that matters related to the formation, authority and proceedings of courts, and matters related to judges are to be regulated by law.

Those matters, including matters related to the Supreme Court, are regulated by the Law on Organization and Jurisdiction of Courts of the Islamic Republic of Afghanistan.

Justices and judges may not engage in other jobs during their term of office, and may not be members of political parties (arts. 152 and 153).

Regarding the discipline of judges, when a judge is accused of a crime, the Supreme Court shall, in accordance with the provisions of the law, consider the case, and if, after hearing the judge's defense, the Court considers the accusation valid, it shall present a proposal to the president for the dismissal of the judge. If the president approves, the accused judge shall be dismissed and punished in accordance with the provisions of the law (art.133).

Provisions Related to the Judiciary Generally:

The jurisdiction of the courts is very broad and includes all cases filed by real or incorporeal persons, including the state, as plaintiffs or defendants which come before the courts in accordance with the provisions of the law (art. 120).

Likewise, the Supreme Court seemingly has the authority to rule on the constitutionality of statutory laws:

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 (art. 121).

We will return to this question of judicial review in detail later in the course.

In the courts of Afghanistan, trials shall be open and every individual has the right to attend in accordance with the law, except that in situations clarified by law, the court can hold secret trials when considered necessary; however, pronouncement of decisions shall be open to the public in all cases (art. 128).

Courts must state reasons for their decisions and verdicts, and all final decisions of the courts shall be enforced, except for capital punishment, which requires the approval of the president (art. 129).

The hierarchy of law to be applied is clearly prescribed:

In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws (art. 130).

If there is no provision in the Constitution or other laws about the case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner (art. 130).

The courts shall apply the Shia jurisprudence in cases involving personal matters of followers of the Shia sect in accordance with the provisions of the law. In other cases, if no clarification in this Constitution and other laws exist, the courts shall rule according to laws of this sect (art. 131).

Under these provisions, where would a judge look first in deciding a case?

- The Constitution
- Other statutory laws
- Binding international treaties, covenants, and conventions
- Presidential legislative decrees
- Duly adopted regulations having the force and effect of law

When would the judge look to Hanafi jurisprudence: only if there is no provision in the Constitution or other law about the case.

When would a judge look to Shia jurisprudence?

- In cases involving personal matters, that is, family and inheritance matters, where both parties are followers of the Shia sect and the application is in accordance with the provisions of the law
- Other cases where both parties are followers of the Shia sect and there is no clarification in the Constitution or other law about the case

If a party in a lawsuit does not know the local language, the court must appoint a translator who speaks the party's mother tongue so that the party can understand the materials and documents in the case and the conversation in the court (art. 135).

(E). Separation of Powers – Checks and Balances

Who is the most powerful person in the country?

Which branch of government is the most powerful branch?

Now that we have looked at the specific powers, duties, and responsibilities of the three branches of government, the question recurs: What is the essential nature of a republic?

The answer is separate but equal branches of government with checks and balances built into the constitutional framework.

Why do these checks and balances exist in a republican form of government: to prevent the accumulation of disproportionate power by one person or institution, that is, to prevent tyranny.

Let's review these checks and balances. Some are constitutional; others are political.

What is the president's check on the exercise of power by the parliament?

- Veto proposals for laws, subject to possible override
- Execute laws and programs minimally and unenthusiastically
- Declare a state of emergency

What is the parliament's check on the exercise of power by the president?

- Refusal to adopt proposals for law presented by the government
- Refusal to approve all or parts of the annual budget or national development program
- Requiring ministers to appear
- Establishing investigating committees
- Votes of no confidence for ministers
- Impeachment

What is the president's check on the exercise of power by the Supreme Court?

- Refusal to submit the Supreme Court's requested budget with the annual budget
- Refusal to approve the appointment of judges recommended by the Supreme Court
- Refusal to appoint a justice to an open seat on the Supreme Court
- Submitting to parliament a proposed law to overrule a decision of the Supreme Court
- Refusal to enforce judicial decisions (art. 75, para. 1)

What is the Supreme Court's check on the exercise of power by the president?

- In a particular case, order the president to take specific action or refrain from taking specific action

- In a particular case, declare a specific law, legislative decree, or government regulation unconstitutional and unenforceable

What is the parliament’s check on the exercise of power by the Supreme Court?

- Refusal to approve the Supreme Court’s requested budget
- Refusal to confirm a Supreme Court justice nominated by the president
- Proposing and adopting a law to overrule a decision of the Supreme Court
- Impeachment

What is the Supreme Court’s check on the exercise of power by the parliament?

- In a particular case, declare a particular law or international treaty, covenant, or convention unconstitutional

[reading assignment for next class – Constitution, articles 22 – 33]

III. Fundamental Rights and Duties

Learning objectives – Class Hours 7 and 8
Describe the fundamental rights delineated in the Constitution
Indicate the complexity of several of the fundamental rights
Demonstrate the ambiguities inherent in several of the fundamental rights
Focus on the importance of an independent judiciary to the vindication of these fundamental rights

(A). Introduction

In the first class we talked about the social contract and the reason people decide to form governments.

What are those reasons again?

- Protection and security from neighbors (army)
- Security and stability within the community (police)
- Provision of necessary services (government)
- Guarantee of fundamental rights and freedoms

We have talked about protection, security, and necessary services. Let’s move on to a discussion of fundamental rights and freedoms in the Afghan context. Many of these rights and freedoms are universal and are found in the constitutions of most countries and in international covenants and conventions.

Later, we will discuss the protection of these fundamental rights and freedoms, and the unique importance of an independent judiciary in the vindication of these rights and freedoms.

(B). Fundamental Rights and Duties (articles 22 – 59 of the Constitution)

Article 22 – Equal protection under the law: Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden, and all citizens, man and woman, have equal rights and duties before the law.

- Could this be clearer?
- Is there any ambiguity here?
- Why? Why not?
- What about article 3, which states that “[n]o law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan”?
- Does this mean that Islamic jurisprudence prevails over the provisions of the Constitution?
- Why? Why not?
- If the answer is “yes,” who would decide?
- Ultimately, isn’t it fair to assume that inherent and implicit in the Loya Jirga’s approval of the Constitution was a decision by the people through their representatives that the provisions of the Constitution are in conformity with Islamic jurisprudence?

Article 23 – Right to life: Life is the gift of God and a natural right of human beings, and no one shall be deprived of life except by provision of the law.

Article 24 – Right to liberty and human dignity: Liberty is a natural right of human beings, and cannot be limited except to protect the freedoms of others and the public interest, as regulated by law, and because liberty and human dignity are inviolable, they shall be respected and protected by the state.

Article 25 – Right to be presumed innocent: Because innocence is the original state, a person charged with a crime is presumed innocent unless and until proven guilty by the order of an authoritative court.

- What does the presumption of innocence mean in real life?
- What is its purpose (counter the enormous police power of the state)?
- Is it fair to assume, as a judge, that if a person has been charged with a crime by the prosecutor that there probably is a pretty good chance that the person is guilty?
- If the presumption of innocence applies and liberty is the natural state, can an accused be deprived of liberty and held in jail pending a trial?
- What would be the justification for this?
- Would pre-trial custody always be the exception, or could it become the rule?

- If the accused is presumed innocent during the trial, does the prosecutor have a burden to prove the guilt of the accused?
- Does the accused have to assist the prosecutor or the court in any way in proving guilt?
- What is the quantum of this burden of proof?
- If there is a reasonable doubt about a key fact during the trial, how must that doubt be resolved?

Article 26 – Freedom from guilt by association: Because crime is a personal act, the investigation, arrest, detention, and sentencing of an accused cannot incriminate another person.

- Under this article, could a spouse be convicted for a crime committed by the other spouse?
- How about parental responsibility for the crime of a minor child?
- Can a business be convicted of a crime?
- Can the CEO of a business be convicted of a crime perpetrated by another person in the name of the business?

Article 27 – Right to due process of law and freedom from ex post facto laws: No one can be pursued, arrested, or detained by the police or the prosecutor without due process of law. No act can be prosecuted as a crime unless defined as a crime in a law in existence at the time the act was committed, and no person can be punished for the commission of a crime without the decision of an authoritative court in accordance with a law in effect prior to the commission of the crime.

- What does due process of law mean?
- Must the police have a good reason to pursue and arrest a person?
- Where are such reasons set forth?
- Can a person be held in jail between the date of arrest and an indictment for a crime?
- Under what circumstances?
- Where are these circumstances found?
- Is there a time limit following an arrest when a suspect who is held in custody must be brought before a court?
- Is there a time limit in which an indictment must be prepared following an arrest?
- Where are these time limits found?
- Is this part of due process of law?
- Which branch of government establishes the penalties for crimes?
- Can the penalty for a particular crime be increased?
- If the penalty for a particular crime is increased after the crime was committed but before the accused is convicted, can the accused be sentenced to the higher penalty?
- Why? Why not?

Article 28 – Right to citizenship and freedom from extradition except where reciprocal: No Afghan can be deprived of citizenship or sentenced to domestic or foreign exile, and no citizen accused of a crime can be extradited to a foreign state unless pursuant to a reciprocal arrangement with the state and an international treaty ratified by Afghanistan.

Article 29 – Freedom from torture and persecution and right to human dignity: Torture of suspects, persons accused of crimes, and convicted persons is prohibited even for discovering the truth, as is punishment contrary to human dignity.

- Who defines “torture” and “human dignity”?
- Under certain extreme circumstances, would torture be justified to find out information to prevent the loss of innocent life?
- Is there any reason to believe that torture is a good method of obtaining reliable information?
- Where would you look to find out what punishments are contrary to human dignity?

Article 30 – Freedom from coerced confessions: A confession to a crime is a voluntary admission before an authorized court by an accused in a sound state of mind, and any statement, confession, or testimony obtained from an accused or any individual by means of compulsion is invalid.

- What courts are considered “authorized courts” to accept confessions and guilty pleas?
- What does “compulsion” mean?
- Given article 29, is any act by the police or prosecutor short of torture authorized under this article to obtain a voluntary confession, or can compulsion by something that does not rise to the level of torture?
- Can the police or prosecutor lie to an accused in order to obtain a confession?
- How long can an interrogation last before a resulting confession would be deemed compelled or involuntary?
- If the confession of an accused has been coerced in violation of this article, can the confession be used at the trial of the accused to support a verdict of guilty?
- Can these questions be answered by looking at existing statutory laws?
- If not, who will answer these questions and enforce this article of the Constitution?

Article 31 – Right to notice of charges and defense attorney: Immediately upon arrest, an individual has the right to be informed of the nature of the accusation, appear before a court within the time limit specified in the law, and be represented by a defense attorney, including a defense attorney appointed by the state for an indigent individual. The duties and powers of defense attorneys will be regulated by law, except that the confidentiality

of conversations, correspondence, and communications between an accused and their attorney shall be secure from any kind of violation.

- Does a suspect who has not been arrested have a right to have a defense attorney present during police questioning?
- Does a suspect, after being arrested but before being charged, have a right to have a defense attorney present during police questioning?
- How about an appointed attorney in these situations?
- At a court hearing, can the judge ask a suspect or accused questions that might elicit a confession?
- If a judge does that, what should the defense attorney do?
- If a suspect or accused confesses to his or her defense attorney, can the attorney tell anyone?
- If a suspect tells his or her defense attorney that he is about to commit a crime, what should the defense attorney do?
- In what law are the duties and powers of defense attorneys regulated?

Article 32 – Freedom from debtor’s prison: A person’s freedom cannot be curtailed because the person owes a debt, and the method and means of recovering a debt is to be regulated by law.

Article 33 – Right to elect and be elected: As regulated by law, the citizens of Afghanistan have the right to elect and be elected.

[reading assignment for next class – Constitution, article 34 – 59]

Article 34 – Freedom of expression: Freedom of expression shall be inviolable, and every Afghan has the right to express thoughts through speech, writing, illustrations, and other means in accordance with the provisions of this Constitution, and according to the provisions of law, print or publish on subjects without prior submission to state authorities. Directives related to the press, radio, television, publications, and other mass media shall be regulated by law.

- Is the freedom of expression guaranteed by this article unlimited?
- What are some possible limitations?
 - Incitement to violence?
 - Criticizing the sacred religion of Islam?
 - Criticizing the president or another public official?
 - Endangering public safety?
- Can the government censor what people think or believe?
- Can the government censor what people say?
- Can the government censor what people watch on TV?
- If so, on what basis and to achieve what objectives?

Article 35 – Freedom of association: In accordance with the provisions of the law, citizens have the right to form associations to attain moral and material goals; and to form

political parties, provided that their manifestos and charters do not contravene the holy religion of Islam, their organizations and financial resources are transparent, they do not have military or quasi-military aims, and they are not affiliated with foreign political parties or other sources. However, the formation and operation of a political party on the basis of tribalism, parochialism, language, or religious sectarianism is prohibited, and a party or association formed according to the provisions of the law can be dissolved by order of an authoritative court for legal causes.

- Because the freedom of association is tied to the provisions of the law, could a law completely forbid the forming of worker unions?
- Does article 35 forbid the formation of a political party on the basis of the sacred religion of Islam?
- Can attorneys form a bar association?
- Can female attorneys form a separate bar association?
- Can the Supreme Court prevent judges from forming an association of judges, or female judges from forming an association of women judges?
- If so, under what theory?
- Could such associations be prohibited or limited by law?

Article 36 – Right to peaceful assembly and to petition the government: The people shall have the right to gather and hold unarmed demonstrations, in accordance with the law, for attaining legitimate and peaceful purposes.

- Could a law outlaw peaceful demonstrations?
- What sorts of limitations could be placed by a law on the right to peaceful assembly?
- Aside from legitimate limitations that may be contained in a law, can the police prevent or limit peaceful demonstrations?
- For what sorts of reasons?
- Could a law require a permit from the police to peacefully demonstrate in public?
- How about in private in someone's house?
- Who would decide if the limitations contained in a law, if the actions taken by the police, or the requirements for obtaining a permit are in compliance with the Constitution?

Article 38 – Freedom from unlawful entry into residences: Residences are immune from trespassing, and no one, including the state authorities, can enter a personal residence and search it without the consent of the owner or an order of an authoritative court, except in situations and through methods delineated by law, provided that in case of an evident crime, the responsible official can enter and search a personal residence if the official obtains a court order after the search within the time limit set by law.

- This article already contains an exception based upon an evident crime. What other situations or exceptions could be delineated in a law?

- What does “an evident crime” mean?
- Does a police officer have to see the crime being committed and the person run into the house?
- If a police officer violates this article, enters a residence, and finds evidence of a crime, at the trial of the accused what happens to the evidence?
- Can the illegally obtained evidence be used to support a verdict of guilty?
- If so, what good is this freedom, and what remedy would be available to the accused?
- Who will decide these questions?

Article 39 – Right to travel: Afghans have the right to travel and settle in any part of the country, except in areas forbidden by law; and to travel outside the country and with state protection of their rights, and return, according to the provisions of the law.

- Are there laws that prohibit settlement in certain areas?
- Could such prohibitions be based on tribal or sectarian considerations?

Article 40 – Right to obtain and own property: Unless limited by a provision of law, no one shall be prohibited from acquiring and owning property, which shall be safe from violation; acquisition by the government of private property is legally permitted only for the sake of public interests and in exchange for prior and just compensation, and private property cannot be confiscated without the order of the law and decision of an authoritative court. Search and disclosure of private property shall be carried out in accordance with the provisions of the law.

- Does this article apply to Afghan business organizations as well as citizens?
- The government can take a citizen’s private immovable property for the sake of the public interests. What would some of these interests be?
- What if the owner disagreed that the government was acting in the public interest?
- What could the owner do?
- Who would decide whether the taking was in the public interest?
- What if the owner disagreed with the amount of money being offered by the government for the property?
- What could the owner do?
- Who would decide if the amount offered was adequate and just?

Article 41 – Foreign ownership or lease of immovable property: Foreign individuals, except diplomatic missions and international organizations in which Afghanistan holds a membership, cannot own immovable property, but the lease of property for capital investment is permitted in accordance with the provisions of law.

- Given this article, is it clear that article 40 only applies to Afghan citizens and businesses?
- Can leases be long term, for example 100 years?

Article 42 – Freedom from unjust taxes: While every Afghan, as well as foreign individuals and organizations, must pay taxes and duties to the state, which will be deposited to a single state account, in accordance with the provisions of the law, no taxes and duties can be levied without legal representation, and taxes and duties, along with the method of payment, must be determined with due respect to social justice.

- Can the willful nonpayment of taxes be considered a crime, or would it be considered a debt under article 32?
- What does the phrase, “no taxes and duties can be levied without legal representation,” mean?

Article 43 – Right to education: A free education in state institutions up to a B.A. is the right of all citizens, and the state shall design and implement effective programs, including the teaching of mother tongues in areas where they are spoken, to expand balanced education and provide mandatory intermediate education programs throughout the country.

Article 44 – Right of women and nomads to balanced education: The state shall devise and implement effective programs to create and foster balanced education for women, improve education for nomads, and eliminate illiteracy in the country.

- Does a “balanced education” mean educational opportunities equal to those available to men?
- If not, what does it mean?

Article 45 – Unified educational curriculum: The state shall devise and implement a unified educational curriculum based on the tenets of the sacred religion of Islam, national culture, and academic principles, and develop a religious subjects curriculum for schools on the basis of existing Islamic sects in Afghanistan.

Article 46 – Right to higher education: It is the duty of the state to establish and administer higher, general, and specialized educational institutions, and the terms of admission to state higher educational institutions will be regulated by law. With permission of the state and in accordance with the provisions of law, private educational institutions can be established by citizens and foreign individuals.

Article 47 – Right to protection of intellectual property: The state shall devise effective programs to foster knowledge, culture, literature, and arts, guarantee the copyrights of authors, inventors, and discoverers, and encourage and protect scientific research in all fields, publicizing the results for effective use in accordance with the provisions of the law.

Article 48 – Right to work: Work is the right of every Afghan, with free choice of occupation and craft within the bounds of the law. Working hours, paid holidays, employment, employee rights, and related matters shall be regulated by law.

Article 49 – Forced labor prohibited: Forced labor of adults and children is forbidden, but active participation in times of war, disaster, and other situations that threaten public life and comfort is among the national duties of every Afghan.

- Can parents make their children work on the family farm or in the family business?
- Can parents make their children go to work for someone else?

Article 50 – Right to fair and honest government administration: The state shall create a healthy administration and realize reforms in the administrative system; the administration shall perform its duties with complete neutrality and in compliance with the provisions of the law; citizens shall be recruited by the state on the basis of ability, without any discrimination, according to the provisions of the law; and citizens shall have access to government information in accordance with the provisions of the law, limited only by public security and when disclosure would harm others.

- Could ministries use affirmative action to hire less qualified persons to achieve certain beneficial purposes?
- For example, could the Ministry of Women’s Affairs hire a female applicant who was less qualified by reason of education and experience than a male candidate?
- Could ministries hire less qualified women generally to achieve gender balance in the workforce?
- Could these goals be met by placing quotas in the law?

Article 51 – Right to compensation for damages caused by the government: Any individual suffering damage without due cause from the administration can recover compensation by appealing to the court. Except in conditions stipulated by law, the state shall not, without the order of an authoritative court, claim its rights.

- Does this mean that the government has given up all claim of immunity for damages it causes?
- How does a person actually appeal to the court?
- What are some examples of these types of cases?
- What does the last sentence mean?

Article 52 – Right to free medical care: The state shall provide free preventative healthcare, treatment of diseases, and medical facilities to all citizens in accordance with the provisions of the law; shall encourage and protect the establishment and expansion of private medical services and health centers in accordance with the provisions of the law; and shall adopt measures to foster healthy physical education and the development of national and local sports.

Article 53 – Right to aid for certain groups of persons: The state shall adopt necessary measures to regulate medical services and financial aid to survivors of martyrs and

missing persons, and for the reintegration of the disabled and handicapped into active participation in society in accordance with the provisions of the law. The state shall also guarantee the rights of retirees, and render necessary aid to the elderly, women without a caretaker, the disabled and handicapped, and poor orphans in accordance with the provisions of the law.

- Are the rights accorded in articles 51 – 53 absolute, or do they depend on available state resources?
- If a poor person has a need for medical care, but there is no medical clinic or doctor available, what can that person do?
- Can the person bring a court action against the state?
- Is there any remedy for the state’s failure to vindicate these rights and make the necessary services available?

Article 54 – Right to protection of the family: Because the family is the fundamental pillar of the society, it will be protected by the state, which will adopt necessary measures to attain the physical and spiritual health of the family, especially the child and mother, the upbringing of children, and the elimination of related traditions contrary to the principles of the sacred religion of Islam.

- What are some examples of these related traditions contrary to the principles of Islam?

Article 55 – Duty to defend country: It is the duty of all citizens to defend the country, and conditions for compulsory military service shall be regulated by law.

Article 56 – Duty to obey the law: It is the duty of all citizens to follow the provisions of the Constitution, obey the law, and respect public order and security, ignorance of the law not being an excuse.

Article 57 – Rights and duties of foreign citizens: The state will guarantee the rights and liberties of foreign citizens legally in Afghanistan, who are obliged to respect the laws within the limits of the provisions of international law.

Article 58 – Establishment of Independent Human Rights Commission: To monitor respect for, foster, and protect human rights, the Independent Human Rights Commission shall be established by the state, and its method of operation regulated by law. Any individual “shall” [can] complain to the Commission about the violation of personal human rights, and the Commission shall refer human rights violations of individuals to legal authorities and assist them in the defense of those rights.

- Is the intent of this article to require that human rights complaints be made first to the Commission?
- Could a person decide to file a case in court and not file a complaint with the Commission?
- Or is this issue addressed in a statutory law?

Article 59 – Duty of loyalty: No individual shall be allowed to manipulate the rights and liberties enshrined in the Constitution, or act against independence, territorial integrity, sovereignty, or national unity.

[reading assignment for next class – Charter of the United Nations; Universal Declaration of Human Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Convention on the Rights of the Child]

IV. International Human Rights Law

Learning Objectives – Class Hours 9 and 10
State the role of international human rights law in Afghanistan
Describe articles of selected covenants and conventions that bear upon the fundamental rights in the Constitution of Afghanistan
Point to the international sources for many of the fundamental rights in the Constitution

(A). Obligation of State under International Law

As we have seen, under article 7 of the Constitution, the state must observe the United Nations Charter, international treaties ratified by Afghanistan, and the Universal Declaration of Human Rights.

What do you think this means?

Does it mean that the provisions of these international treaties and conventions have the force and effect of law and are as binding as statutory laws adopted under the Constitution?

(B). International Treaties, Covenants, and Conventions Associated with Human Rights

Introduction:

It is beyond the scope of this training course to examine all the international treaties that may have been ratified by Afghanistan.

Rather, we will explore only those international treaties and conventions that are associated with basic human rights. They are as follows:

- **Charter of the United Nations**
- **Universal Declaration of Human Rights**

- **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**
- **Convention on the Rights of the Child**
- **Convention on the Elimination of All Forms of Discrimination against Women**
- **International Convention on the Elimination of All Forms of Racial Discrimination**
- **International Covenant on Economic, Social and Cultural Rights**
- **International Covenant on Civil and Political Rights**

The exploration of these treaties and conventions will be limited to those principles in the treaties and conventions that bear directly on human rights and that are not covered in the 2004 Constitution of Afghanistan

Charter of the United Nations:

Chapter X (Articles 61 – 72) of the Charter establishes the Economic and Social Council.

One purpose of the Council is to make recommendations for the purpose of promoting respect for, and observance of human rights and fundamental freedoms for all (Art. 62, para. 2).

The Council may prepare draft conventions for submission to the General Assembly (Art. 62, para. 3), and shortly, we will review several of these conventions.

Universal Declaration of Human Rights:

The Universal Declaration of Human Rights was adopted by the General Assembly on December 10, 1948.

Many of the rights and freedoms proclaimed in the Declaration are reflected, in substance, in the list of fundamental rights and freedoms set forth in the Constitution, and will not be repeated here.

There are some additional rights and freedoms that are worth noting:

Article 8 provides that every person has the right to an effective remedy by a competent national tribunal for acts violating the fundamental rights granted to the person by a constitution or law.

- Said another way, a right that carries no remedy for its violation is a hollow right.
- Is Article 8 applicable here in Afghanistan?
- Why?

- What does it mean for enforcing the fundamental rights and freedoms set forth in the Constitution?

Article 9 provides that no person will be subjected to arbitrary arrest, detention or exile.

- The opposite of an arbitrary arrest is an arrest for just cause.
- In Afghanistan, where would we find the legal standards for arrest and detention.
- Is exile permitted under any circumstances in Afghanistan (Constitution, art. 28)?

Article 10 provides that every person is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of the person's rights and obligations, and of any criminal charge. **Article 11** also provides, in part, that criminal trials must be public.

- A fair and public hearing is one of the underlying principles of due process of law (Constitution, art. 27).
- Can you think of any circumstances where a person's trial could be held in secret?
- Would such circumstances be justified under these Articles?

Article 16, in part, guarantees to men and women of full age the equal right to marry and found a family, as well as equal rights during the marriage and at its dissolution, and prohibits forced marriage.

- Is there an argument that forced marriage is permitted under the Constitution?
- If so, is that argument answered and defeated by this Article?
- Since the Declaration is specifically adopted in article 7 of the Constitution, is it fair to assume that the Loya Jirga was aware of the rights contained in the declaration at the time of the adoption of the Constitution?

Article 23 provides, in part, that every person, without any discrimination, has the right to equal pay for equal work, and to form and join trade unions for the protection of the person's interests.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

The Convention against Torture entered into force on June 26, 1987.

As we have seen, torture and punishment contrary to human dignity are prohibited by article 29 of the Constitution, but that article does not define "torture" or "human dignity."

We can look to this Convention for some assistance in this regard.

Article 1, in part, defines the means of torture as the intentional infliction on a person of severe pain or suffering, whether physical or mental.

Article 2, in part, provides that absolutely no exceptional circumstances or an order from a superior officer or public authority may be invoked as a justification for torture.

Article 14, in part, provides that each ratifying country shall ensure in its legal system that a victim of torture can obtain redress and has an enforceable right to fair and adequate compensation.

- What would be the logical forum in which a victim would seek redress and compensation?

Article 15, in part, provides that each ratifying country shall ensure that any statement obtained through torture cannot be used as evidence against the victim.

- What happens if a ratifying country does not do this?
- Can a victim nevertheless seek enforcement of this exclusionary rule?

Convention on the Rights of the Child:

The Convention on the Rights of the Child entered into force on September 2, 1990.

Article 3, paragraph 1, states the overriding principle that in all actions concerning children, including court actions, the best interests of the child shall be the primary consideration.

Article 12, paragraph 2, provides that in any judicial or administrative proceeding affecting a child, the child shall be provided the opportunity to be heard [express his or her opinion], either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 49 of the Constitution prohibits forced labor of children. **Article 32** of the Convention on the Rights of the Child goes farther and requires that ratifying nations provide a minimum age for employment, appropriate regulations of the hours and conditions of employment, and appropriate penalties and other sanctions to ensure compliance.

Article 40 mandates many procedural rights and protections for children accused of committing crimes, including the right not to be compelled to give testimony or to confess guilt.

[reading assignment for next class – Convention on the Elimination of All Forms of Discrimination against Women; International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Economic, Social and Cultural Rights; and International Covenant on Civil and Political Rights]

Convention on the Elimination of All Forms of Discrimination against Women:

The Convention on the Elimination of All Forms of Discrimination against Women entered into force on December 18, 1979.

Article 22 of the Constitution guarantees equal rights and opportunities to women and men, and that article applies to all aspects of Afghan life.

The Convention goes into great detail in directing that ratifying nations “take all appropriate measures” in the areas of education, employment, and economic and social life, to ensure that women are in fact treated equally and provided the same opportunities and rights as men.

Article 15, more particularly, requires that ratifying nations accord to women equality with men before the law, including in all stages of procedure in courts and tribunals.

- Does article 22 of the Constitution, as well as this article of Convention, prohibit the government from using resources and procedures that discriminate against women?
- What about the informal justice system?
- Can the Huquuq legally refer a case involving a woman to a shira or jirga that will only allow the woman’s father or husband to present the woman’s case?

Article 16, paragraph 1, addresses the issue of marriage, and requires ratifying nations to ensure, among other things, on the basis of the equality of men and women, the same right to freely choose a spouse and enter into marriage only with their free and full consent; the same rights and responsibilities during marriage and at its dissolution; the same rights and responsibilities as parents in matters relating to their children; and the same rights in respect of ownership, acquisition, enjoyment, and disposition of property.

Article 16, paragraph 2, provides that the betrothal and marriage of a child shall have no legal effect, and that all necessary action shall be taken to specify in the law a minimum age for marriage, and to require the official registration of all marriages.

International Convention on the Elimination of All Forms of Racial Discrimination:

The International Convention on the Elimination of All Forms of Racial Discrimination entered into force on January 4, 1969.

Article 22 of the Constitution forbids any kind of discrimination and distinction between citizens of Afghanistan. Article 4 recognizes that the nation of Afghanistan is comprised

of many different tribes, and several provisions of the Constitution recognize that practitioners of both sects of the sacred religion of Islam are citizens of Afghanistan. Racial discrimination, as such, is not mentioned in the Constitution.

“[R]acial discrimination” is defined broadly in **Article 1, paragraph 1**, of the Convention to include discrimination “based on race, colour, descent, or national or ethnic origin”

- What does “ethnic origin” mean?
- Do you think the provisions of the Convention would apply to discrimination based on tribal origin?
- Is this question important in Afghanistan?
- Is there a history of discrimination based on tribal origin?

The Convention provides in **Article 5** that ratifying nations will undertake to eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law and the enjoyment of a panoply of enumerated human and civil rights.

Article 6 states as follows:

States Parties [ratifying nations] shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

- Are there national tribunals and state institutions in Afghanistan to do this?
- What are they?
- Can the Independent Human Rights Commission provide an effective remedy?

International Covenant on Economic, Social and Cultural Rights:

The International Covenant on Economic, Social and Cultural Rights entered into effect on January 3, 1976.

Article 3 provides that the ratifying nations undertake to ensure the equal right of men and women to the enjoyment of all economic, social, and cultural rights set forth in the Covenant, including, among other rights, the right to work and equal pay for equal work (Articles 6, 7); the right to form trade unions and conduct legal strikes (Article 8); the right to social security and insurance (Article 9); the right to protection of and assistance for the family (Article 10); the right to an adequate standard of living, including adequate food, clothing, and housing (Article 11); the right to the highest standard of physical and mental health (Article 12); the right to an education (Article 13); and the right to take part in cultural life and enjoy the benefits of scientific progress (Article 15).

International Covenant on Civil and Political Rights:

The International Covenant on Civil and Political Rights entered into force on March 23, 1976.

While the Covenant includes many civil and political rights that are also set forth in the other covenants and conventions that have been reviewed, it also guarantees additional rights which are worth mentioning because they are not delineated in the Constitution.

Article 6, which addresses the right to life and capital punishment, provides, in part as follows:

- A death sentence may be imposed only for the most serious crimes pursuant to a final judgment rendered by a competent court
- Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence, which may be granted in all cases
- The death sentence shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women

Article 9, which addresses arrest and detention, provides, in part, as follows:

- Anyone arrested shall be informed, at the time of the arrest, of the reasons for the arrest and shall be promptly informed of any charges
- Anyone arrested and detained on a criminal charge shall be brought promptly before a judge and shall be entitled to trial within a reasonable time or to release
- It shall not be the general rule that persons awaiting trial are detained in custody
- Anyone deprived of liberty by arrest or detention shall be entitled to take proceedings before a court in order that the court may decide without delay on the lawfulness of the detention, and order release if the detention is not lawful
- Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation

Article 10 provides, in part, that detained accused persons shall be segregated from convicted persons, and detained juveniles shall be segregated from adults and brought as speedily as possible for adjudication.

Article 14, which addresses the rights of persons charged with a crime, provides, in part, that an accused shall have the right:

- To a fair and public hearing (subject to certain limited and specific situations in which a nonpublic hearing is authorized) by a competent, independent, and impartial tribunal established by law
- To be presumed innocent until proved guilty according to law

- To be informed promptly, in detail, and in a language understood by the accused of the nature and cause of the charge
- To be afforded adequate time and facilities for the preparation of a defense and communicate with counsel of the accused's choosing
- To be tried without undue delay
- To be present and defend in person or through counsel of the accused's choosing, be advised of these rights, and be afforded counsel without cost if indigent
- To examine the adverse witnesses, call witnesses, and require witnesses to appear
- To have the free assistance of an interpreter if needed
- Not to be compelled to testify against himself or herself or to confess guilt
- To review of a conviction by a higher tribunal according to law
- To compensation for a conviction resulting from a miscarriage of justice
- Not to be twice put in jeopardy for the same crime

V. Enforcement of Fundamental Rights

Learning Objectives – Class Hours 11 and 12
State the importance of an independent judiciary as a check against the abuse of power by the executive and legislative branches of government
Describe the concept of Judicial review of executive branch actions
Describe the concept of judicial review of statutory laws
Demonstrate the principle of judicial review

(A). Introduction

We have now spent several class hours reviewing the fundamental human rights delineated in the Constitution of Afghanistan and several international covenants and conventions that have been ratified by Afghanistan.

We have also discussed in detail the republican system of government in Afghanistan, which is composed of three separate but equal branches, and we have touched on the principle of checks and balances.

We know from article 116 that the judiciary is an independent organ of the state headed by the Supreme Court. But what does judicial independence mean, and how does it come into play in the vindication of the fundamental human rights guaranteed to the people of Afghanistan?

These are the questions that will engage our attention for the duration of this course.

(B). Judicial Independence

We have seen that under article 116, the judiciary in Afghanistan is an independent organ of the state, separate from and equal to the executive and legislative branches of government.

The Supreme Court is not a ministry, a department, or an office.

It should not be viewed as one of several justice institutions blended into something called “the justice sector.”

Such a view threatens the very essence of an independent judiciary.

We have also seen that the importance of an independent judiciary is recognized internationally.

That importance rests on the overriding principle that the judiciary must be an independent and unrestrained check on the actions of the legislative and executive branches of government.

(C). Judicial Review

The principle of an independent judiciary is especially important in a young and developing republic, formed after several decades of turmoil.

The survival of Afghanistan as a republic will depend upon the ability of all three branches of government to vindicate the fundamental rights delineated in the Constitution.

The Parliament passes laws. The President, through the Ministry of Interior, other ministries, and the Office of the Attorney General, executes and enforces the laws.

But what is the role of the judicial branch when it comes to these fundamental rights?

Said another way, where does the ultimate duty and responsibility to ensure the vindication of these rights lie?

Hypothetical scenarios for Discussion

Let’s examine two hypothetical scenarios:

First scenario:

- Let’s assume the Parliament passes and the President signs a law that states that it is unlawful and a crime for more than 50 persons to

assemble at the same time in front of the Parliament or the Presidential Palace to protest an action taken by the government.

- Any problems with such a law (article 36)?
- Could an interested citizen challenge the law before participating in a protest?
- If the Supreme Court finally reviewed the case and decided that the law was unconstitutional because it violated the right to peacefully assemble and protest, a fundamental right under article 36, what power would the Supreme Court have?
- Could the Supreme Court declare the law void and unenforceable (checks and balances) or just resolve the case for the one citizen by granting compensation under article 51?
- Would the Parliament and the President have to honor the decision of the Supreme Court?
- What options would the Parliament and the President have?
- Would the situation be different if a protest organizer was arrested outside the Presidential Palace and charged with a crime for refusal to disperse, as ordered by the police, during an assembly of more than 50 persons?

Discussion:

These questions are difficult because the Constitution does not expressly state that the Supreme Court has the authority to nullify a duly adopted law on the grounds that it is contrary to a provision of the Constitution.

The closest provision is article 121, which, as we know, provides that “[a]t 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.”

What does “at the request of the courts” mean?

In the hypothetical scenario that we have just discussed, would an appeal where the issue of the constitutionality of the law is raised be considered a request from a court under article 121?

If we all agree that the law in the scenario clearly violates article 36 of the Constitution, then if the Supreme Court cannot order that the law not be enforced, can it provide an effective check against the use of the legislative power to adopt an unconstitutional law?

Said another way, can the Court order two kinds of relief – retroactive (damages for harm already done) and prospective (authority to exercise a right in the future)?

In this scenario, can an organizer of a demonstration go into court and seek a prospective order that would permit a demonstration to occur notwithstanding the law, or must people demonstrate, be arrested, and challenge the statute as part of their criminal cases?

Let's break this question down:

- Can an individual start a case against the government?
- Article 120 states in part that the judicial organ shall include consideration of cases where the state is a defendant.
- Is article 120 sufficient to accord standing to an individual to sue the government?
- In this scenario, who would the demonstration organizer sue?
- If the Supreme Court declared the law unconstitutional and unenforceable, would the government have to comply?
- Article 75, para. 1, states that the government has a duty to execute the provisions of the Constitution, other laws, and the final decisions of the courts.
- Does this article answer the question?

Would the result be different if the prohibition against demonstrations came from a regulation adopted by the Ministry of Interior instead of a statutory law?

- Under article 76, the government can approve regulations to implement the fundamental lines of policy so long as they are not contrary to body or spirit of any law.
- Does it follow that such regulations also cannot be contrary to the Constitution?
- Who would the organizer sue?
- Would the Supreme Court have the authority under article 121 to declare the regulation unconstitutional even though that article does not mention regulations?

Several of the conventions and covenants that we looked at recognize the fundamental principle that a right without a remedy for its violation is an illusory right, and one of little value.

Does anyone think that making a complaint to the Independent Human Rights Commission would provide an adequate remedy?

Second scenario:

- Let's assume that because of a lack of public resources, poor persons accused of crimes are not given an attorney to represent them in court, and they are convicted and sent to prison.
 - What is the problem here (article 31)?

- What can the convicted person do (complaint to IHRC; appeal)?
- Let's assume that the case ultimately ends up in the Supreme Court, and the Court decides that the conviction must be reversed because the accused was denied his or her fundamental right to an attorney.
- Will the decision of the Court apply to other persons in prison or only to the accused who appealed the case?
- Is there a theory of precedent?
- Could the Court order the MoJ to provide attorneys in the future?
- Why? Why not?

Discussion:

Can the Supreme Court order the executive branch to release a prisoner because the conviction was illegal?

If not, can the Court reverse the conviction and send the case back to the primary court for a new trial?

And in that case, could the primary court review the question of pre-trial detention?

What about other prisoners who are in precisely the same position as the convicted person in the appeal?

Can the Supreme Court render a decision that covers all similarly situated prisoners, or does every prisoner have to bring a separate case?

What makes more sense?

What other new issue is raised by this scenario that was not presented by the first scenario?

Can the Supreme Court order the MoJ to spend money for defense attorneys?

If not, what effectively can the Supreme Court do to force the MoJ and the government to comply with the Constitution and provide defense attorneys for indigent persons accused of a crime?

The purpose of these scenarios is to suggest that the ultimate duty and responsibility to ensure the vindication of the fundamental rights set forth in the Constitution will fall to the judiciary.